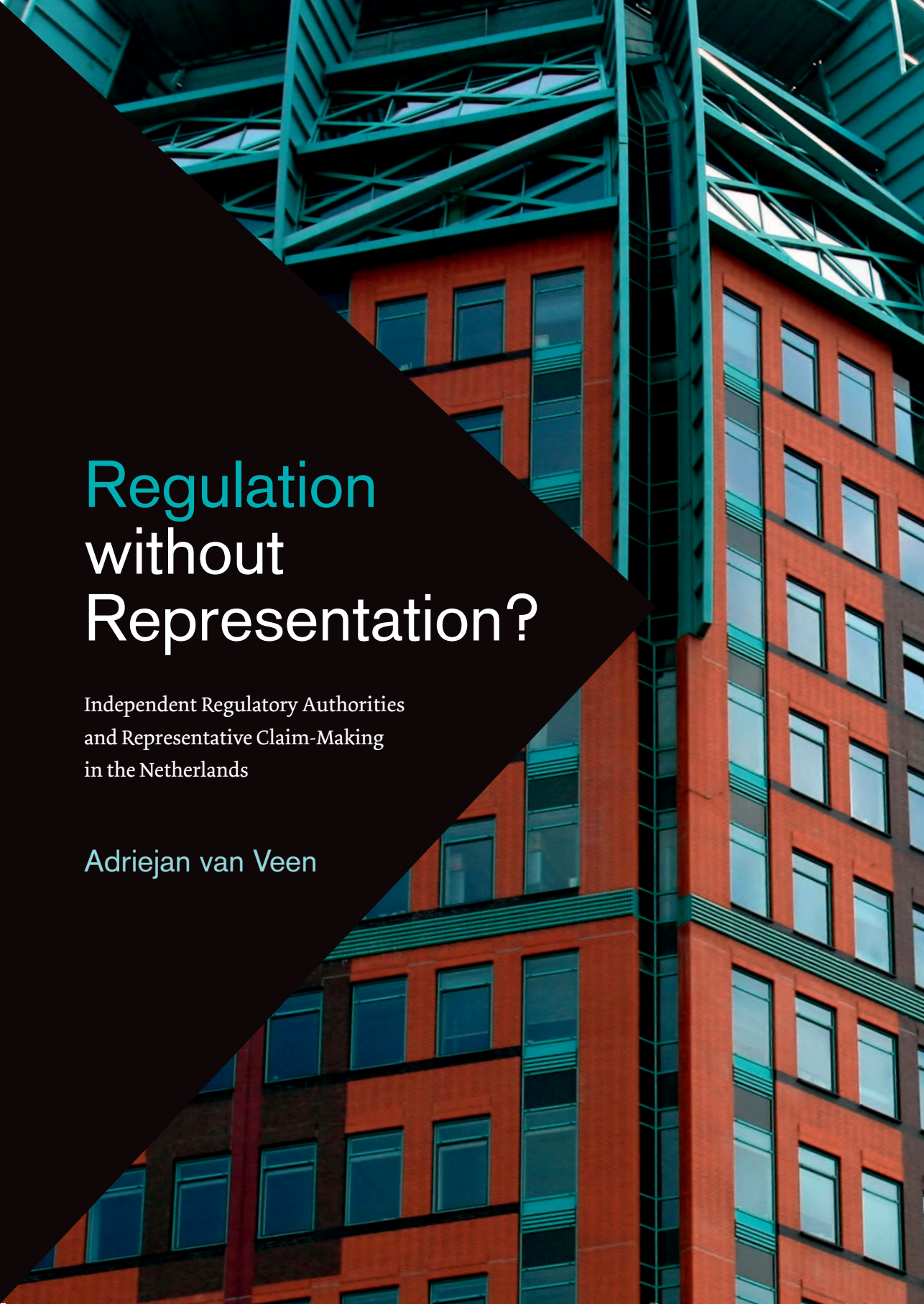

Regulation without Representation?

Independent Regulatory Authorities and Representative Claim-Making in the Netherlands

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Regulering zonder representatie? Onafhankelijke markttoezichthouders en het maken van vertegenwoordigende claims in Nederland
(met een samenvatting in het Nederlands)

Proefschrift

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Chapter 1

Regulation without representation?

The Dutch Banking Association (NVB) blames the Financial Markets Authority (AFM) it is being kept out of deliberations. The AFM, on its part, says it is waiting for a telephone call of the NVB. (*Het Financieele Dagblad* 2010)

Thus read the opening sentences of a short article in the Dutch financial daily *Het Financieele Dagblad* in June 2010. In the remainder of the article, a disagreement between the two organisations – one an interest group, the other an authority formally independent of both government and the financial sector – about the 'standardization of risk profiles' is described. Risk profiles are instruments employed by banks to assess what kind of investor a financial customer is. Based on this, banks recommend offensive, neutral or defensive portfolios in stocks, bonds or other securities to their customers. At the time of writing, banks in the Netherlands differed sharply among each other in defining these portfolios, which prompted the AFM – which according to its website seeks to advance 'fair and transparent financial markets' and thus to contribute to the 'public interest' associated with those (AFM 2014g) – to want to make the process of drawing up risk profiles more uniform. Not wanting to impose the new rules all by itself, however, the independent authority sent out a consultation document with proposals to all affected parties, including the NVB. Yet, reads the article, according to the latter's spokesperson, the authority had already gone in consultation with an allegedly 'select' club of experts, without responding to the banking association's feedback: 'We don't hear anything'. Asked for a reply by the reporter, the AFM stresses it does not want to exclude anyone: 'If you want a conversation, we are happy to. That's what we said to NVB. But they didn't respond.' And so, the article concludes, silence remains; with both organisations waiting for a phone call of the other.

This innocuous report of a small public spat between two organisations annoyed at each other, published in the mid-section of one Dutch financial daily, may not seem to be of much concern to anyone without a specific financial interest, let alone a regular citizen. The anecdote, however, reveals a thing or two about an aspect of the fabric of contemporary democracy that has become increasingly important globally: independent market regulation. On the one hand, in this story we find an independent authority that has resolved to intervene with quite some detail into the business practice of certain corporations. The impulse behind this action is not hard to grasp: regulating these practices and products must be deemed better for those who purchase them, the customers, the public, or the marketplace at large. The authority has turned to experts for aid in doing so. Yet we also find this authority, although it has the instruments to do so, not wanting to impose the rules all by itself; instead, it turns to an association purporting to represent the interests of the regulatees, even expressing the willingness to talk to everyone.

Incidents like these do not stand alone: a watchful reader may, dotted through newspapers, find instances displaying similar or related patterns. To take the Netherlands for example once more: the same *Financieele Dagblad* reported about a consortium of Dutch financial interest associations of banks, insurers and pension funds expressing

concern about the 'undemocratic' rulemaking powers of AFM (*Het Financieele Dagblad* 2011). News magazine *Elsevier* found a confused Dutch Member of Parliament becoming aware that he could not file motions to reverse decisions by the Dutch independent telecommunications authority OPTA (*Elsevier* 2005). This same authority remarked in a public fight with the former state telecommunications monopolist KPN that it was there to 'look after the interests of consumers and customers' (*De Telegraaf* 2012). The Dutch Socialist Party once thought it necessary to ask parliamentary questions about the number of staffers of the independent Netherlands Healthcare Authority (NZa) with 'actual background experience' in the healthcare domain it regulated (Second Chamber (SC) 2011-2012). In 2013, the chairman of the newfound Consumers and Markets Authority (ACM) at its opening press conference stated it would put the consumer interest central, to the point of announcing interventions in the political debate as a way of doing so (*De Volkskrant* 2013).

From these stories, certain threads emerge. On the one hand, we find these independent authorities and their representatives invoking the notion of a 'public'. They proclaim to act for or speak on behalf of a certain constituency: a public consisting at least partially of consumers, or customers. On the other hand, these authorities exercise power beyond the grasp of the people's representative body: the elected parliament. They seem to fall outside the textbook model of representative democracy: that of a single center of political authority, a representative parliament periodically elected by geographical constituencies, in which majorities control the government and so monopolize the exercise of public decision-making power. But other threads emerge from these anecdotes as well: the insistence on the employment of expertise, and the importance attached to experience with or involvement of affected interests in the domains over which the authorities hold sway. The question a newspaper reader might then ask is: who, or what, do these authorities represent?

1.1 The rise of the unelected

Politics in the twenty-first century is not confined to the traditional domain of political parties, elections and parliaments. Political expression nowadays takes place everywhere: on the streets, where activist movements occupy public squares and claim to speak for the '99 percent'; in corridors and backrooms adjacent to the political and financial halls of power in Brussels, Washington DC and New York; and in the meeting rooms, both physical and virtual, of public participatory processes in cities, on the environment, in schools, hospitals and workplaces. Political authority, likewise, is fragmented: supranational organisations such as the European Union (EU) issue laws and regulations, in governance networks public and societal actors come together to draw up and implement policies, and independent authorities affect large areas of the economy.

Political observers have therefore expressed worries about the 'relocation' or 'dissemination' of politics to opaque and possibly undemocratic stages and venues

(Bovens et al. 1995). Some have raised the alarm and argued we are entering an age of 'post-democracy', in which policies are increasingly determined by cabals of elected politicians and business interests (Crouch 2004; Pitkin 2004). Yet others have praised the spread of democratic practices to civil society and its increasing impact on elected politics (Rosanvallon 2008; Keane 2009). Historians, meanwhile, have argued the displacement of politics to stages outside of the parliamentary domain in itself is nothing new, but has been a feature of democracy since at least the late nineteenth century (Rosanvallon 1998; Chatriot 2002; Couperus 2012; Schrijvers 2012; Van Veen 2013). Despite this historical perspective, nevertheless, the argument can be made that today more than ever since the rise of parliamentary democracy, at least in Western Europe, political life is taking place outside of and beyond elected parliaments (Noordegraaf 2003).

One of the most thoroughly documented attempts to capture this development and place it in a historical perspective is found in *The Life and Death of Democracy* (2009; cf. idem 2011) by the Australian political historian John Keane. He argues that democracy, after the Athenian assembly-based and nineteenth- and early twentieth century representative parliament-based forms, has since the Second World War entered a new age of post-parliamentary 'monitory democracy' (idem 2009: 688). Monitory democracy is defined by the rapid growth of many different kinds of extra-parliamentary, power-scrutinizing mechanisms: monitory bodies such as citizen juries, focus groups, advisory boards, consumer protection agencies, electoral commissions, watchdog groups and online petitions that in the name of 'the people' or 'the public' keep a check on elected political power and so mitigate an unrestrained control by arithmetic majorities. Keane is, in principle, positive about these new extra-parliamentary, power-scrutinizing institutions: they 'raise the level and quality of public monitoring of power' (idem 2011: 214), and have provided to the term democracy itself, or so he argues, a new meaning which goes beyond one centred solely on elections, political parties and parliaments. Indeed, Keane writes, 'the number and range of monitory institutions have so greatly increased that they point to a world where the old rule of 'one person, one vote, one representative' – the central demand in the struggle for representative democracy – is replaced with the principle of monitory democracy: 'one person, many interests, many voices, multiple votes, multiple representatives." (ibid. 215) Likewise, the French political theorist Pierre Rosanvallon, in his account of the 'new democratic order' constituted in part by independent authorities and constitutional courts, states that 'there is more than one way of to act or speak "on behalf of society" and to be representative' (Rosanvallon 2011: 8).

Keane's account of monitory democracy, and that of Rosanvallon, in certain respects resonate in the stories about independent regulatory authorities (henceforth referred to by the acronym IRAs) above. They seem to confirm we have indeed entered an age of post-parliamentary politics, in which independent bodies with an uncertain place in the textbook model of representative democracy have taken root and impact society with increasingly tangible effects. Keane's point about these extra-parliamentary bodies invoking notions of 'the people' or 'the public' (ibid. 213) in their power-scrutinizing activities also is well-taken. Indeed, he writes, the observation that unelected bodies

do not conform to the standard model of representative democracy does not mean that representation itself has withered away. The new power-scrutinizing mechanisms identified by Keane, rather than presenting an effort to re-establish 'direct' or assembly-based democracy, 'as if citizens could live without others acting on their behalf', 'rely inevitably on representation' (author's emphasis) (ibid. 219-220).[1] Monitory democracy, according to Keane, still 'thrives on representation' (ibid. 218).

Yet the anecdotes about IRAs also indicate ways in which Keane's account of monitory democracy may need to be amended. His analytical focus, first, is on the new monitory bodies' surveillance of governmental or elected powers. Semi-independent 'watchdog' institutions, for example, he portrays as merely checking abuses of public power (Keane 2011: 223-224). The IRAs of the stories, however, scrutinize *marketplace*, *societal* and *private* powers as well. Keane also implies that extra-parliamentary and unelected bodies merely scrutinize power. Consumer protection agencies, for example, he describes as raising awareness (ibid. 215). Yet the IRAs of the stories *wield* extensive powers over people, businesses and society as well. Keane's observations about monitory democracy may thus even go further than he himself implies. These amendments, then, make the question who, or what, these independent regulatory bodies in the age of monitory democracy represent – or claim to represent – all the more pertinent.

1.2 Independent regulatory authorities

IRAs, in the Netherlands as well as elsewhere, were established in the wake of widespread marketization and privatization policies in various economic sectors in the last three decades. In Western Europe at least, these policies have profoundly altered the relations between state, democracy and society in the provision of goods and services to citizens. A snapshot image of the governance structure of Western European countries in 1979 would have shown how in various economic domains – telecommunications, electricity and gas, water services, public transport, healthcare – the national state, steered and legitimized through a parliamentary system of representation, would have been supplier of goods and services, either directly or indirectly through industries it controlled. In 2013, a similar snapshot would demonstrate how the national democratic state has retreated, and left this activity to great extents to the global marketplace.

In the Netherlands, while the state-owned corporation PTT had a monopoly on postal and telephone services, the electronic communications sector is currently a vibrant marketplace of competing national and international providers. Municipally-owned energy companies like PGEM and Intergas have been privatized and taken over by German and Swedish corporations. The national railway provider NS is hesitatingly

1 Although Keane in 2009's *The Life and Death of Democracy* presented his account of monitory democracy as entailing a form of 'post-representative' democracy, in later publications he has withdrawn this point, to stress the representative qualities of the new monitory bodies (Keane 2011: 219-220).

allowed to compete on the tracks. The traditionally publicly-funded but civil society-run healthcare sector is currently subject to a thorough process of marketization. Since the 2008 financial crisis, on the other hand, the private-run Dutch financial sector (sized four or five times the gross national product) has been upheld by the state and supported through injections of public money.

What unites these sectors, in addition to having been subject to marketization and privatization policies, is the institution of IRAs. These bodies – also known as 'market authorities', 'supervisors' or 'watchdogs' – are supposed to keep watch over the newly liberalized economic domains, but also guard the entry to them. They make crucial decisions about the flow and infrastructure of goods and services, as well as the contents and definitions of products, behaviours and practices on marketplaces. They provide a forum at which consumers may obtain redress. Yet these IRAs, in the Netherlands as well as elsewhere, are only partially controlled by the established institutions of parliamentary-representative democracy: elected parliaments and governments. Neither are those who are most affected by their activities, sectoral industries and consumers, formally incorporated in their boards or decision-making structures.

IRAs, some more so than others, are set apart from the chain of delegation and accountability that in standard accounts of representative democracy runs from voters, via parliament and government, to the bureaucracy (Majone 1996; idem 1999; Thatcher and Stone Sweet 2002; Strom, Bergman and Müller 2003; Coen and Thatcher 2005; Levi-Faur 2005; Baldwin, Cave and Lodge 2012). They are 'one step removed' from the electoral cycle (Gilardi 2008). IRAs possess varying amounts of decision-making autonomy, but are not directly accountable for all of their actions and decisions to the political sphere or sectoral industries and consumers (Van der Meulen 2003; Maggetti 2010). While the heads of IRAs are usually appointed by elected politicians, they are protected against incursion by them into case-specific decisions and actions. IRAs and their competencies are demarcated by law and to varying degrees of depth checked by legal courts, but the laws they implement often contain open norms and allow for high levels of interpretative and discretionary authority (Schueler 2004; Zijlstra 2005; Verhey and Verheij 2005; Lavrijssen 2006). Lastly, IRAs participate in transnational networks that sometimes have a role in policy formulation, and often also provide policy advice to elected governments (Coen and Thatcher 2008; Maggetti 2009; Levi-Faur 2011).

An independent handling of specialist matters seems to constitute their entire raison d'être. In the Netherlands, the telecommunications authority OPTA, for example, was concerned with 'local loop unbundling' and 'interconnection', pertaining to the way in which fixed line owners grant access to rival companies.[2] The Energy Chamber of the competition authority NMa set 'x' and 'q factors', which are efficiency and quality

2 Since April 1, 2013, the OPTA has merged with the competition authority NMa and a consumer rights authority to form the *Autoriteit Consument en Markt* ('Consumer and Market Authority') (ACM). Its tasks in the electronic communications and postal services domains, themselves unchanged, are now exercised by the ACM directorate Telecom, Transport and Postal Services.

discounts network operators must apply to their tariffs.[3] The healthcare authority NZa regulates 'diagnosis treatment combinations', this being the healthcare 'product' of actions performed on patients. But these ostensibly technical matters affect thousands of producers, providers and practitioners, and millions of consumers; they involve many millions of euros in investments, costs and expenditures (and are supposed to raise millions of euros as well); and behind them are huge interests and often contested choices.

For these reasons, political commentators and scientists have from the establishment of IRAs onwards worried about their place in the democratic polity.

1.3 The legitimacy of IRAs: three approaches

In the scholarly literature dedicated to the question of the legitimacy of IRAs, a couple of approaches can be distinguished. These encompass both political theoretical approaches to the legitimacy of IRAs, and justifications for them employed in practice by politicians, legal scholars and practitioners. While they are abstractions, they represent important strands of thinking about these institutions and their democratic credentials. Legitimacy is defined here as the acceptance of a public authority by people on the basis of a certain belief or principle.

In the first, 'technocratic' approach, IRAs are considered to have their own, autonomous legitimacy, based on the quality and efficiency of their activities (Majone 1996; idem 1997; idem 2001; Sosay 2006; Maggetti 2010). Because of their independence they are thought to be able to achieve policy goals not attainable by traditional political and bureaucratic institutions, which in this line of reasoning are marred by the self-interest and short-termism of elected politicians, and outside lobby influences (Thatcher 2005; Gilardi 2008). Likewise, the expertise of IRAs in this approach is thought superior to that of both the political sphere and the bureaucracy. A separation of political goal-setting from agency implementation – or even a delegation of policy-making competences to IRAs – would free up elected politicians to concern themselves with policy debate, while specialist agencies would manage policy details (Van Thiel 2000; De Ridder and Zijlstra 2010). The resulting increase in quality results would benefit citizens and society at large. In one variant of this approach, the Montesquieian separation of powers concept is employed to positively evaluate the new 'fourth branch' of independent agencies. They are argued to possess 'inherent' legitimacy based on 'superior' information-processing skills, which should incur traditional representative institutions to adopt a more deliberative role as value-oriented arenas, while empirical 'problem-solving' should be left to independent agencies (Vibert 2007). In the technocratic approach, therefore, a measure of democratic legitimacy is traded in for the attainment of 'output legitimacy': the positive evaluation of results by citizens (Scharpf 1999).

3 Since April 1, 2013, the Energy Chamber of the NMa is known as the ACM directorate Energy. Its tasks in the electricity and gas sectors have remained unchanged.

In a second, 'delegation' approach, IRAs are considered to fit in the standard model of representative democracy after all. In this conception, while unelected bodies such as IRAs have powers delegated to them, they still fall under the sway of elected political institutions, 'deriving' indirect democratic legitimacy from them (Vibert 2007). The chain of delegation, which runs from voters via parliaments and governments to bureaucracies, and ultimately to autonomous bodies, is supposed to remain intact. As parliaments stipulate a mandate for the hived-off bodies in advance, they are subsequently kept in check by ministers through political control and accountability mechanisms. In the study of the real-life workings of delegation and control of IRAs, these political control and accountability mechanisms are often conceptualized as a 'contract' determining the controls of a 'principal' and the discretion of an 'agent' (the principal-agent approach) (Epstein and O'Halloran 1999; Huber and Shipan 2002; Thatcher and Stone Sweet 2002; Strom, Müller and Bergman 2003; Coen and Thatcher 2005; Thatcher 2005; Maggetti 2007; Hanretty and Koop 2013). The degree of formal or real autonomy of the agent then is object of research, as are the make-up and functioning of the control and accountability mechanisms between political principals and agents such as IRAs. Accountability here can be defined as the obligation the agent has to *ex post facto* explain and justify its conduct to its political principal, who can then take actions; it can take such forms as formal questioning, policy evaluations, quality controls, accounting, budgeting and reporting, and can have democratic, checks and balances and learning effects (Bovens 1998; idem 2007; idem 2010).

In a third, 'relational' approach, the legitimacy of IRAs is conceived to be depending less on their relations with the political sphere, and more on those with their environment at large. This environment, sometimes called the 'regulatory space' (Hancher and Moran 1989), consists of political institutions but also the judiciary, other administrative bodies and IRAs, transnational networks, experts, affected interests and the general public. To compensate for their independence and possible lack of derived democratic legitimacy, the degree in which IRAs are 'accountable', 'responsive' or 'transparent' to this wider environment is considered an additional source of legitimacy (Majone 1999; Scott 2000; Black 2002; Van der Meulen 2003; Lodge 2004; Norton 2004; Sosay 2006; Black 2008; Maggetti 2010). This approach correlates with a vast literature on a multitude of forms of accountability in politics and administration. Accountability can be conceived of as running in different directions (upwards, downwards, horizontal, diagonal), assume different forms (political, legal, administrative, public) and involve different actors and forums (Bovens 1998; Mulgan 2003; Bovens 2007; idem 2010). This corresponds to the 'governance turn' in political-administrative research, which emphasizes the formation of public policies by networks of public and non-public actors rather than through the standard model of representative democracy (Rhodes 1997; Pierre and Peters 2000; Kjaer 2004; Sörensen and Torfing 2008; Papadopoulos 2010). Other relational approaches to the legitimization of IRAs, however, focus more explicitly on their 'responsiveness' towards political institutions and affected interests, stressing the involvement of these actors in the regulatory process, or the attitude or willingness of agencies to heed their preferences

(Golden 1998; Yackee 2006; Yackee and Yackee 2006; Braithwaite 2006). Or, they focus on the deliberative qualities of IRAs, emphasizing peer review and deliberation in a multi-level governance setting (Sabel and Zeitlin 2008). Some of them point at their place in regulatory networks (Coen and Thatcher 2008; Maggetti 2010; Levi-Faur 2011). In all, the legitimacy of IRAs is supposed to be not only stemming from their ties with the political sphere, but also from the procedural legitimacy of their 'multidimensional' or 'hybrid' accountability or responsiveness relations with the regulatory environment at large.

From an optimistic viewpoint, the technocratic, delegation and relational approaches to the legitimacy of IRAs may be conceived as complementary to each other. IRAs would then ideally be created by democratically enacted statutes and have legally circumscribed mandates. They would be controlled and held to account by elected politicians in government and parliament to the extent this is necessary, while exercising their discretionary authority on the basis of specialist expertise. They would also allow for public participation in the regulatory process, and be properly checked by the judiciary (Majone 1996: 292; idem 1997: 161; idem 1999; Thatcher and Stone Sweet 2002: 19; Baldwin, Cave and Lodge 2012: 27-33). From a more pessimistic viewpoint, however, the three approaches could be said to suffer from inherent contradictions: too much accountability and responsiveness towards political or affected-interest actors (the delegation and relational approaches, themselves already potentially contradictory) could conflict with the independence necessary for IRAs to fulfil their mandate on the basis of specialist expertise (the technocratic approach). This, then, would undermine the justification for their establishment in the first place (Sosay 2006; Maggetti 2010). Each approach, moreover, has been argued to suffer from its own internal tensions as well.

The technocratic approach, first, runs against the problem that policy outputs and results of IRAs are difficult, if not impossible, to objectively measure (Radaelli 2004; Pollitt and Bouckaert 2004; Verhoest 2005). It is even harder to establish the causal relationship of results with the independence of the bodies producing them (Maggetti 2010). The assessment of quality or performance can depend on subjective viewpoints based on interests or outlook, or even on one's involvement in the very regulatory process (Papadopoulos 2003; Radaelli and De Francesco 2007). Regulation, in addition, can have redistributive rather than mere efficiency-raising effects, which one can hold should be subject of stakeholder involvement (Maggetti 2010). The neutrality and objectivity of mere efficiency-raising independent experts can thus be contested, and so can the idea of a 'common good' which they should pursue independently of the political sphere or affected interests (Baldwin, Cave and Lodge 2012).

The second, delegation-based approach, in which the framework of representative democracy is supposed to remain intact, has been argued to run into problems as well. Between the political control and autonomy of independent agencies a fundamental tension has been observed. Too much independence may impair the democratic legitimacy of IRAs, but too much political control runs the risk of losing the purported benefits of establishing them at all (Smith and Hague 1971; Thatcher and Stone Sweet 2002; Coen and Thatcher 2005). This tension is reinforced when IRAs develop their own

expertise, independently pursue goals, or start to prepare policy decisions for their political principals (Maggetti 2009). The bilateral principal-agent approach to the study of political control and delegation has been argued to obscure the real-life complexity of the regulatory environment: not only do agents often face multiple political principals (ministers, parliaments), but also a variety of other actors like courts, administrative bodies, international networks and regulatees, which impact their decision-making (Vibert 2007: 74-75). While the standard model of parliamentary-representative democracy would remain intact if IRAs would fit in, because of the tension between political control and autonomy, perhaps irreconcilable, it is still contested whether they do – and, in light of the technocratic approach, whether they should.

Regarding the third, relational approach, questions persist as to whether the procedural legitimacy, multidimensional accountability or responsiveness of IRAs towards the regulatory environment can, in terms of democratic legitimacy, compensate for a lack of political steering (Papadopoulos 2010). A minimal version of accountability towards the regulatory environment, in which IRAs justify and explain conduct to forums but are not sanctioned by or open to substantial participation of outside parties, could be argued to be inadequate in this respect (Schueler 2004; Sosay 2006; Maggetti 2010). Relatedly, the frequent use of the accountability concept in an 'umbrella' sense, as standing for either responsiveness, transparency, equity or other desiderata, has been argued to obscure what actors such as IRAs must conform to in order to boost their procedural legitimacy (Mulgan 2000; Bovens 2007). The involvement of outside parties in IRA procedures could furthermore be biased towards those able or willing to bear the costs of organizing (Olson 1971), or towards those possessing particular deliberative qualities (Habermas 1981). Governance networks such as those in regulatory space have been argued to be themselves opaque, closed off and informal (Sörensen 2005; Papadopoulos 2010).

1.4 **Regulation without representation?**

The question of the legitimacy of IRAs, and their place in electoral-representative democracy, is therefore far from solved. As one contributor to the ongoing debate on the desired and actual place of these independent bodies in the polity has noted: 'There is consensus (…) neither on the diagnosis (how undemocratic are independent regulators?) nor on the remedy (what should be done about it?).' (Gilardi 2008: 26)

Yet, despite all differences, adherents of all approaches in the existing literature seem to at least agree on one central tenet: that IRAs, because of their independence, are 'unrepresentative'. IRAs 'do not conform to the representative model' (ibid: 25), and they are said to 'not rely on any claim of representativeness' (Maggetti 2010: 2). Frequently, this is implied rather than explicitly stated in analyses of IRAs and their place in representative democracy. They are usually grouped in a larger class of entities called 'non-majoritarian institutions' (NMIs), which are commonly defined as governmental

or public bodies exercising authority 'that are neither directly elected by the people nor directly managed by elected officials' (Thatcher and Stone Sweet 2002: 2; Sosay 2006: 172; Vibert 2007: 5). This is said to constitute a transfer of powers 'away from elected bodies to unelected ones' (Coen and Thatcher 2005: 300). Hence, in analyses their 'non-elective and non-representative nature' (Maggetti 2010: 2) is frequently equated. Statements that power has shifted from parliamentary to 'unrepresentative' and non-democratically accountable institutions (Papadopoulos 2010: 1043) are therefore often encountered.

Disagreements about approaches to the legitimacy of IRAs notwithstanding, the essentially non-representative character of these institutions seems to be uncontested. This observation, however, seems to rest on the conflation of two distinct concepts: the electoral and the representative. When the 'unrepresentative' nature of IRAs is mentioned in analyses, this is meant to refer to their unelected character. IRAs are not elected by the public or by industries and consumers; and they are placed at a distance of elected parliaments and the governments these control. Therefore, IRAs are not representative. This observation contains the implicit assumption that parliament is the only source of representation. It contains another assumption as well: that representation is derived solely from elections. This seems to imply that political expression and authority beyond elected parliaments cannot involve representation.

Yet as became clear in the opening anecdotes of this study, and was confirmed in the discussion on Keane's account of monitory democracy and Rosanvallon's account of the new democratic order, claims to speak or act for others, and invocations of constituencies are still very much part of twenty-first century politics outside and beyond elected parliaments, including in the realm of IRAs. Indeed, it would be difficult to imagine political expression and political authority, including that exercised by or around IRAs, *without* entities speaking or acting on people's behalf, or without the former depicting or portraying the latter in some manner. These activities need not necessarily entail elections or parliaments. When referring to extra-parliamentary or non-electoral politics, in fact, the word representation is often already employed, such as when we talk about 'interest group representation', 'legal representation' or 'social and economic representation'. Monitory bodies such as IRAs, too, have been said to 'rely inevitably on representation' (Keane 2011: 219); they are claimed to act as 'unelected representatives' (ibid. 214, 222). But how is this possible when representation is derived solely from elections?

In this thesis, I will argue that IRAs are indeed acting and speaking not as representatives, but as representative *claimants*. IRAs have been put into the world with a certain purpose or function: to benefit some thing or some people. They draw upon this purpose when they present themselves to the outside world in their political legitimation. The constitution of IRA board leadership stands in service of this purpose too. And in their decision-making procedures, IRAs allow for a representation of affected interests that is, again, in the service of their stated function. This, it will be argued in this study, constitutes representation, or better put: representative claim-making. For it will be argued in this study that representation is not a fact that is derived from mechanisms such as elections, nor a property only of bounded institutions such as parliaments.

Rather, representation – or better put: representative claim-making and receiving – happens all around us. It is a phenomenon that, because of the centrality of language in political expression, and the necessity of a division of labour in political authority, has systemic properties. It is therefore present in and around IRAs as political institutions as well, enabling them to act and speak as 'unelected representative claimants'.

In making this argument, this study will build on recent advances in representation theory and regulation studies. First, Rosanvallon, in his work on new forms of democratic legitimacy, argues that agency independence and impartiality constitute forms of 'general' interest representation. Independent authorities, he claims, have revived classical ideas about independent representation that existed before the modern equation of the concept with electoral democracy (Rosanvallon 2011). Yet Rosanvallon's work, while highly inspirational in its expansion of conceptions what representation is and what it could do beyond the electoral, also is idealistic and mostly conceptual. This study will seek to nuance some of his ideas by empirically studying how representation works in practice. Secondly, I am influenced by the work of the British and American legal scholars Tony Prosser and Mike Feintuck. They have shown how motivations for regulation often draw on invocations of public or other general interests. Yet the conceptions of these interests often have a basis in a particular (economic) worldview that imbues both regulations and the role of independent authorities in enforcing them (Prosser 1999; idem 2006; Feintuck 2004; idem 2010).

Most of all, however, this thesis builds on the work of the British political theorist Michael Saward. In a series of articles (Saward 2005; idem 2006; idem 2009) and his work *The Representative Claim* (idem 2010), Saward has delineated a performative approach to representation that aims to divest the concept of its mechanistic and institutional connotations. His approach enables a recognition and analysis of representational practices in the political world at large, including in domains outside of or beyond elected parliaments. This approach is therefore suited to a world in which claims to act and work for others, and invocations of constituencies, are increasingly heard in post-parliamentary settings, such as the domain of IRAs. Yet this approach requires a provisional departure from the normative delimitations of the concept of representation as traditionally understood, in order to be able to pinpoint and analyse practices of representation not always recognized as such. It requires that representation is henceforth seen as a reciprocal and fleeting process of representative claim-making and receiving, that may or may be not be informed by democratic, normative or electoral criteria. The recognition of certain practices not informed by these criteria as nevertheless involving representation has positive and analytical benefits, which can subsequently be employed in normative analyses.

This study argues this is relevant for IRAs. Recognizing the practices and activities of IRAs as representational – and their interaction with external parties as involving representative claim-making and receiving too – yields positive and normative insights that may be employed in further study of these unelected bodies. This again may contribute to existing approaches of IRAs and their place in the democratic polity. The goal of this

thesis is therefore to readjust a common notion encountered in the literature that IRAs are unrepresentative. It argues they should instead be seen as unelected representative claimants.

1.5 Contribution to the literature

This will be a study about representation – or more precisely put: representative claim-making and receiving – in which IRAs as unelected bodies stand central. As such, it will touch on certain questions central to other approaches to IRAs and their democratic legitimacy, but does not aim to solve any of them in and of themselves. This thesis is, for instance, not concerned with measuring performance, or establishing whether the IRAs analysed in it achieve quality results. Neither is this an argument about the degree of formal or real independence of IRAs, or that of those selected for analysis. A measure of formal-legal independence from the political sphere and affected interests will be established for purposes of case selection (as this study is about IRAs), but this is not further explored. This thesis also does not aim to offer or test functionalist explanations for the establishment of IRAs or for those selected here. Neither is this a study about accountability, in either its political or public conceptions. While many of the interactions observed in this study could be conceptualized as accountability relations, it will not be aimed at analysing accountability as such, or describing or testing any of its variations or effects. Lastly, this thesis is not about 'regulatory capture' (the process whereby affected interests come to control IRA decision-making) (Stigler 1971). While it aims to describe IRA-regulatee interactions at the cases selected, it does not do so for the purpose of establishing capture in any of them.

The goal of this study, instead, is to make a historically and empirically informed political theoretical argument about IRAs. It is about their place in representative democracy in a time when politics increasingly takes place outside the domain of political parties, elections and parliaments, but in which claims to speak or act for others, and invocations of constituencies, are still part and parcel of political expression and political authority. It is argued this should be recognized as representative claim-making. As such, it hopes to contribute to existing approaches to the study of IRAs and their democratic legitimacy. But it also hopes to advance the study of representation, both in theory and in practice, by providing an account of its existence in a place – independent market regulation – hitherto assumed to be devoid of its occurrence. As an empirical application of Saward's theory of representative claim-making, currently one of the few, it seeks to contribute to a young and emerging literature (Marochi 2010; Ron and Cohen-Blankshtain 2010; Severs 2010; Bellamy and Castiglione 2011; De Wilde 2013; Michailidou and Trenz 2013). IRAs, therefore, are analysed as *political* institutions. They are also, of course, public or governmental entities that apply competition and administrative law in order to achieve empirical results in the economy or society (Van der Meulen 2003: 126). For this reason, they are mostly studied in the disciplines of public administration,

law or economics. Here, however, they are studied from the vantage point of political theory, in particular that on representation and representative claim-making.

1.6 Research questions and outline of the study

The main question that drives this study is: '*What is the representative character of independent regulatory authorities*?' The proposed answer to this question in this thesis constitutes the argument of this study. This argument will be developed in steps.

To answer the main question, in the subsequent chapters, first, theoretical understandings of regulation, the rise of the 'regulatory state', IRAs, and common motivations for their independence will be discussed. Then, the historical rise of the regulatory state in the Netherlands – the area in which case studies will be conducted – will be described (Chapter 2). As the locus of the thesis has then been established, subsequently the study will proceed towards its focus: the phenomenon of representation, conceived of as a reciprocal process of representative claim-making and receiving. Chapter 3 establishes the main conceptual definitions of the phenomenon of representation, by moving from the seminal work of Hanna Pitkin to twenty-first century representation theory, and ending with a discussion of Michael Saward's understanding of representation as a reciprocal process of representative claim-making and receiving. The ensuing chapter operationalizes Saward's understanding of representative claim-making in order to enable the empirical observation of representative claims in the domain of IRAs (Chapter 4). Here, case selection and methods of data collection and analysis are also explained and defended: four IRAs in the Netherlands were selected for a study of representative claim-making on three different conceptual levels.

The main part of the study constitutes the empirical analysis of representative claim-making at these three different levels of the four selected IRAs. In Chapter 5, representative claims on the *institutional* level of the four selected IRAs are identified and analysed. This chapter aims to delineate what the four selected IRAs have been claimed to stand or act for by the legislature of the Netherlands, and how their constituencies have been portrayed in political debate and law. In Chapter 6, it is subsequently traced how these representative claims and constituency portrayals are rhetorically and visually reproduced and reiterated by the four selected IRAs themselves in their attempts at public self-legitimation. This part of the argument – covered in two chapters – thus aims to establish the four selected IRAs as unelected representative claimants.

The following chapter moves the analysis to the leadership or *board* level of the four selected IRAs (Chapter 7). It aims to explore how selection criteria for the boards of the four selected IRAs underpin the representative claims of these bodies as institutions. Yet it also pays attention to deviations of commonalities across the four selected cases, and potential conflicts between board-level and institutional-level representative claims. Then, in light of the representative claims about board members, the chapter embarks on a descriptive analysis of all actual board appointments at these four IRAs

from the past until the present day (2014), in order to show who gets appointed to the boards of these powerful unelected bodies.

The final empirical chapter explores the work-floor or *administrative* levels of the four selected IRAs (Chapter 8). It seeks to investigate the extent to which preparatory or implementation decision-making processes at this level, which often involve interaction with affected interests in regulated domains, involve representative claim-making and receiving. On the basis of interviews with 45 representatives of affected interests and the four selected IRAs, hitherto unexplored consultation and interaction procedures are charted, criteria for the inclusion of affected interests into them described, and the reciprocal process of representative claim-making and receiving (or regulatory affairs lobbying) as perceived by participants is analysed.

In the last chapter, the results of the study are summarized, while the positive and normative benefits of viewing IRAs from a representative claim perspective are delineated (Chapter 9). These are then interpreted in light of the three approaches to the legitimacy of IRAs identified in the literature. The thesis will conclude with a consideration of the democratic legitimation of IRAs and their practices from a representative claim-making perspective.

Chapter 2

The rise of the regulatory state

What is regulation? And why are independent authorities involved in it? In this chapter, concepts that are relevant throughout this thesis will be introduced. It thus lays the groundwork for the analysis in terms of representative claim-making later on. After providing a general definition of regulation, rationales for regulation from economic theory and beyond will be discussed. Having examined regulation in relation to the contemporary state, the focus will be on the institution of independent regulatory authorities. Subsequently, the chapter turns to the Netherlands. General concepts will here be brought to life in a historical exploration of the rise of a regulatory state in the polity that will form the setting for the exploration of representative claim-making later on.

2.1 **A definition of regulation**

What is regulation? Definitions are notoriously befuddling. Conceptualizations in circulation differ in the kind of activity described and the actors involved. In a first, most encompassing sense, regulation is defined as *all* attempts at social influence or control (Baldwin, Cave and Lodge 2012: 3). This may include all laws, rules, norms and standards intended to guide human conduct and behaviour, both formal and informal, written and unwritten, and enacted by state, hybrid or societal bodies. Regulation can then be unintentional or incidental as well. In this definition, it comes close to Foucault's notion of 'governmentality' (Black 2002: 3), but it lacks sufficient delineation or boundaries to make it, in this thesis, useful for purposes of analysis. In a second, more narrow sense, regulation is defined as all deliberate efforts *by the state* to influence or control the economy or society. This may include lawmaking, rulemaking, standard-setting, taxing spending, pricing, subsidizing, contracting and supplying information, as well as supervising and enforcing compliance to laws, rules and regulations (Baldwin, Cave and Lodge 2012: 3). It can be restrictive or facilitative, or in other words, prohibit or enable certain actions. In a third, most narrow definition, however, regulation is limited to the promulgation by the state of a set of authoritative *rules* accompanied by some mechanism, typically an independent public agency, for *overseeing and enforcing compliance* to these rules (Baldwin, Cave and Lodge 2012: 3).[4]

The understanding of regulation as employed in this thesis is between the second and third definitions. In a widely adopted take, the American sociologist Philip Selznick defined regulation as attempts at 'sustained and focused control by a public agency over activities that are valued by a community' (Selznick 1985). This definition is broad enough to capture the range of activities that the independent agencies analysed in this study nowadays undertake, which includes the formulation of rules as well as their enforcement. It is also neutral enough to reflect the fact that ultimately, regulation is value-based and expressive of political wishes and choices.

4 The evolving conceptualizations and definitions of regulation have as much to do with the growth and development of rules and rule enforcement in modern society, as with expanding understandings in the literature on which human activities should be conceived of as 'regulatory' (Black 2002).

The focus of this thesis will be on independent agencies involved in regulation in the Netherlands. Unfortunately, however, the concept of regulation does not travel well (Black 2002: 2). In Dutch, no exact translation that has the same academic, political-administrative or legal ring to it exists. While the noun *regulering* is the literal translation, this word has no formal usage in the Dutch political-administrative and legal lexicons (Van der Meulen 2003: 26; Meuwese 2004; Lavrijssen 2006: 28).[5] Instead, in these lexicons the noun *toezicht* ('supervision', 'oversight' or 'surveillance') is often employed to refer to the regulatory activities of independent agencies. A distinction is then often made between attempts at regulatory control beforehand ('*ex ante* toezicht'), and monitoring and enforcing compliance to rules afterwards ('*ex post* toezicht') (Schueler 2004; Baarsma, Pomp and Theeuwes 2006). Both activities, however, are already included in the English definition of regulation. In this study, therefore, the term regulation will be employed to refer to 'sustained and focused control by a public agency of activities that are valued by a community', which includes both *ex ante* regulation and *ex post* supervision and enforcement. Sometimes, however, the word 'supervision' will be used to refer specifically to the *ex post* monitoring and enforcement activities of the agencies concerned.

2.2 **Rationales for regulation**

Rationales or justifications for regulation and supervision are very often tied to notions of 'market failure' stemming from economic theory, particularly welfare economics (Breyer 1982; Ogus 1994; Baarsma, Pomp and Theeuwes 2006; Baldwin, Cave and Lodge 2012). Market failure is thought to exist where 'the marketplace' – the allocation of goods and services through the interplay of the economic forces of supply and demand, structured by the competition mechanism – produces outcomes that are considered 'undesirable' to the marketplace or to 'society' in one way or the other.[6] Such market outcomes can, depending on one's perspective, be perceived as either economic, or as non-economic – for instance as 'social', 'public' or 'societal' – in nature. Efforts to combat these outcomes through regulation and supervision are likewise justified with recourse to either economic, or to non-economic, public or social rationales. In the scholarship of regulation, however, economical-theoretical rationales for regulation are dominant (Prosser 2006; Feintuck 2010).

Market failure, first, can occur where the competition mechanism in economic theory is 'distorted' by price or supply cartels, or by the existence of a monopoly in a certain

5 The related word *regelgeving* ('rule-making') also comes close in translation, but in the Dutch political-administrative and legal lexicons refers to legislation, which is not normally produced by IRAs (although exceptions exist, in the Netherlands as well).

6 It is a matter of perspective whether the interplay of economic forces is seen as not free or competitive enough and therefore produces undesirable outcomes (the market failure assumption behind much economic theory), or whether free markets naturally fail to adhere to the ideal of competition and therefore produce undesirable outcomes (a slightly more pessimistic take on the necessity of regulation). A third approach questions whether the marketplace itself, even were it to conform to the ideal of economic theory, produces the most valuable or desirable outcomes to society (Prosser 2006).

domain.[7] Monopoly formation can occur through natural economies of scale: in sectors like telecommunications, energy, water services and railways, the provision of goods and services is partly tied to a network infrastructure that is too costly to replicate for competitors, thus creating the potential for monopolistic abuse. This is to be combated by regulation.[8] A *second* rationale for regulation in economic theory is the existence of 'information asymmetries' among consumers: a lack of information preventing them from acting in a rational and self-interested manner as one half of the supply and demand mechanism. This, too, is considered a form of market failure to be combated by regulation. A *third* rationale for regulation lies in what in economic theory is known as the 'external' or 'spill-over' effects of market outcomes: the costs to society of certain goods and services not integrated in their price, such as environmental-unfriendliness, unsustainability, disadvantages to health or workplace safety. In economic theory, this is considered a form of market failure too, but from a non-economic perspective, these goals can be seen as public values or social goods to pursue. A *fourth* rationale for regulation, which likewise does not strictly stem from economic theory, is the commonly perceived societal necessity of a continuous, reliable and affordable provision of goods and services such as telecommunications, energy, water, healthcare, and sometimes public transport and financial services, to all consumers or citizens in a given polity (Prosser 1999).

The dominant economical-theoretical rationales for regulation are criticized, notably by the legal scholars Tony Prosser (1999; 2006) and Mike Feintuck (2004; 2010), for containing the implicit assumption that the marketplace, were it to function correctly, would produce the most desirable outcomes to society. In economic theory, according to their criticism, regulation is always perceived as a 'second best' solution to the free marketplace. This, in the view of Prosser and Feintuck, reflects a value-based rather than a universally acceptable rationale. They therefore offer alternative primary rationales for regulation, such as public interests, human rights and social solidarity. They have also demonstrated that governments and legislatures when enacting regulations often employ various economic-theoretical analyses of market failure, in combination with non-economic, public or social rationales (Prosser 2006; Feintuck 2010).

2.3 **The regulatory state**

The 'regulatory state' is the state in which regulation – the sustained and focused control by a public agency of activities that are valued by a community – constitutes an important or even the dominant way of attempting to control or steer the economy and society (Majone 1994; idem 1996; idem 1997; idem 1999; Braithwaite 2000; Moran

7 From a non-economic perspective, however, certain price distortions may be argued to serve a social or public good, such as when fair trading initiatives agree to pay producers an above-market price.

8 For this reason, throughout much of the twentieth century, in Western Europe these goods and services were provided by state-owned or controlled corporations.

2002). The thesis that a regulatory state exists was coined by the Italian political economist Giandomenico Majone, and is connected to the widespread privatization and liberalization of utilities such as telecommunications and energy in Western Europe since the late 1970s.[9] According to Majone, in Western Europe since this time market regulation grew in relative importance to the traditional post-war state functions of income redistribution and macroeconomic stabilization. While the Keynesian welfare state, through fiscal, labour and industrial policies, and state ownership of utilities, was often directly involved in the economy, in the regulatory state another mode of control developed, in which utilities and other industries are in private hands but subject to rules developed and enforced in part by specialized public agencies (Majone 1997: 144). The 'positive' interventionist state of direct expenditures of public money in areas considered crucial for human welfare has according to Majone to some extent been replaced by a more distant, regulatory state, marked by independent administrative satellites in pursuit of 'market efficiency' and other goals. In Western Europe, this has been propelled by the single market policies of the European Union (EU).

Others, however, have pointed at a more widespread diffusion of regulation, coining the term 'regulatory capitalism' to denote the increased reliance on rules and rule enforcement throughout states, markets and society, not confined to Europe, but part of a global, albeit historically and cross-nationally differentiated trend (Jordana and Levi-Faur 2005; Levi-Faur 2005). Black promotes the term 'regulatory society', to emphasize the dissemination and 'decentring' of regulation through society at large, the product of interdependencies in multi-level networks and hybrid organisations, rather than expressions of a clear-cut state-market divide (Black 2001; idem 2002). Others have put forward proposals to speak of the 'post-regulatory state' (Scott 2004) in order to de-emphasize the role of the state in regulation, or have pointed out the non-existence of a single regulatory state model (Moran 2002; Thatcher 2002; Coen 2005). No agreement, in short, exists on how to position regulation within the state-market-society nexus, and what historical or descriptive overall label to apply to it.

In this study, therefore, 'the' regulatory state is not seen as an encompassing description of the kind of state we live in today; but as one possible mode of the state, as it appears to a certain audience at a certain time, when it manipulates economic or societal activity through regulatory activities, as it frequently does through independent specialist agencies. In that sense, the regulatory state is considered a 'state within a state' (or perhaps better, 'a state of the state within the state'). It co-exists with various other forms of regulation, such as private rulemaking or 'self-regulation' (in which organisations of private actors draw up rules and monitor them, such as in crafts or professions) or hybrid or mixed regulation (in which public and private actors work together in producing

9 Regulation as such, however, is in some of the broader definitions above historically a much older state practice, predating privatization and liberalization. In addition, the regulatory state as one marked by specialized public agencies attempting to influence and control the economy can be argued to have existed in the United States since the early twentieth century Progressive Era (Scott 2004). Since this thesis is concerned with Western Europe, however, Majone's thesis will be discussed.

regulation) (Majone 1996; Black 2002). Rather than having replaced redistribution, regulation can have redistributive effects itself (Majone 1996: 295; Levi-Faur 2005; Gilardi 2008). The regulatory state has no single blueprint, but exists in various forms across countries. In Western Europe, however, the proliferation of IRAs that followed the privatization and liberalization of public utilities, and the emergence in recent years of cross-national multilevel regulatory regimes (consisting of networks of national IRAs coordinated by the European Commission (EC)), together with the judicialization of relations between state and market or societal actors (Van Waarden and Hildebrand 2009), constitute a 'new governance of markets' and society (Coen and Thatcher 2005) for which the term regulatory state is appropriate.

2.4 Independent regulatory authorities: three types, three powers

The most notable *institutional* manifestation of the regulatory state understood this way is the 'independent regulatory authority' (IRA). IRAs are part of a broader class of 'quasi-autonomous non-governmental organisations' (quangos) or 'non-majoritarian institutions' (NMIs). These historically comprised only the judiciary, central banks and institutions such as electoral councils and ombudsmen, which have traditionally functioned to some extent autonomously from elected political institutions. In the course of the twentieth century, however, their ranks have been strengthened by large numbers and a great variety of (quasi-)autonomous public sector agencies, audit and inspection bodies, risk assessors, service providers and supranational organisations (Van Thiel 2000; Vibert 2007; Verhoest et al. 2012).[10] Of these, IRAs are exclusively devoted to regulation and supervision.

IRAs are also known as 'independent regulatory agencies' or 'non-majoritarian regulators' (NMRs) (Coen and Thatcher 2005). In Dutch, they are currently known as *toezichthouders* ('supervisors') or *markttoezichthouders* ('market supervisors'). Scholars in the Netherlands have also argued to call them *marktautoriteiten* ('market authorities') (Van der Meulen 2003), *marktmeesters* ('market masters') (Verhey and Verheij 2005) or just to go with the English name 'regulators' (Lavrijssen 2006), in order to distinguish IRAs from other NMIs. In this thesis, however, the English acronym IRA is employed.

IRAs as institutions historically predate the late twentieth century Western European regulatory state, having a much longer pedigree in the United States. Here, the Interstate Commerce Commission (ICC) of 1887 was the first independent regulatory authority set up. The ICC was to regulate the railroads by setting tariffs, counteracting discriminatory practices, developing safety standards and adjudicating disputes. This was an institutional innovation at the time: the ICC was argued to perform its tasks autonomously from Congress and the federal bureaucracy in a non-political and expertise-based manner (Landis 1938; Cushman 1941; Majone 1996; Rosanvallon 2011).

10 Some activities of some of those bodies can also be seen as regulatory.

Independent commissions subsequently spread in the US during the early twentieth century Progressive and 1930s New Deal eras with the establishment of such agencies as the Federal Trade Commission (FTC) (1914), the Federal Communications Commission (FCC) (1934) and the Securities and Exchange Commission (SEC) (1934). They spread again during the 1960s and 1970s with the setup of such agencies as the Environmental Protection Agency (EPA) (1970). Independent regulation in the US has been argued by both critics and adherents for a long time to constitute a 'fourth branch' of government (Majone 1996: 288).

Across the Atlantic, however, with the exception of certain competition authorities such as the British Monopolies and Mergers Commission (MCC) (1948) and the German *Bundeskartellamt* ('Federal Cartel Office') (BKartA) (1957), IRAs did not appear before the 1960s, when in the United Kingdom regulatory agencies for health and safety and against discrimination were set up. These were followed in the UK by independent regulatory offices in privatized public utilities domains in the 1980s, such as the Office of Telecommunications (Oftel) (1984), the Office of Gas Supply (Ofgas) (1986), the Office of Water Services (Ofwat) (1989) and the Office of Electricity Regulation (Offer) (1990) (Hall, Scott and Hood 2000; Moran 2002). In the late twentieth century, IRAs appeared in Western Europe as well, prompting Majone to formulate his thesis of the historical rise of the regulatory state. The creation of the EU single market stimulated this development.

From the mid-1980s onwards, in Europe but also globally, in the course of the privatization and liberalization of public utilities as well in other domains, many IRAs were set up in a movement of 're-regulation' or 'regulatory reform' (Majone 1996). These terms reflect the paradox that a privatization and liberalization of economic domains often went hand in hand with the imposition of new state rules and agencies on these domains (Vogel 1996). Three ideal types of IRAs are nowadays distinguished, which display a measure of overlap with the various rationales for regulation discussed above.

The *first* type of IRA, in Western Europe as well as other regions, consists of competition authorities. These are to safeguard the functioning of the competition mechanism in the whole of the market sector in a country. This entails the investigation and disbanding of price and production cartels, and the prevention of the abuse of economically dominant (oligopolistic or near-oligopolistic) positions of market actors. Competition authorities independently enforce (European) competition law, and have the discretionary authority to veto or fiat business mergers, and to impose fines and sanctions for non-competitive behaviour. Their powers are thought of as *ex post* supervisory (Van der Meulen 2003; Schueler 2004; Verhey and Verheij 2005).

The *second* type of IRA consists of sectoral regulators. These are established in domains, commonly privatized public utilities such as telecommunications, energy, water services and railways, in which competition does not occur naturally because of networked economies of scale. For this reason, throughout much of the twentieth century, in Western Europe these goods and services were provided by state-owned or controlled corporations. Sectoral regulators implement and enforce (European) sectoral law, such as telecommunications or energy law, to restructure these domains so that

liberalized competition can occur, and to prevent the abuse of remaining network structures.[11] They have the discretionary *ex ante* authority to impose tariffs and access conditions to network use. Such regulations are to facilitate the transformation to a liberalized market, but can also have a more permanent character (Van der Meulen 2003; Schueler 2004; Verhey and Verheij 2005).

The *third* type of IRA consists of those set up to secure or advance societal desiderata in certain domains, or throughout the entire market sector (or depending on one's definitions: throughout society). These desiderata often relate to what in economic theory is known as the 'external' of 'spill-over' effect of market outcomes. The third type of IRA is to combat these effects through regulation and supervision in order to safeguard health, safety, environmental-friendliness, sustainability, durability, quality, affordability, and the like (Van der Meulen 2003; Schueler 2004; Verhey and Verheij 2005). They may also combat information asymmetries among consumers. Their powers can display a mixture of *ex ante* regulatory (when they set standards, for instance, or interpret law) and *ex post* supervisory competences.

These are ideal types. In practice, IRAs frequently combine competition supervisory and sectoral regulatory functions, while securing and advancing societal desiderata in economic or societal domains. As the rationales for regulation display overlap, so do the missions and tasks of IRAs. They may regulate or supervise the entire economy, or particular sectors. IRAs also often possess combinations of *ex ante* regulatory and *ex post* supervisory powers (Schueler 2004). Although in terms of the three political branches of government, they are usually categorized as executive bodies, IRAs often combine powers from all three branches. The *ex ante* regulatory powers and *ex post* supervisory powers delegated to them can be (quasi-) legislative, executive and (quasi-) judicial in nature. In addition, IRAs often have advisory and more undefined powers (Verhey and Verheij 2005: 157).

Legislative powers of IRAs enable them to enact formal legislative rules. Quasi-legislative powers allow them to implement laws and regulations, and to interpret the use of delegated executive powers. They do this through the formulation of soft law such as policy rules and informal guidelines. *Executive* powers of IRAs enable them to make decisions on market entry through licensing and registration, and to supervise and enforce compliance to regulations. They do this through collecting information, monitoring compliance and conducting searches. IRAs may also issue binding directions, or fine or sanction market and societal players, and name and shame them. Tariff and network access condition setting is an executive power too. *Judicial* or quasi-judicial powers of IRAs, lastly, are those pertaining to dispute adjudication between private parties, for instances about network tariffs or access conditions, or the settlement of appeals to IRA decisions (Van der Meulen 2003: 81-82; Schueler 2004; Verhey and Verheij 2005: 158-161; Lavrijssen 2006: 26-27; Duijkersloot 2007: 47-59).

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11 For this reason, sectoral regulators have been thought of as executing only temporary tasks, until liberalization would be achieved. In recent years, however, it has become clear that regulation of remaining – or newly emerging – network structures will be required for the unforeseeable future.

The laws and regulations that are implemented and executed by IRAs often contain 'open norms' and vague legal terminology, which leave interpretive and discretionary authority to them (Van den Berg and Pars 2012).[12] Some IRA actions may go beyond the formal legislative framework, such as when they informally address market or societal actors, or speak out in public on certain matters (Schueler 2004: 21; Duijkersloot 2007: 43-45). IRAs frequently advise ministerial departments on regulatory and supervisory policy. Lastly, they often participate in cross-national (European) networks of IRAs, which in coordination with the EC have a role in the formulation of (European) regulatory and supervisory policy (Lavrijssen 2006; Duijkersloot 2007: 59).

Since IRAs make independent decisions that are not formally controlled by political government, the most important check on their powers is the judiciary. Administrative courts can, when a case is brought before them, check and destroy the individual regulatory and supervisory decisions of IRAs on procedural and sometimes on substantial grounds (Van der Meulen 2003: 81-82; Schueler 2004: 25-26; Duijkersloot 2007: 43-44; Lavrijssen 2006: 98-100).[13] This however puts a burden on the judiciary that according to critics because of the highly technical nature of IRA decisions may be too much to bear. The independence of IRAs, therefore, is a topic of much debate.

2.5 Twofold independence for long-term goals, expertise, flexibility, and impartiality

The defining characteristic of IRAs is their twofold independence from political institutions and the bureaucracy, and from affected market and societal interests. IRAs are always supposed to be independent from the latter. Their independence from the political sphere, however, is not an absolute. Different components and graduations of independence can instead be discerned (Gilardi 2005a; idem 2008). Political institutions commonly retain various control and accountability mechanisms over IRAs (Thatcher and Stone Sweet 2002; Van der Meulen 2003; Schueler 2004; Thatcher 2005).

Parliaments and governments, first, retain their democratic legislative powers on economic and societal domains. They can change laws and regulatory frameworks at their behest. In the EU, however, European law must be applied, and market regulatory law often hails from Brussels.[14] After IRAs are instituted, secondly, ministers retain system-level responsibility over their general functioning. This ministerial responsibility, however, does not cover the individual decisions of IRAs (Duijkersloot 2007: 103). Ministers in the Netherlands do have the power of giving general directions to IRAs, which can be laid down in secondary ministerial rules or policy rules that prescribe

12 This is sometimes done intentionally, to enable IRAs to make flexible decisions.

13 In the EU, the European Commission (EC) is in some domains, such as telecommunications, also capable of amending or destroying certain national IRA decisions.

14 Since European law takes precedence over national law, courts have also ruled that IRAs must apply the former even when it goes against the latter (Lavrijssen 2006).

how the bodies are to use their delegated powers. These, however, may not be issued to influence particular decisions. Ministers appoint and may fire IRA board members, but only in cases of misconduct. They may also approve IRA board regulations, budgets and annual reports, ask for information, and intervene in cases of gross misconduct (Van der Meulen 2003; Schueler 2004: 21-24; Duijkersloot 2007: 104-108; Lavrijssen 2006: 98-99).

From a helicopter view, it could be argued that it would be more accurate to speak of the 'quasi' or 'semi' political independence of IRAs in the general polity. Formal independence from the electoral political sphere exists, nonetheless, in their individual decision-making autonomy; and this has widespread regulatory effects. Lastly, IRAs to varying degrees operate outside the line of formal political-administrative control in terms of financial, personnel and organisational autonomy (De Ridder and Zijlstra 2010).[15] They usually have corporate identities which emphasize their separation from regular ministerial departments.

Motivations for this twofold independence of IRAs are to be distinguished from *explanations* for their existence. In political science, public administration and economics, the international proliferation of IRAs has been explained in terms of, for instance, public choice dynamics between interest groups and government (Stigler 1971; Wilson 1980; Peltzman 1989), various institutionalist theories (Horn 1995; Baldwin, Cave and Lodge 2012: 53-65), blame-shifting (Fiorina 1982), functionalist or principal-agent (PA) theories (Thatcher and Stone Sweet 2002) and policy diffusion (Gilardi 2005b; idem 2008). Despite this huge variation in social scientific explanations for the establishment of IRAs (which this thesis does not seek to add to), four general professed motivations for their twofold independence can be discerned from the literature. These are, again, ideal typical, but often employed by scholars, politicians and policy-makers.

A *first* stated motivation for the twofold independence of regulatory agencies is a pursuit of certain long term goals, or those that are considered of general interest. These goals are deemed so important as to transcend the need for direct political control and electoral approval. Frequently, this is argued for in terms of 'credible commitment' (Majone 1996; Thatcher and Stone Sweet 2002; Coen and Thatcher 2005; Gilardi 2008). Goal commitment in democratic systems is inherently unreliable. Politicians may for a variety of reasons, such as electoral pressure, renege on past promises, or policies may be changed by the next governing coalition. This phenomenon is named 'time inconsistency' (Gilardi 2002). Although this is inherent to the fabric of electoral majoritarian democracy, policy-makers may perceive it as an obstacle to the realization of goals. If they want to be sure these goals are nonetheless met, they delegate powers to an independent agency.[16] In privatized and liberalized utilities sectors, this need for credibility or 'policy stability' has since the 1980s been argued to be urgent. New investors in these

15 Of course, their formal or de jure independence may differ from their real or *de facto* independence (Maggetti 2007; Hanretty and Koop 2013). This however is not explored in this thesis.

16 At the turn of the twentieth century, some countries for this reason bestowed independence to central banks. The power to influence interest rates, and boost short-term economic growth possibly in the hope of gaining electoral favour, was deliberately taken out of the political sphere in order to guarantee restrictive monetary practices (Majone 1996; idem 2001; Gilardi 2008).

sectors would want to be certain they are not subject to sudden political interference, as investment costs are high and partially irreversible (the problem of sunk costs). Their worry was exacerbated by the remaining state ownership of utility firms and the social nature of utility goods and services, which were argued to enlarge the chance of political involvement. To favour the investment climate in newly liberalized domains, therefore, the delegation of regulatory powers to non-political, independent agencies was argued for and implemented (Levy and Spiller 1994; Majone 1996; Gilardi 2002; idem 2008).

A *second* stated motivation for the twofold independence of regulatory agencies stems from the nature of the regulatory craft. A sustained and focused control by a public agency over activities that are valued by a community requires detailed involvement in complex economic and societal domains. IRAs must therefore have a deep knowledge of the processes and operations in these domains, and the industries and practices in them. Self-regulation, for this reason, is attractive, as industries and practitioners commonly have the greatest knowledge of their own domains (Majone 1996; Zijlstra 2005). As this could lead to unwanted outcomes, however, while political dependency is argued to be no option either, the independence of agencies is alternatively thought to favour the formation of technical expertise. Regulation often takes the form of tariff and price setting, norms and standards formulation, and supervision to the behaviour of market and societal actors. This is thought to exist on a level of factuality in which the 'objective' or 'technical' determination of the 'best' policy seems possible. The independence of regulatory agencies has been argued, via functional specialization, to facilitate the application of neutral or 'scientific' knowledge in ways not attainable for the regular bureaucracy and elected parliaments (Majone 1997: 152-153).

A *third* stated motivation for the twofold independence of regulatory agencies is the flexibility in policy implementation it would permit. A position independent from the hierarchical bureaucracy would allow agencies to adapt regulations to evolving circumstances in market and societal domains. This would make regulation more future-oriented and in tune with marketplace developments, rather than an impediment to it. An independent position would also allow regulatory agencies to interpret legislation in such a manner as to be able to address specific problems in a case-by-case manner (Lavrijssen 2006: 11). This would be facilitated by the formulation of open norms in regulatory legislation, instead of detailed prescriptions. The spread of 'New Public Management' (NPM) thinking in public administration since the 1980s, with its focus on the adoption of results-based private sector techniques in the public sector, also encouraged the hiving-off of agencies for reasons of flexibility (Van Thiel 2000; Zijlstra 2005). Functional task-based agencies such as IRAs would be able to perform in a more flexible and efficient manner, leaving the formulation of general policies to the elected political sphere.

A *fourth* and last stated motivation for the twofold independence of regulatory agencies is the impartiality it is thought to guarantee in their task performance. Tariff-setting and price setting inevitably involve winners and losers, particularly in liberalized network utility domains in which former state monopolists must grant access to new rival competitors. Dispute adjudication about tariffs or access conditions

is a quasi-judicial activity. Similar to the judiciary, then, IRAs were to be defined by disinterestedness (Rosanvallon 2011). They were to be impartial, removed from political and sectoral interests. A broader need for impartiality can be said to underlie other stated motivations for their independence: the need for their political independence in order to enhance credible policy commitment (thought endangered by the simultaneous state ownership of utilities), and their application of technical expertise (purportedly objective and scientific).

The setup of IRAs therefore seems to present an attempt at the de-politicization of certain state functions: those of regulation and supervision. IRAs are placed 'one step removed' from elections (Gilardi 2008) and formally beyond the reach of sectoral interests to create an – in a narrow, electoral sense – a-political sphere for regulation and supervision. For this reason, they are commonly seen as unrepresentative, and not relying on any 'claim of representativeness' (Maggetti 2010: 2). Politics, however, can also be viewed in a broader perspective: as being about the questions of who gets what, when, and how (Laswell 1936). In this sense, IRAs, making independent decisions about such questions, are political institutions. And as will be demonstrated in this thesis, they also rely on claims to representation.

2.6 The rise of the regulatory state in the Netherlands: 1980-present

General concepts important throughout this thesis have been introduced. In order to explore how these are applied in practice, and to introduce the country setting within which representative claim-making about and by IRAs will be analysed in later chapters, the rise of the regulatory state in the Netherlands will subsequently be discussed. The formation of the regulatory state in this country can be seen as a result of the confluence of three different processes:

- the privatization of state-owned corporations;
- the hiving-off or autonomization of government agencies;
- the marketization of economic and societal domains

In the course of three decades, public policies to stimulate these processes amounted to a large-scale reconfiguration of state, society and market responsibilities in the provision of goods and services, out of which IRAs emerged as central players. Appendix A of this thesis provides a timeline for an overview of relevant legislative acts.

The 1980s: the privatization of state-owned corporations and agencies

'More market, less government' was the header under which the 1982 centre-right government of the Netherlands embarked on a reform program that was to entail both

privatization and the hiving-off of government agencies. This reform program was inspired by neoliberal policies followed by the Thatcher and Reagan governments in the UK and US. Later called the *Grote Operaties* ('Great Operations'), the Dutch program was to consist of a structural reconsideration of government expenditures, a reorganisation of the civil service, a decentralization of administrative tasks, deregulation, de-bureaucratization, and what was then known as privatization (Nispen and Noordhoek 1986; De Kam and De Haan 1991; Van Mierlo 1993). The concept of privatization in the Netherlands at the time stood for any kind of administrative reform in which a public agency or entity was granted a measure of autonomy.[17] The privatization of state-owned corporations (the modern meaning of the concept), the contracting out of public tasks to private actors, and the hiving-off or *verzelfstandiging* ('autonomization') of government agencies or corporations – in which the entity gained some autonomy but remained in public hands – were all considered privatization (De Vries and Yesilkagit 2004). The *Grote Operaties* were argued to achieve budgetary savings, to make the bureaucracy smaller, easier to control and more efficient, and to stimulate the market economy (Stellinga 2012). Privatization would serve all these goals.

The first of a series of two centre-right Christian Democrat and conservative liberal governments therefore prepared the privatization (in the modern meaning) of four state-owned corporations, among which the state postal services and telephony monopolist PTT. The state-owned bank Postbank was autonomized, while shares for a number of Dutch *staatsdeelnemingen* ('state participations', or private corporations of which the shares are fully or partially owned by the state) were sold (Andeweg 1994). The second centre-right government, which served from 1986 to 1989, declared that 'all services which are not necessarily performed by the government should in principle be subject to privatization' (Staatscourant 1986). The telecom monopolist PTT was autonomized with the state remaining sole shareholder, while telecom regulatory and supervisory functions were vested in a ministerial directorate. An independent authority for regulation and supervision of media broadcasting was also set up: the *Commissariaat voor de Media* ('Media Commission'). State agencies like the IJmuiden Fishery Port Authority, the maritime pilotage service and various certification and standardization bodies were autonomized, and shares of national industries like the airline company KLM and the Hoogovens steel factory were sold (Andeweg 1994; Van Damme 2004). At the end of the decade, privatization in the Netherlands had resulted in a transfer of about 120,000 employees from the public to the private sector.

The early 1990s: the autonomization of government agencies

The focus on privatization in the Netherlands decreased in the early 1990s, when a centre-left government of Christian Democrats and Social Democrats served. Yet the autonomization of government agencies now became an official policy goal: the coalition

17 Today, the concept of privatization stands for the privatization of state-owned corporations only.

agreement stated that 'major policy functions should remain in the central government, while executive tasks can be delegated to other governmental units or to independent public bodies and independent agencies' (Verhaak 1997: 165).[18] In line with NPM prescriptions for administrative reform, the autonomization of government agencies was argued to improve the efficiency and effectiveness of the bureaucracy. Hived-off agencies focusing on policy execution and implementation were thought to render more efficiency, a better service delivery and a closer proximity to citizens (Kickert 1997; Verhaak 1997). Many important public services, such as the Forestry Service and the central body providing student loans, were made autonomous, no longer completely controlled by a minister in terms of their individual decisions. Rather than as the result of a coherent policy, each ministerial department autonomized public agencies as a way of achieving budget cuts (Zijlstra 1997; Kickert 2005: 15). The result was a proliferation of quangos or NMIs.

This zeal for the autonomization of government agencies coalesced with a growing political awareness of independent bodies. In a string of government reports on what at the time was called 'functional decentralization' – the delegation of public tasks to functional bodies, as contrasted to the delegation of these tasks to lower-level territorial bodies – it was uncovered that in the country in the late 1980s, about 600 individual quasi-independent bodies of some kind already existed (De Vries and Yesilkagit 1999). These had been created by attrition. The term *zelfstandig bestuursorgaan* ('autonomous administrative organ') (ZBO) was now coined to denote any kind of organisation exercising public tasks that was not completely controlled by a minister in its individual decisions (Scheltema 1974; Zijlstra 1997). While some traditional functionally decentralized bodies, such as the medieval *waterschappen* ('water boards') and the postwar *publieksrechtelijke bedrijfsorganisatie* ('corporate business organisation in public law') were grounded in the Constitution of the Netherlands, ZBOs were not. Yet the newly independent bodies that had been created for various reasons throughout the years were discovered to perform myriads of public tasks, to have a great variation of competences, to be of public and private legal nature, and to differ in budget, personnel size and kind. Most were concerned with certification, registration, subsidizing or supervision, while others were advisory councils or quasi-judicial bodies. About 200 (clusters of) quasi-independent bodies seemed to be true ZBOs: beyond the reach of ministerial responsibility. 60 Percent of them were founded before 1980, but 40 percent in the decade since (Van Thiel 2000; Verhoest and Van Thiel 2004). A fifth of the public budget went to quasi-independent bodies, while they provided work to 130,000 people – more than the central bureaucracy (Van Thiel 2000).

Increasing awareness lead to growing criticism of the widespread delegation of public tasks to independent agencies. In 1995, the Netherlands Court of Audit issued a report that spoke of an 'uncontrolled growth' of independent agencies, and a hollowing-out of the principle of ministerial responsibility central to parliamentary democracy (Algemene Rekenkamer 1995). The same year, therefore, the new centrist Social Democratic and liberal 'Purple' government announced a 'restoration of the

18 This shift in focus was accompanied by a reformulation of the term privatization into its modern meaning of a full transfer of ownership of a state corporation to the private sector (De Vries and Yesilkagit 2004).

primacy of the political'. Henceforth, new ZBOs were to have a foundation in public law, and only allowed to be established for three motivations. The *first* of these was the need for non-political independent expert judgment, as in the case of the electoral council, drug testing or the collection of statistics. The *second* was the increased efficiency of a continuous application of a rule to large numbers of individual cases, as in the case of the distribution of student loans. The *third* was the desirability of societal interest interest group involvement, as in the case of certain corporatist bodies (Verhoest and Van Thiel 2004). The political accountability of the independent bodies was to be strengthened, and existing ZBOs to be brought in line with the new regulations.[19]

At the same time as independent bodies became contested, however, a new zeal for privatization and, more broadly, liberalization and marketization resulted in the setup in the Netherlands of the agencies central in this thesis: IRAs.

The 1990s: the liberalization and marketization of utility domains, and the establishment of IRAs

The centrist 'Purple' governments of Social Democrats and liberals that served from 1994 until 2002 had a policy program that to a large extent was focused on stimulating economic growth via the introduction of liberalization and marketization in various economic and societal domains in the Netherlands.[20] This was prompted by EU single market policies, to which the government of the Netherlands had contributed and been a proponent (Wilkeshuis 2010: 35-36; Stellinga 2012: 45). Deregulation was to reduce the burden of regulations on the market sector, while EU competition law was introduced to cleanse the traditional Dutch 'cartel paradise' (Schueler 2004: 20). EU directives, meanwhile, prescribed the liberalization and marketization of various networked public utility domains. These EU directives were to create a competitive European internal market through introducing market competition in various domains until then dominated by the state, and to allow for cross-border market activity. Yet national legislatures had much leeway in implementing the EU directives.

For the telecommunications sector, the EU Open Network Provision directive (90/387/EEC) was implemented in the Netherlands' Telecommunications Act of 1996. Unprompted by EU directives, the former state postal services and telecom monopolist PTT had already been fully privatized in 1994, although the state retained shares. This had created a private monopoly. From 1996 onwards, new competitors were allowed on the Dutch telecommunications market, while PTT – henceforth named KPN – had to grant access to its fixed telephony network on a non-discriminatory basis against reasonable tariffs. This was to create a competitive marketplace for telecommunications. To this end, and a number

19 An alternative type of quasi-independent authority was now promoted as well: the *agentschap* ('agency'), introduced in 1991 and modeled to the British 'Next Step' agencies. These were functionally autonomous as well, but remained under full ministerial responsibility (Van Thiel and Pollitt 2007: 31).

20 These policies were referred to as the introduction of *marktwerking* ('the workings of the market'). This could consist of the privatization of state-owned corporations, and of liberalization: the entrance of new competitors in formerly closed-off domains. The question which should come first resulted in heated policy debates. Different approaches were tried in, respectively, the telecommunications and energy sectors (Stellinga 2012: 46-47).

of others as well (discussed in Chapter 5), in 1997 the first IRA in the Netherlands was set up: the sectoral regulator *Onafhankelijke Post- en Telecommunicatieautoriteit* ('Independent Mail and Telecommunications Authority') (OPTA). Although not required by EU directives, the OPTA was an independent administrative authority in public law – a ZBO.[21]

For *ex post* supervision to market compliance to the new Competition Act of 1998, meanwhile, a second IRA was set up: the *Nederlandse Mededingingsautoriteit* ('Netherlands Competition Authority') (NMa). The NMa was to investigate and disband price and production cartels, prevent the abuse of economically dominant positions of market actors, and fiat or veto business mergers. This was to stimulate the Dutch economy through enforcement of the competition mechanism in the domestic 'cartel paradise'. The NMa was at first not formally a ZBO: the Minister of Economic Affairs retained the possibility of giving directions to it in individual cases. Yet certain measures were taken to prevent the minister from 'hasty' interventions, and in subsequent years, the *de facto* independence of the competition authority was fully respected (Verhey and Verheij 2005: 148-149). The NMa was made a *de jure* independent authority in 2005.[22]

For the electricity and gas sectors, the EU Electricity directive (96/92/EG) and EU Gas directive (98/92/EG) were implemented in the Netherlands' Electricity Act of 1998 and Gas Act of 2000. These sectors were hitherto dominated by four large electricity production corporations coordinating generation together with the state in a national association, a state-market monopolist partnership for the exploitation of natural gas, and 23 publicly-owned energy distribution companies (Van Damme 2004). The Electricity Act demanded that the operation of energy networks – a crucial service in the distribution of electricity and gas – was legally unbundled from the energy production and distribution companies and regulated. The entry of new competitors on the energy production, distribution and supply markets was allowed, and market access to industrial and household consumers to be opened up in steps. This was to create a competitive marketplace in energy. To these ends, and a number of others as well (discussed in Chapter 5), in 1998 a third IRA was set up: the sectoral regulator *Dienst uitvoering en toezicht Elektriciteitswet* ('Electricity Act Implementation and Supervision Service') (DTe). Like the competition authority NMa, the DTe was at first not a formally independent ZBO; but like the NMa, its *de facto* independence from politics, while not prescribed by EU directives, was respected, although not entirely (De Jong 2006). In 1999, the DTe was merged with the competition authority to become a sectoral regulatory 'chamber'. From 2008 onwards, it was called the *NMa Energiekamer* ('Energy Chamber').[23]

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21 In 2013, the OPTA was merged with the competition authority NMa and the consumer rights authority *Consumentenautoriteit* (CA) to form the Consumer and Market Authority (ACM). Its tasks in the electronic communications and postal services domains, themselves unchanged, are now exercised by the ACM directorate Telecom, Transport and Postal Services.

22 In 2013, the NMa was merged with the telecommunications authority OPTA and the consumer rights authority *Consumentenautoriteit* (CA) to form the Consumer and Market Authority (ACM). Its tasks in ex post supervision to market compliance to competition law remain the same.

23 Since April 2013 the Energy Chamber of the NMa is known as the ACM directorate Energy. Its tasks in the electricity and gas sectors have remained unchanged.

In the public transport sector, lastly, prompted by EU directive 91/440, the Dutch national railways NS were autonomized in 1995. The state nevertheless retained full ownership. Infrastructure management was henceforth the provision of a separate network operator, while regional railway companies were allowed to compete. The state, nevertheless, remained highly involved in the railways, in part through subsidizing (Baarsma, Pompe and Theeuwes 2006). Regional public transport services through bus and tram are since 2000 provided via a concession system (Wilkeshuis 2010). A department of the competition authority NMa, the *Vervoerkamer* ('Transport Chamber'), was since that year to supervise contractual relations between the railway network operator and service providers, and check concessions for competition law aspects.[24]

The 2000s and 2010s: the proliferation of IRAs

At the turn of the twenty-first century, after a decade or more of privatization, liberalization and marketization policies, criticism of these policies in the Netherlands became increasingly vocal. In the previous decades, opposition to these policies, which were implemented by varying coalitions of centre-right and centre-left parties, had been limited to smaller left-wing parties and trade unions. Now, various national advisory bodies, among which the constitutional advisory body the Council of State, became critical as well (Raad van State 2000). Around 2000, the autonomization of the national railways was widely considered a failure, the liberalization of the taxi market likewise, while the privatization of the energy sector was anxiously awaited. On the short term, this lead the then-ruling Social Democrat party to become somewhat more critical of privatization and marketization policies (Stellinga 2012: 53). Yet societal criticism did not prevent various Dutch governments and legislatures since then from transplanting the IRA model to various other, non-utilities domains.

A privacy authority, first, was established in the Netherlands in 2001. This was prompted by EU directives: directive 95/46/EC was implemented in the Netherlands' Personal Data Protection Act. The result was the setup of a fully independent ZBO: the *College Bescherming Persoonsgegevens* ('Personal Data Protection College') (CPB). The CPB was to supervise compliance to privacy and data protection legislation in the Netherlands.

The financial sector in 2002 was the first Dutch non-utility domain on which a new IRA was set up.[25] This was not directly prompted by EU directives, but the result of a modification of nine domestic sectoral laws.[26] The globalization of the financial markets since the 1980s, and the growth and conglomerization of the Dutch financial

24 Since April 2013 the Transport Chamber of the NMa is subsumed into the ACM directorate Telecom, Transport and Postal Services.

25 This same year, unprompted by EU directives, a *Voedsel en Warenautoriteit* ('Food and Consumer Product Authority') (VWa) was set up as well. The VWa was to independently supervise market and societal compliance to a host of food, consumer product and smoking laws. Yet although it was to become a fully independent ZBO, it was ultimately kept under full ministerial responsibility.

26 In 2006, the changes to these nine sectoral laws were enshrined in the Financial Supervision Act, which replaces them.

sector since the 1990s, lead the centrist 'Purple' government at the end of its tenure to establish a 'Twin Peaks' model of financial sector supervision (Prast and Van Lelyveld 2004). Conglomerization is the process whereby banking, insurance and other financial services are increasingly offered by single financial institutions. Until then, three sectoral authorities had supervised compliance to regulations in the banking, insurance and pension funds sectors. This was changed into a model in which prudential supervision – on the liquidity and solvability of financial institutions – on the entire financial sector was henceforth the task of the central bank *De Nederlandsche Bank* ('The Bank of the Netherlands') (DNB). Conduct-of-business supervision – on financial market processes, relations between market participants, and the careful treatment of customers – on the entire financial sector, meanwhile, was the task of the new IRA the *Autoriteit Financiële Markten* ('Financial Markets Authority') (AFM). The AFM is a formally independent ZBO; as successor to a former securities market supervisor, it is a foundation in private law bestowed with public tasks.

In the telecommunications and energy sectors, in 2004 new EU directives prompted the legislature and a new centre-right Christian Democrat and liberal government to revise existing legislation (Lavrijssen 2006; Duijkersloot 2007: 16). The telecommunications authority OPTA and the energy authority DTe – now a directorate of the competition authority NMa – in 2004 were given expanded tasks (this will be more fully discussed in Chapter 5). The NMa was made a *de jure* independent authority a year later.

The ongoing delegation of public tasks to independent agencies, nevertheless, remained subject of criticism in the Netherlands. In 2004, a bureaucratic working group report appeared that was highly critical of past policies of autonomization. They were stated to have led to 'opacity about administrative institutions, opacity about what the administration stands for, opacity about responsibilities and opacity about the role of parliament' (Commissie Kohnstamm 2004: 6, 25). Whole public organisations, instead of specific tasks that required independence, had been hived off beyond the reach of the political sphere. The principle of ministerial responsibility central to parliamentary democracy was, so the report read, still hollowed out, while the NPM promises of greater efficiency and proximity to citizens of independent agencies had not been achieved. The report advocated a near-complete undoing of past autonomization policies, and a return to the unity of the hierarchical bureaucracy controlled by the electoral political sphere. Independent authorities were only to be retained for specific tasks for which the possibility of political interference was to be ruled out (and only to be independent in respect to these tasks). One example the report gave of an appropriate motivation for independence, however, was supervision to compliance in economic domains in which the state still owned shares, such as the telecommunications and energy sectors (ibid: 7). The place of IRAs was therefore confirmed.

Although the recommendations of the report were not heeded, in 2006 a legislative framework for independent agencies was, for the first time in the Netherlands, enacted. Efforts to pass this had stalled for years in part because of disagreements between proponents of 'uniformity' and 'diversity' for ZBOs (Van Thiel 2001; Zijlstra 2004). The

Framework Act for Autonomous Administrative Organs now formally limited the establishment of independent authorities in the Netherlands to three motivations. These were, as before, the need for non-political independent expert judgment, the efficiency of a strict application of rules to a large number of individual cases, and the desirability of societal interest group involvement. A public register for ZBOs was developed. In the years after that, some establishment laws for existing IRAs were modified to conform to the act, but no substantial changes were made, and all IRAs retained their independent ZBO status.

The IRA model in fact spread further. The healthcare sector in 2006 was the next Dutch non-utilities domain in which an IRA was set up. This was not prompted by EU directives, but an entirely domestic affair. Argued for because of the rising costs of healthcare uncontained in the previous decades by state and corporatist budget and tariff controls, in 2006 the centre-right government embarked on a process of liberalization and marketization. This was to transform the publicly-funded civil society-run healthcare sector into a regulated marketplace. A basic insurance for everyone was mandated, while insurers were henceforth allowed to compete for supplemental packages; healthcare provision subsectors were to be marketized in steps, and the remaining ones regulated; and providers were to compete for contracts with insurers. To this end, and a number of others as well (discussed in Chapter 5), an IRA was set up: the sectoral regulator *Nederlandse Zorgautoriteit* ('Netherlands Healthcare Authority') (NZa). The NZa was a formally independent ZBO, and successor to two older supervisory and regulatory bodies (one tripartite, consisting of healthcare insurers, providers and the state).

On the area of consumer protection, in 2007 a separate IRA was set up. This was prompted by EU directives. Regulation 2006/2004/EC was implemented in the Netherlands' Consumer Protection Enforcement Act of 2006, to establish an IRA for the administrative sanctioning of market actor infringements into collective consumer rights. This IRA would coordinate its activities with similar IRAs in other EU countries. The *Consumentenautoriteit* ('Consumer Authority') (CA) was established as a formally independent authority, a ZBO. It was to investigate and sanction such possible misdemeanours as deceptive commercials and unfair contract conditions, which hitherto had been a private law affair.

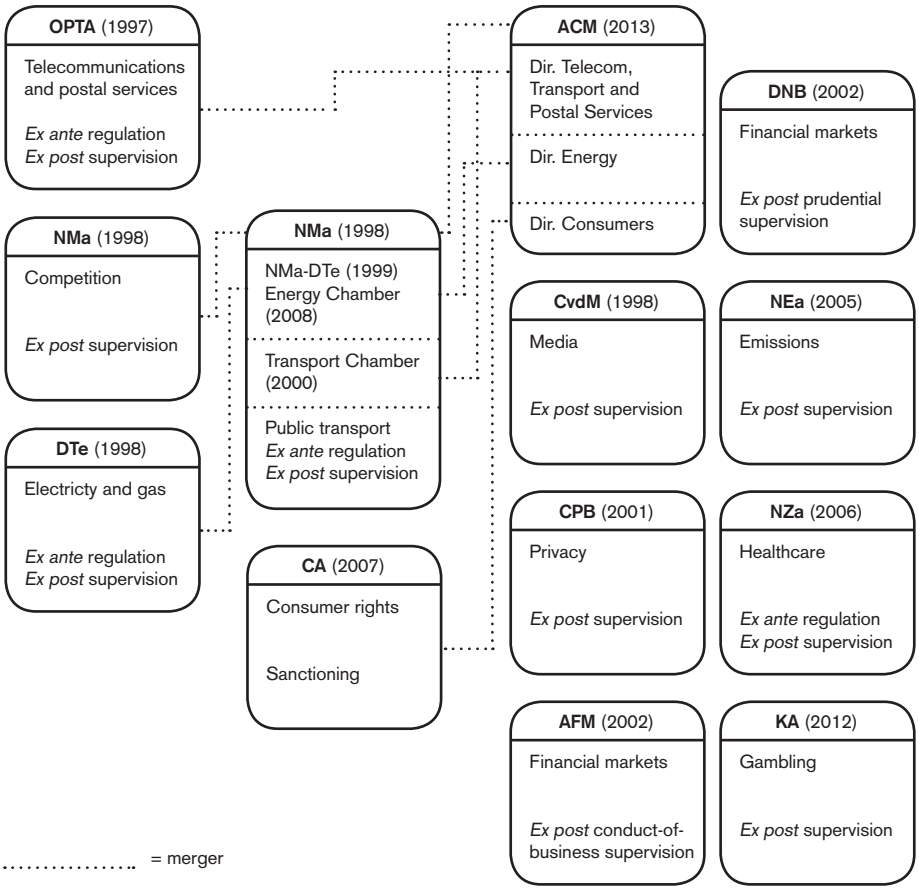
The CA did not exist separately for long, however. In 2013, it was merged by a new centrist conservative-liberal and Social Democratic government with the telecommunications authority OPTA and the competition authority NMa (including its Energy and Transport Chambers). A new and comprehensive IRA, the *Autoriteit Consument en Markt* ('Consumer and Market Authority') (ACM), nowadays forms one of the most important regulatory-supervisory bodies in the Netherlands. A formally independent authority (a ZBO), the ACM is currently responsible for:

- *ex post* supervision to compliance to competition law (the task of the former NMa)
- *ex ante* regulation of the electronic communications and postal services sectors (the task of the former OPTA)
- *ex ante* regulation of the energy sector (the task of the former NMa Energy Chamber)
- *ex ante* regulation of the public transport sector (the task of the former NMa Transport Chamber)

- sanctioning infringements of collective consumer rights (the task of the former CA)
- *ex post* supervision to compliance to various sectoral laws

The regulatory state in the Netherland today is therefore composed of ACM, along with the central bank DNB (responsible for prudential financial sector supervision), the independent financial markets authority AFM, the independent healthcare regulator NZa, the independent Media Commission (CvdM), the independent privacy authority CPB, and a host of minor IRAs – among which the *Kansspelautoriteit* ('Gambling Authority') (KA) and the *Nederlandse Emissieautoriteit* ('Netherlands Emission Authority') (NEa), responsible for independent supervision to, respectively, gambling and emissions trade. Figure 1 below provides an organizational chart of the independent regulatory authorities in the Netherlands. Appendix A of this thesis provides a timeline for an overview of relevant legislative acts.

Figure 1. Independent regulatory authorities in the Netherlands (1988-2014)



Political control and accountability mechanisms are in place for all these authorities, yet are removed from one, crucial domain: individual regulatory and supervisory decision-making autonomy. Here, the IRAs can be checked only by the judiciary. All IRAs, moreover, have advisory capacities, while most of them participate in international regulatory networks, both European and otherwise. The decisions of these bodies have wide-ranging regulatory effects, and affect Dutch economic and societal domains of crucial importance, such as telecommunications, energy, public transport, financial markets, healthcare and the economy and society at large. The question who, or what, they represent is therefore a salient one.

2.7 Conclusion: an a-political sphere devoid of representation?

Regulation has in this chapter been defined as sustained and focused control by a public agency over activities that are valued by a community. While rationales for regulation often have a basis in economic theory and its analysis of market failure, non-economic rationales are sometimes proposed and adopted as well. These can be based on public interests, human rights and social solidarity. Independent regulatory authorities (IRAs) are the most notable institutional manifestation of the late-twentieth century rise of a regulatory state. As the result of a large-scale historical reconfiguration of state, society and market responsibilities in the provision of goods and services, due to privatization and marketization policies prompted by the EU and national states, IRAs have emerged as central institutions making independent decisions about this provision. In a sense, the recent marketization of state-dominated domains, and the simultaneous establishment of independent agencies could be seen as the reverse process of what Habermas called the 'stateification of society' and the 'societalization' of the state around 1900 (Habermas 1962 [1991]: 142). Now, the state withdraws from society's marketplace, while societal interests ostensibly withdraw from state agencies. For this reason, being independent in their decisions from the political sphere as well as affected sectoral interests, IRAs are often seen as a-political and unrepresentative. As the following chapter will demonstrate, however, representation is not confined to the electoral domain. It is, instead, a feature of politics and society at large. And in the regulatory state, representations of constituencies and interests still abound as well.

Chapter 3

Representation from elections to representative claim-making

What is representation? In its most common political usage today, is it thought to refer to politicians, representing voters via elections. Yet in politics, the word has a longer and more complex history. It emerged in thirteenth century England to refer to the practice of summoning feudal lords to bind them to the king's will (Disch 2008). In the eighteenth century, however, it became conversely connected to the idea of interests to be spoken for, exemplified in the American revolutionary phrase 'no taxation without representation' (Pitkin 1967). Representation through elections, nonetheless, was at the time considered an aristocratic practice compared to the more democratic practice of lottery for public office. It was meant to delegate the most 'suited' to parliament (Manin 1997). Only with the democratization of parliamentary government in the course of the nineteenth century, the word became intricately tied to the electoral machinery. 'Democratic representation', therefore, nowadays is still widely thought to refer to elections and parliaments (Kröger and Friedrich 2013). Yet outside of the electoral realm, the word representation has always retained a broader meaning.

Trade union and employer's delegates, for instance, are also said to represent their constituencies, while they may or may not be elected. Interest groups may be thought of as representing the interests of animals or nature, but neither of those have the capacity to consult their spokespeople. Young and urban protesters on Cairo's Tahrir Square in 2011 were said by Western media to represent the people against the Muburak regime, but their connection to the Egyptian populace was unsure. Hip hop artist LL Cool J in the classic track *Doin' It* claims to 'represent Queens', as do many rappers with respect to their 'hoods, but this is not meant in a political sense. In religion, symbols represent divinity. In art, a distinction is usually made between representational and non-representational forms.

These broader meanings of the word representation, both ancient and modern, are still relevant to political life today. They are relevant, it is argued in this thesis, to IRAs. Representation – in Latin: *representaere* – was historically tied to theatrical performances, and to the embodiment of ideas in artistic objects (Saward 2010). Out of this original sense, the concept retained a core meaning: that of something making something else 'present again', or giving the impression of doing so. The formulation of this basic meaning is owed to the American political theorist Hanna Pitkin, whose work (1967) will in this chapter first be discussed. In it, she made conceptual distinctions that are still relevant today. Pitkin's search for the normatively most desirable form of political representation, however, obscured other, important understandings of the word, including in politics. As the ideal typical 'standard model' of electoral-representative democracy today has partly given way to more fragmented constellations of governance, in part through the rise of the regulatory state, twenty-first century political theorists have attempted to again broaden understandings of what political representation it, and what it can do. The most promising of these new understandings is the representative claim-making perspective of the British political theorist Michael Saward (2010). His approach to representation as a systemic complex of practices that includes, but also goes beyond the realm of elections and parliaments (and even democracy), is more attuned to

the fragmented nature of political authority and expression today. In the remainder of this thesis, Saward's framework is put to practice with respect to IRAs. This chapter is devoted to his theoretical understanding of representation as a practice of claiming to speak or act for others, and invoking and constructing notions of constituencies.

3.1 Pitkin's concept of representation

For a long time, the most elaborate conceptual treatise on representation was Hanna Pitkin's *The Concept of Representation* (1967). After four decades, it still functions as a handbook for contemporary scholars, and many of the typologies and categories Pitkin offered still form the conceptual framework in which political representation is usually discussed (Saward 2010: 10). It so formed the nucleus for present-day understandings of representation, including the one employed in this thesis. Yet on the other hand, *The Concept* served to narrow understandings of political representation in ways that are important for this thesis as well.

In *The Concept*, Pitkin employed tools and methods of 'ordinary language philosophy' in a systematic study of all the usages and contexts of the word representation at the time, including non-political ones. This was meant to clarify the different connotations of the word, which according to Pitkin were all partially right, while none of them captured its totality. The concept of representation and its usages could, in the words of Pitkin, at the time be likened to a 'convoluted, three-dimensional structure' in a dark enclosure, photographed from different angles. These photographs created partial images, which were nevertheless mistaken for the whole. They showed something of the truth, but only from a certain angle (Pitkin 1967: 10, 38).

Immediately at the outset, Pitkin nevertheless identifies one basic meaning of representation, applicable in every context: *re-presentation*, or the 'making present in some sense of something which is nevertheless not present literally or in fact'. Re-presentation somehow makes present that what is not literally present: 'something not literally present is considered as present in a nonliteral sense' (ibid. 8-9). It is therefore re-presented, or presented again, but possibly in a different form.[27] From this definition onwards, Pitkin studies the various applications of the concept. She does this mostly for the political domain, but in cultural and artistic senses as well. Importantly, however, Pitkin's normative intentions are never obscured. Her goal was to go beyond description, to show when it is 'correct' to say that people 'are' politically represented, when they 'should' feel presented in the sense of: being made present again (ibid. 9).

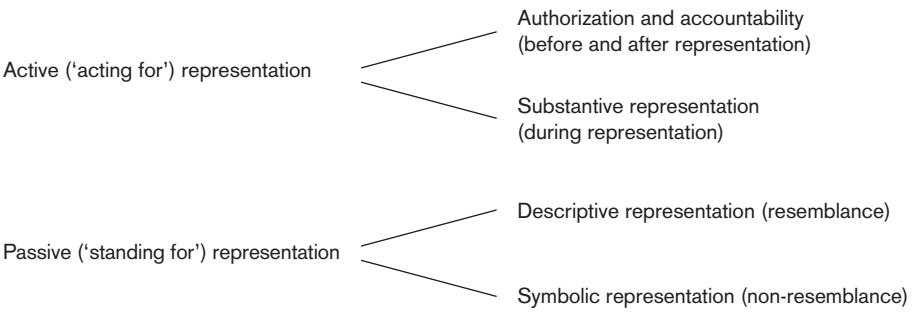
Pitkin's taxonomy of dominant views on representation can be presented this

27 In Dutch, this etymological meaning can be found as well. The word 'representation' is here commonly translated as either 'representatie' or 'vertegenwoordiging'. These terms can be split up in two halfs: 're-presentatie' and 'ver-tegenwoordiging', literally meaning that something that was present, is presented *again* (but possibly in another form or context).The most accurate translation of the word representation, however, would perhaps be the non-existing 'her-presentatie'.

way (see Figure 2). Representation, according to Pitkin, is usually either taken to mean activity, an action or 'acting for' performed by humans. Or it is taken to mean a feature or property, a more passive 'standing for' by either people or other entities (ibid. 11). Re-presentation can be performed, or it can just be. Within the first category, Pitkin distinguished between formalistic views on representation, concerned with mechanistic arrangements of authorization and accountability before and after representation, and 'substantive representation'. The latter was Pitkin's own contribution to representation theory: she took it to be the 'essence' of political representation, and that which goes on 'during' political representation (ibid. 112-115, 163).

Within the second category of passive, 'standing for' representation, meanwhile, Pitkin distinguished between descriptive views on representation, in which the making present again is done through likeness or resemblance (as in a painting), and symbolic views, in which this resemblance is absent, but one thing still represents another (as in symbols). In politics, a descriptive representative is someone who resembles the represented, is like them, while symbolic representation is achieved through non-resemblance.

Figure 2. Pitkin's (1967) taxonomy of views on representation



Yet each view on representation, while demonstrating how the word was commonly employed, according to Pitkin did not tell the *whole* story about representation (as one view does not explain the use of the word in another view), and was also silent about her normative intent: to show how a political representative 'ought' to behave, what his or her 'obligations' are, and how we can 'judge' his or her behaviour (ibid. 112, 115).

To take the authorization and accountability view on representation (see Figure 2): while the delegation of authority to an agent, and his rendering of account to a principal afterwards, as institutionalized most famously in elections, have something to do with political representation, according to Pitkin they are not to be *equated* with it. This view says nothing about the way in which symbols or statistical samples can represent – a fairly normal use of the term, including in politics – or the way in which people can represent abstractions, such as interests, ideas or causes. In Pitkin's view, in addition, the authorization and accountability view is silent about the actual behaviour

of representatives. It concentrates on the formalities before and after their activity, while what happens in between – according to Pitkin: the activity of substantive representation – remains unnamed. Acts of authorization and accountability therefore are not to be equated with representation.

Descriptive views, part of the passive or 'standing for' kind of representation (see Figure 2), on the other hand seem better equipped to tackle cases in which representation is considered a feature or property of something through resemblance. A parliament can be said to require descriptive resemblance to the people or the nation, for instance by having minority or women representatives. To re-present this way is to make something that is literally absent, present through correspondence. While this form of representation may seem passive, in art it actually also entails an activity: a painter must actively make representations of something in order to achieve resemblance. The same goes for political speakers: they must aim to make accurate representations of their constituency (ibid. 84, 90). Yet again, descriptive representation according to Pitkin did not tell the whole story about representation, nor did it live up to her normative demands: resemblance does not necessitate good actions (ibid. 112).

Pitkin's own idea of substantive political representation, then, she presented as the *only* view that says something about the political activity of representing, and the only normatively satisfactory view (ibid. 113-115). She conceived of substantive political representation as an acting for others, an activity on behalf of, or in the interest of someone else; but done in such a manner as to be 'responsive' to that someone else. It was therefore bilateral, a two-way street. The representative (for instance: a politician) must act according to the wishes of the represented (for instance: the voters), except when he thinks this is not in their best interest. Then he must act otherwise, and later explain and justify to them. The represented (the voters) should therefore also be capable of independent action and judgment, in order to express their opinion.[28]

In Pitkin's view, this was the only view that set actual limits to the behaviour of political representatives, while allowing for a normative judgment of their actions (ibid. 115). To induce responsiveness, then, certain institutional mechanisms could be thought of. In the final chapter of *The Concept*, Pitkin introduces the well-known features of traditional political democracy, such as elections. While not presenting the whole of representation, these features would nonetheless best induce substantive political representation. Ultimately, Pitkin's search for 'true' political representation (ibid. 163), or the normatively most desirable form of it, led her to the established institutions of political democracy: elections and parliaments. These would best induce systemic responsiveness. Forty years later, she wrote: 'At the time I took that relationship for

28 For Pitkin, substantive representation was a way of overcoming the 'mandate-independence' controversy in representation theory. In this controversy, too constraining a mandate makes a representative no longer a representative, but rather a shackled mouthpiece (instead of a true re-presenter). Too much independence, on the other hand, does not guarantee responsive representation. Substantive representation steps right in the middle: the representative, while exercising independent judgment, should always act as *if* he were to be held accountable (Pitkin 1967: 118). Conflicts with the wishes of the represented should be possible, but as a rule they should not happen (ibid. 155).

granted as unproblematic. Like most people even today, I more or less equated democracy with representation.' (Pitkin 2004)

3.2 The standard model of representative democracy and its fragmentation

Pitkin's *The Concept* (1967) remained the 'standard account' of the concept of representation in political theory for the next three decades (Rehfeld 2006: 3). According to two scholars, its typologies stood for a long time as 'the last word in representation' (Urbinati and Warren 2008: 393). It has been said that 'one cannot overestimate the extent to which Pitkin has shaped contemporary understandings of political representation' (Dovi 2011).

The study of representation as a phenomenon therefore for a long time remained restricted to the main institutions of post-1945 electoral democracy in Western nation states: elections, political parties, parliaments, and governments. In an ideal typical 'standard model' of representative democracy, the nation state as bounded territoriality formed the container within which political representation was almost exclusively considered to happen. In it, on the basis of political equality, every individual citizen would have the right to vote in periodical elections, and launch other individuals as their representatives into the fixed political space of a parliament. This elected parliament formed the epicentre of political decision-making. Whether elections induced responsiveness was the primary focus of representation studies (Eulau and Karps 1977).

The concept of representation in many important accounts of post-war democracy so remained equated with elections, and as such, was not positively received by all. Schumpeterian theorists coolly viewed electoral-representative democracy as a mechanism for elite selection. The represented, in this view, were voters, mostly passive selection agents (Schumpeter [1942] 1981; Sartori 1965). Participation theorists from the 1960s onwards adopted this view, yet turned it into criticism. They, too, equated representation with elections, and saw it as incurring voter apathy. Direct citizen participation they considered a more preferable democratic ideal (Arendt 1958; Pateman 1976; Barber 1984). Pluralist and neo-corporatist theorists put the organisation of citizens in interest groups outside of parliament on the scholarly agenda, but did so mainly in terms of their position to government, and still reserved the concept of representation to the electoral realm (Truman 1951; Dahl 1956; Schmitter 1974). Deliberative theorists from the 1980s onwards viewed electoral-representative democracy as a mechanism for fixed interest aggregation, and negatively contrasted this to the, again, more preferable democratic ideal of communicative deliberation (Habermas 1981; Dryzek 2000). All equated representation with elections.

In the 1990s, however, the concept of representation was re-discovered as an object of study in political theory, and normatively re-appraised as well. This was prompted by reasons both internal to political theory and external to it. *Within* political theory, first, scholars started to focus on the exclusion of groups based on gender, race and ethnicity

within the electoral model of political representation. Individual representation was argued to obscure group identities, and proposals for more expansive notions of representation based on a recognition of group diversity were argued for (Philips 1995; Kymlicka 1995; Williams 1998; Young 2000). Manin's historical account of the principles of representative government also put the concept of representation back into the scholarly spotlight (Manin 1997). Plotke, finally, in an important article aimed to resolve the firmly-ingrained theoretical opposition between representation and participation. 'The opposite of representation is not participation', he argued. 'The opposite of representation is exclusion. And the opposite of participation is abstention.' (Plotke 1997: 24) Not only was representation unavoidable in complex societies, he argued, it also lends agency and autonomy to those represented. It should therefore be seen as crucial to democratic practices, rather than as the lesser alternative to participation (ibid. 31-32).

External to political theory, moreover, various empirical developments in the post-1945 standard model of representative democracy prompted a re-think of the concept of representation, and its attachment to elections, as well. These developments amounted to an increasing proliferation of acts of political expression and political authority beyond the national parliamentary domain. The first of these is, in the last decades, the increasing transnationalization and international interdependence of political decision-making arenas. The globalization of markets and corporations has resulted in a corresponding proliferation of supranational and international decision-making bodies. Examples of these are the World Trade Organisation (WTO), the International Monetary Fund (IMF), the World Bank, and various organisations for specific domains, including stakeholder forums and more fluid structures. Organisations built of territorial nation states, such as the United Nations (UN), European Union (EU), or the Association of Southeast Asian Nations (ASEAN) similarly occupy an increasingly marked role on the political stage. Issues like trade, climate change, migration flows, energy, crime and food security nowadays transcend territorial boundaries. Correspondingly, the nation state and its elected parliament no longer form the primary loci in which many political issues are decided. Other bodies of political authority increasingly make claims to representation, or facilitate them (Saward 2005; Urbinati and Warren 2008).

A second empirical development that prompted a re-think of the concept of representation, and its attachment to elections, is the increasing pluralization of constituencies. Historically, political constituencies have been organized along national geographical lines. Within these, they were organized in class-based, religious or ethnic political parties (Lijphart 1968). Additionally, functional interests such as workers and employers were incorporated in the state through neo-corporatist structures (Schmitter 1970; Couperus 2012; Van Veen 2013). Yet in the last decades, constituencies have proliferated in diversity, become more fluid, and have organized across national boundaries. Interest groups, non-governmental organisations (NGOs), social movements, activist networks, stakeholder associations and various other organisations nowadays provide focal points for political expression. Individuals such as U2 singer Bono and the NSA whistle-blower Michael Snowden seem to be able to rally causes without any political organisation.

These organisations and individuals all claim to represent myriads of interests, issues and constituencies, ranging from environmental issues, labour rights, privacy rights and professional interests to social and animal rights, and so on. Through the Internet, constituencies nowadays can be temporary, spontaneously formed and overlapping. Neither territorial residency nor traditional cleavages, nor even personhood, today constitute an exclusive basis for political expression, and claims to constituency representation can be multiple, overlapping and diverse (Urbinati and Warren 2008).

A third empirical development that has prompted a re-think of representation, and its attachment to elections, is the increasing fragmentation of political and bureaucratic power at the nation state level. This has been described in Chapter 2 with respect to the rise of the regulatory state in Western Europe. Due to post-1980 processes of privatization and marketization of economic domains and the hiving-off of government agencies, quasi-independent or non-governmental bodies such as IRAs increasingly play a role in public policy formation and implementation in many nation states – and beyond. The corresponding rise of governance networks, in which public, private and societal actors cooperate in policy-making, and of forms of hybrid or self-regulation, mark a shift from formal, centralized policy formation processes to more informal, decentred modes of decision-making (Rhodes 1997; Black 2002). These again intersect with the two previous developments: the internationalization of political arenas and the pluralization of constituencies (Papadopoulos 2010). Nowadays, independent bodies, interest and stakeholder groups, businesses, consumer groups and think tanks play a part in public policy formation and implementation via a host of consultative, participative and deliberative processes. While this is often referred to as 'interactive' policy-making, 'participatory' democracy or public accountability, these groups and entities all also claim to speak or act for something or somebody. It is, however, frequently unclear which constituencies or interests they represent, or claim to do (Hendriks 2009).

A fourth and final empirical development that prompted a re-think of representation, and its attachment to elections, is the declining levels of trust in the post-war institutions of electoral-representative democracy: politicians, political parties, and parliaments. Mass-based political parties have lost their central role as stable connections between politics and society; voter volatility is on the rise; and generally, citizen trust in established political institutions seems to be decreasing (Dalton 2004). This increasing mistrust has given cause for political and scholarly concern, leading to a discussion about a 'crisis of representation' in electoral democracies in industrialized nations (Pharr and Putnam 2000; Crouch 2004).

This fourfold fragmentation of the standard model of representative democracy, with its pillars of the territorial nation state, elected parliaments as centres of political authority, and political parties as means of political expression, has made salient the question, first, how this model as a mechanism for decision-making is holding up under conditions of transnationalization, diffusion and displacement, and decreasing trust (Bovens et al. 1995; Noordegraaf 2003). But secondly, these developments have made poignant the issue how the fragmented nature of political expression and authority today

can still be understood in terms of representation. Who represents whom, how is this done, and which activities can be considered representational? (Bellamy and Castiglione 2011) According to Urbinati and Warren, however, 'until recently, democratic theorists were not well positioned to these developments, having divided their labours between those working within the standard account of representation and those concerned with participation and inclusion' (Urbinati and Warren 2008: 391).

In this standard account, and its dominant conceptualization by Pitkin (1967), representation was largely equated with elections, and studied from normative angles. Geographically and periodically elected politicians in parliament were the ones primarily understood as political representatives, having to conform to norms of voter responsiveness in order to be 'good' representatives (Eulau and Karps 1977). The various entities and organisations proliferating beyond the parliamentary locus, meanwhile, while studied from a great variety of angles and concepts, have for long had no place in accounts of *representation*. Such bodies and the political processes they are engaged in are very often studied from such theoretical angles as 'interactive policy-making', 'governance', 'participation', 'deliberation' and 'accountability', without an adequate grasp that they all, also, *claim to speak or act for others*, and *invoke constituencies* (or allow for doing so) (Urbinati and Warren 2008: 405). Following Pitkin, the concept of representation in mainstream scholarship has been taken to refer primarily to the parliamentary and electoral realm, even though claims to representation, and the facilitation thereof, have proliferated, multiplied and diversified beyond this arena – including, it was shown in Chapter 1, on, by and around IRAs.

A new wave of representation theory in the twenty-first century, therefore, has aimed to disentangle the concept of representation from its traditional statal, mechanistic, electoral and parliamentary connotations, and re-conceptualize it in such a way as to retain its core meaning of a 'making present in some sense of something which is nevertheless not present literally or in fact' (Pitkin 1967: 8-9) in politics, while allowing for its application in contemporary post-parliamentary settings as well.

3.3 Representation beyond parliaments and elections

Twenty-first century political theory has aimed to enrich understandings of both electoral, parliamentary representation, and non-electoral representation in political domains beyond parliament. As such, theorists have aimed to come to an understanding how representation works in the fragmented domains of political authority and political expression today. Mansbridge (2003), for instance, has in addition to 'promissory' electoral representation, in which representation is thought to work through promises made by candidates during the electoral process, proposed understandings of representation as working in an 'anticipatory', 'gyroscopic' and 'surrogate' manner. In the latter, elected representatives are through informal connections thought to be able to speak or act on behalf of *non-geographical* constituencies in parliament as well. An example cited by

Mansbridge is the US Representative Barney Frank representing lesbian, gay, bisexual and transgender (LGBT) communities (ibid: 523).

Yet others have attempted to extend the concept of representation to non-parliamentary settings, or to the representation of non-human interests and other categories. O'Neill (2001), for example, has explored possibilities for the representation of non-human and future constituencies in extra-parliamentary deliberative settings. Keck (2004) has proposed the notion of 'discursive representation' in regard to stakeholder councils for transnational issues, such as environmental policy. In these councils, participants according to Keck represent *ideas* and *positions* rather than, directly, groups and people, thus resembling a 'thin' kind of neo-corporatism on the transnational scene (ibid: 51-52). Dryzek and Niemeyer (2008) have likewise aimed to re-conceptualize deliberative democracy as a 'representation of discourses', which according to them would be appropriate when clear *demoi* are difficult to identify, as is often the case in transnational and network governance. MacDonald (2008), too, has developed a theoretical model for the representation of stakeholders within transnational NGOs on the basis of intra-organisational means of authorization and accountability.

More thorough re-conceptualizations of representation, meant to encompass the 'numerous kinds of representative relationships that inhabit contemporary democracy' (Urbinati and Warren 2008: 396), have been attempted as well. Urbinati and Warren envisage democratic representation as about the 'empowered inclusion' of 'Y' in the representations of the responsive 'X' with respect to good 'Z'. Under this broad formula, a wide variety of political actors (elected politicians, NGOs, lay citizens, panels, committees), of represented goods (preferences, interests, identities, values), and of accountability and authorization mechanisms (elections, deliberation, voice, exit, trust) could theoretically fit in a representative relationship. If would-be representatives are responsive through these mechanisms, they are in this account democratic. Thus the 'rich domain of representative relationships' (ibid. 395-396) in contemporary polities could be analysed.

Rehfeld (2006), lastly, has put central the notion of an 'audience' in judgments of what constitutes political representation. In his view, political representation occurs when outside observers employ certain rules to *decide for themselves* whom they consider (their) political representatives. These rules according to Rehfeld can be democratic in nature, but need not be. The word representation has a 'robust non-normative descriptive sense', which can be employed in democratic and non-democratic contexts alike (ibid. 2). Traditional accounts of representation, according to Rehfeld, unduly wedded the analysis of what constitutes political representation with the conditions that were to render it normatively legitimate. His formulation of a set of analytical rules to determine when representation is considered 'there', or not there, he argues allows for pinpointing its occurrence in democratic and non-democratic arenas alike.

The most thorough new account of representation, however, that is conceptually able to incorporate acts of political expression and authority both within and outside the parliamentary domain, and invocations of constituencies in electoral and non-electoral contexts, is offered by Saward (2010). His re-conceptualization of representation, and

proposals for a conceptual toolkit to empirically analyse claims to representation and their reception in politics and society at large, draws on the categories developed by Pitkin (1967) as well as on the twenty-first century innovations discussed above. Saward's approach to representation – reframed as a matter of representative claim-making and reception – seems to allow for a study of the phenomenon in a great variety of manifestations. This includes, it is argued in this thesis, the domain of IRAs.

3.4 **Saward's *The Representative Claim***

In a series of articles (Saward 2005; idem 2006; idem 2009) and his work *The Representative Claim* (2010), Saward has developed an ontological critique of the theories of representation prevailing until recently, and presents an alternative in the form of an approach revolving around 'representative claims'. This approach allows for viewing representation as a systemic phenomenon: something that occurs in a wide variety of domains, yet at the same time is not as clear or stable as often thought.

Orthodox accounts of the concept of representation, according to Saward, haven often sought to establish the presence of representation as a 'fact' in the world (ibid. 4, 9, 39). The existence of representation, in these accounts, was to be established by reference to conceptual *a priori* definitions of the concept. An agreed and accurate shared meaning of what representation 'is', or what it is not, would enable one to pinpoint when someone 'is' representative or represented, and when not (ibid. 9, 17-18, 39-40). As in the account of Pitkin (1967), political theorists so would set themselves up as 'adjudicators of occurrence': not only would they determine in advance what counts as political representation (for instance: being elected), but also what would constitute normatively legitimate representation. These were subsequently equated (Saward 2010: 9, 15, 42). This worked well in an age in which political expression and authority were still primarily centred in elections and parliaments, and had obvious normative benefits as well. Yet according to Saward, while understandable, it also led to 'dry' taxonomy constructions, an overemphasis on forms, roles and typologies, and most importantly: too little attention to the versatility and dynamism of political representation in real life (ibid. 9, 15, 70-72). This becomes particularly pressing when acts of political expression and political authority are increasingly performed beyond elected parliaments.

Representation, Saward therefore holds, rather than 'making present in some sense of something which is nevertheless not present literally or in fact', more precisely consists of someone giving the *impression* of the presence of something else.[29] Representation should be seen as the product of human performance and rhetoric, rather than a factual product of institutional mechanisms such as elections (ibid. 16, 39-42, 66-70).

29 It can be argued that Saward's more precise re-definition of representation was contained within Pitkin's original formulation of the 'making present *in some sense* of something which is not present literally or in fact'. Saward's added emphasis on impressions, however, is crucial to his re-conceptualization of representation as a matter of rhetoric and performance, rather than a social 'fact' derived from institutional mechanisms like elections.

Rather than a presence, representation is something that is invoked or enacted. It has a more fleeting character than hitherto assumed. This representational invocation or enactment should be seen as an *event*. This event revolves around a *claim:* the claim to represent. The production of claims to representation, and their subsequent reception by audiences, according to Saward is what constitutes 'representation' as an ongoing process, a series of events (ibid. 42-45, 67).

The question for researchers, then, becomes how representative claims are constructed, by whom, and for what purpose; how representative claims are received, or contested, by audiences; and what determines the eventual success, or not, of a representative claim (ibid. 1, 18, 147). This approach in this thesis is argued to be applicable to the domain of IRAs (see Chapters 5-8). With this conceptual move towards human performance, Saward opens up the entire political domain, including and beyond elected parliaments, for research into representative claim-making. The focus on claim-making and receiving also avoids, for purposes of analysis, an equation of the concept with its normatively or democratically most desirable forms – a desire that understandably preoccupied political theory for a long time, but prevented a sensitivity to the more multifaceted and dynamic nature of political representation in the empirical world (cf. Rehfeld 2006).

Although Saward's event and process-based approach to representation is very broad – representation, instead of a narrowly defined feat of particular institutional mechanisms, should henceforth be seen as a systemic phenomenon occurring throughout the political world at large, including in non-electoral domains – he also presents a relatively simple conceptual framework for the analysis of representative claims. This framework will be employed in the empirical chapters of this thesis regarding IRAs (Chapters 5-8).

The representative claim framework

According to Saward, at the heart of the process of representation stand *five* conceptual entities which together produce representation (ibid. 36-38). These five entities and their mutual relations can be conceptually captured in a 'representative claim framework' (RCF) (see Box 1 and Figure 3). An analysis of representative claims, including those on, by and around IRAs, begins with identification of these five entities in the empirical world.

The *first* conceptual entity in the RCF is the 'maker' of representative claims. The maker is the entity that utters a representative claim. It can be person or a collective.

The maker is not to be confused with the 'subject' of representative claims, however: the *second* conceptual entity in the RCF. The subject is that entity which, in a representative claim, has a representative function. It can be an individual, collective, a thing or a construct. It is claimed by a maker to represent or stand for something else.

This represented something, then, is the *third* conceptual entity in the RCF: the 'object'. The object can also be an individual, collective, a thing or a construct. In a representative claim, therefore, a maker claims that a subject represents an object (see Box 1). It is a claim by a maker to the status of a subject in representative relation to an object.

This object is very often a constituency.

This object, again, should not be equated with the real-life entity of which it is a representation: the 'referent' or the *fourth* conceptual entity in the RCF. Importantly, both subject and object in a representative claim should be seen as *rhetorical constructions*. The outside-world referent is that what is purportedly represented (for instance: the real-life people of a constituency) but in a representative claim it always becomes an object.

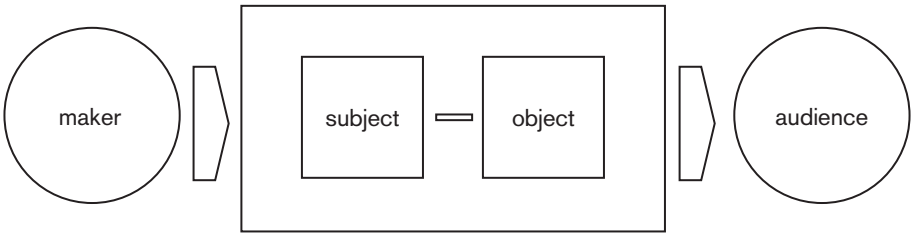
Finally, a maker addresses this representative claim, about the status of a subject in relation to an object, to an 'audience': the *fifth* conceptual entity in the RCF.

Box 1. The general form of the representative claim (Saward 2010: 36)

> A *maker* of representations ('M') puts forward a *subject* ('S') which stands for an *object* ('O') that is related to a *referent* ('R') and is offered to an *audience* ('A').

The representative claim framework (RCF) can be captured in the following visualization:

Figure 3. The general form of the representative claim



To give some non-IRA examples (see Table 1): an elected politician (maker) can offer himself (subject) as working in the interests of his constituency (object) to his very constituency (audience). The real-life people of the constituency are the referent. Or: a street activist (maker) offers the Occupy movement (subject) as standing for the interests of the '99 percent' (object) to the wider public (audience). The real-life people purportedly belonging to the 99 percent are the referent. Or: the Dutch Party for Animals (maker) offers itself (subject) as representing the interests of animals (object) before the other parties in Parliament (audience). Real-life animals are the referent here.[30]

30 One important caveat to this five-part representative claim framework (RCF) is that within the ontology of representation that stresses claims to representation, the referent has no place in an analysis of representative claims *other* than as a conceptual construct. The referent is there as entity in the RCF to denote the fact that in representative *claims*, constituencies are always rhetorically depicted as a constructed object, and never wholly represented 'as such'. The referent is a real-world entity portrayed as a represented object, but it can never be described other than as a represented object. In Saward's conceptualization of representation, and in this thesis, the referent is therefore dropped from empirical analyses. It is 'unrepresentable', except as object.

Table 1. Varieties of representative claim-making

maker	subject	object	audience
politician street activist Party for Animals	himself Occupy movement itself	constituency '99 percent' animals	constituency public Parliament

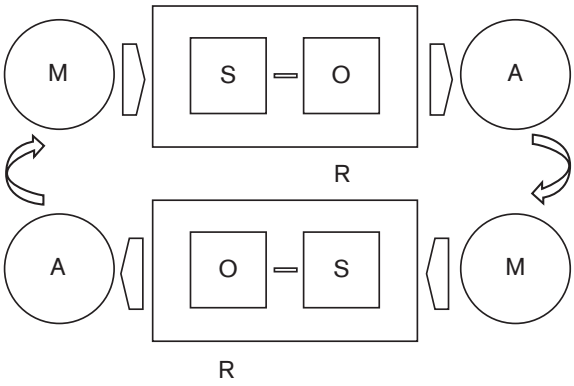
These examples show that the five conceptual entities of the RCF can display overlap.

- A *claim-maker* can offer *himself* as the representing *subject*, as in the example of the politician, but also *someone or something else*, as in the example of the street activist and his movement.
- The *object* that a maker claims is represented by a subject can be the same as the *audience* he addresses, as in the example of the politician and his constituency, but the audience can also consist of *outside observers*, as in the example of the Party for Animals and its place in parliament.

The RCF is broad enough to capture instances of both self-representation and other-representation, as well as instances of speeches to constituencies, or of acts of political expression at large. These are all realities of political life. The substance of the conceptual entities of the RCF – the exact nature of the maker, subject, object and audience – can change and revolve in the production of representative claims, and depend on their contents and the context in which they are offered (ibid. 38). This, again, is a feature of political life, of the multifaceted nature of representation in reality, and something for researchers to identify and describe.

Importantly, moreover, the relation between claim-maker and audience in the RCF (see Box 1) is *circular* (see Figure 4). Audience members, after all, may actively contest representative claims: they may speak up and disagree with claim portrayals. In doing so, they become representative claim-makers themselves. Representative claim-making, reception, and counterclaim-making are therefore a reciprocal and continuous process, a series of events. They are the product of interaction between different political actors (ibid. 42-45).

Figure 4. The circular nature of representative claim-making and reception



Perceived in this way, representative claim-making is an important part of political life and debate. All politics, after all, is rhetoric, and in political rhetoric, different portrayals of the nature of constituencies and their interests, and of whom is their best representative, are frequently exchanged. This, Saward argues, very often constitutes representative claim-making (ibid. 79). Pitkin's notion of representation as an *active making of representations* so becomes the core of the analysis what constitutes representation (see above, and Pitkin 1967: 84, 90).[31] Representation is a creative activity: it involves portrayals and constructions of both representatives and represented, and attempts to persuade audiences to accept these.

What was also already demonstrated in the examples (see Table 1): the RCF can cover a wide variety of cases and political domains, thus corresponding to the fragmented nature of political expression and authority today. A representative claim can, in real life and in the RCF, be:

- *electoral* (as in the example of the elected politician)
- *non-electoral* (as in the example of the street activist, or any kind of unelected would-be representative, for instance a unionist)
- *formal* (as in the case of the elected politician)
- *informal* (as in the case of spontaneous group leaders, such as protest leaders).

It can involve individual or collective *claim-makers* (as in the examples of individual politicians, or political parties, or NGOs), as well as individual, collective, 'thing' or

31 Pitkin herself headed the notion of representation as an active making of representations under descriptive representation (see Figure 1). She normatively discarded this in favour of her preferred substantive representation. As has been argued above, however, the bilateral or unidirectional conception of substantive representation, when confined exclusively to the realm of elections and parliaments, is too restricting a notion to allow for an analysis of instances of representation (or claimed representation) in the fragmented domains of politics beyond the standard model of representative democracy. Representation, in practice, is more versatile, broad-based, and also more unstable than bilateral substantive representation.

constructed *subjects* (as in the examples of, again, elected politicians, but also NGOs, interest groups, or symbols claimed to be representing something). It can also cover individual, collective, 'thing' or constructed *objects* (as in the examples of geographical constituencies, but also more informal or partial constituencies, interests both general and special, future generations, non-human entities, or ideas or discourses claimed to be represented). The claim-receiving *audience*, lastly, can be diverse: it can be they who are purportedly represented (and constructed as an object in a representative claim by a maker), or outside observers in the public sphere. This wide application of the RCF is possible because representative claim-making is seen as, in practice, a matter of rhetoric. This conforms to the realities of political life. The audience – political observers, but from a democratic perspective, especially the purportedly represented constituency – are the ultimate judges of the accuracy of representative claims (ibid. 67, 70).

Notably, the traditional typology by Pitkin (1967) – of active representation through authorization and accountability or substantive representation, of passive representation through resemblance or symbolization (see Figure 2) – can be *subsumed* in Saward's understanding of representative claim-making as a process. A maker can *claim* to be actively representing someone, or he can *claim* that a representing subject descriptively resembles, or symbolizes, a represented object. These claims can, and in practice often are combined: a descriptive representative in the vein of Pitkin (a minority politician claiming to represent minority constituency interests) can claim to be working in the best interest of his constituency (substantive representation in the vein of Pitkin) (Saward 2010: 72). He can back this representative claim up by pointing to the institutional fact of being authorized to do so, and of rendering account, through elections. An *unelected* representative, in turn, can back his claim up by pointing to other, non-electoral organisational means of authorization and accountability. The old typologies of Pitkin are therefore not necessarily lost, but they are subsumed in the broader framework of Saward that emphasizes *claims* to speak or act for others, and their reception, rather than a supposed 'fact' of representation deriving from, for instance, elections.[32] Representation, in practice, is broader and more versatile than that – but it is also more contested.

A last note concerning the RCF: in practice, according to Saward, in claims, a lingual family of terms depicting the relation between representative and represented (or in a claim: subject and object) can often be identified. These are practical substitutes for the formal term 'representing'. They consist of expressions like 'standing for', 'acting for', 'embodying', 'symbolizing', 'working for', 'acting on behalf of', et cetera.[33] This list is not

32 Once again: institutional mechanisms may very well have a place in claims to representation. A representative claim-maker can back his claim up by pointing to his status of being elected, for example. But importantly, institutional mechanisms do not *constitute* representation, nor is representation *exclusive to* institutional mechanisms such as elections. This added emphasis is important for understanding how representative claims function in the political world at large, both in electoral and non-electoral domains, in traditional politics as well as elsewhere.

33 It is to be noted that at certain points in history, these words were all thought of as synonyms for the verb 'to represent' (Pitkin 1967: 121; Saward 2010: 4-5). Saward proposes to re-embrace this historical richness of the word representation, rather than narrowing it down to pre-conceived notions of what may count as representation, or as normatively desirable representation. They can be subsumed in a conceptual framework that stresses *claims* to representation, which in real life, too, are much more varied than many theoretical definitions would have it.

exhaustive, nor do these words even have to be explicitly pronounced in a representative claim; yet they indicate a representative relationship (ibid. 38). Often, these verbs are converted into nouns, and representative roles – synonyms for the word 'representative' – are referred to as 'delegates', 'trustees', 'agents', 'trustees', 'advocates', 'guardians', et cetera. According to Saward, these cultural notions of roles constitute resources for representative claims, allowing a representative claimant (or subject) to *play* the role of delegate, agent or guardian (ibid. 42-43, 70-73).

3.5 The representative claim-maker and the audience: constructing the constituency

The most important tenets of Saward's approach to representation, which will form the theoretical framework for the empirical analysis of representative claims in the domain of IRAs in later chapters of this study (Chapters 5-8), have now been presented. Representation is a process that consists of events and performance, rather than something deriving exclusively and factually from institutional mechanisms such as elections. It revolves around *claims* to representation – to speak or act for others – and their reception. This process can be conceptually captured by means of a representative claim framework (RCF) consisting of five conceptual entities together producing representation (see Box 1 and Figure 3), and able to cover electoral and non-electoral, formal and informal claims to representation. A lingual family of terms in practice often indicating representative relationships (or claims to that effect) has been identified. As such, the RCF is more attuned to the fragmented nature of political expression and authority today: representation happens all around us. Yet in regard to the later analysis in this study, more attention needs to be paid here to the emphasis on *constituency construction* in Saward's approach to representation.

A representative claim in the RCF is a claim to a status on behalf of a subject in relation to an object (see Box 1 and Figure 3). It is therefore, at once, a claim about the would-be representative (the subject), a claim about the would-be represented (the object), *and* a claim about the link between the two (ibid. 47). For example: a politician, or union leader, may in a claim portray himself as somehow – because of being elected, because of his convictions, because of likeness to or knowledge of the constituency – best representing the interests of his constituency. This constituency and its interests are also depicted by the claim-maker in a certain manner: as being working-class in nature, as being deprived, as having an interest in social policies, et cetera (ibid. 47, 67). A maker so makes assertions about the *character* or *properties* of a subject (possibly himself), to stand in a representative relation with an object, which is *portrayed* in a manner that is somehow relevant to the properties of the subject (ibid. 67). Representative claim-making has an aesthetic dimension: makers must depict and portray the representing subjects, as they must emphasize certain aspects of referents in their object constructions (for example: certain interests). They so hope to sway their audiences (ibid. 49, 74; cf. Ankersmit 1996).

This aspect of representative claim-making corresponds to the increasing realization in political theory that constituencies, rather than already existing out there in the world, are very often constructed *in the process* of their purported representation. As in Anderson's well-known notion of the 'imagined community', political constituencies (for example: groups and their interests) are not historically pre-given, unproblematically knowable entities (Anderson 1986). Rather, political entrepreneurs often play a role in the construction of these groups, resulting in members 'becoming aware' of *being* part of a group (or feeling that way). This very process of constituency construction is what representative claim-making and receiving are about as well (Saward 2010: 53). This point was not emphasized in Pitkin's (1967) account, which was focused mostly on the fixed role of the representative.

In Saward's conception of representation, audiences should not be seen as passive, however. Instead, audiences play an active role in the evaluation and success of representative claims (Saward 2010: 48, 53-55). Without audience reception, a representative claim will not get very far. A representative claim can be considered incrementally successful when:

- it is consciously received by someone
- its contents and portrayals are considered accurate by an audience
- an audience recognizes *itself* in its contents and portrayals, and sees its interests as implicated in it

Only in the last case, an audience turns into a constituency (ibid. 49). The object constructions of a claim-maker were at least partially successful. This, however, is only as far as the representative claim goes, and as far as audience members accept it as involving themselves. They may still, moreover, reject the representative claim.

The audience is so a critical ingredient in the reception of representative claims. For example: unless working people start to perceive themselves *as* members of an identifiable group with largely similar interests, they are not likely to consider themselves represented *by* people offering themselves as distinct working-class representatives.[34] Yet success and representation are never dichotomous variables, but always partial, unstable and contestable. There is always room for competing representative claims (ibid. 23, 43, 74). In the matter of audiences and constituencies, Saward draws four conceptual distinctions (see Box 2) (ibid. 49-51, 148-149).

First, there is the claim-maker's 'intended audience'. This consists of all those a claim-maker intends to *reach* with his representative claim. It can consist both of those he intends to portray as an object (the intended constituency), and of outside observers. For example: an parliamentary politician when speaking up for his constituency may intend to appeal to his constituency, while simultaneously addressing the public at large.

34 These would-be working-class representatives, in turn, often play a critical role in constituencies becoming aware or regarding themselves *as* constituencies with a distinct identity.

Second, there is the 'actual audience'. This consists of all those who are *conscious of receiving* a claim. It can consist of the intended constituency, but again also of outside observers. All are free to evaluate and judge the accuracy of representative claims. For example: an NGO's claim to represent poor farmers may be heard by the farmers themselves (the constituency), as well as by a government or business organisation (the audience), and be evaluated by all. If some people recognize themselves and their interests as implicated in the claim, they become its constituency (see below).

Third, there is the claim-maker's 'intended constituency'. This consists of all those a claim-maker *intends* to reach, *and* are purportedly represented – in the double sense of acted or spoken for, and portrayed – in his claim. The intended constituency therefore equals the object ('O') in the RCF (see Box 1). The nature and interests of real-life referents are portrayed by representative claim-makers in a certain manner, and this constituency or object construction is transmitted to audiences. The object, so the maker claims, is represented by a subject who can, in the RCF, be the maker himself. The claim-maker intends for part of his audience to become a constituency. For example: would-be working-class representatives (makers) can intend to represent (as subject) a group of people (the referent) portrayed *as* working-class members (object and intended constituency).

Fourth, there is the 'actual constituency'. This is that part of the actual audience that indeed recognizes itself in the object constructions of a representative claim-maker. To the extent this happens, this part of the actual audience *becomes* the constituency of a representative claim. This actual constituency can then decide to accept, modify or reject a claim to their representation. If they modify it, they become representative claim-makers themselves. If they reject it, they may cease to be a constituency, and regard themselves more as audience. To the extent they accept, they could consider themselves represented. For example: the membership of an interest group, such as those for businesses or practitioners, will likely consider itself the constituency of this organisation (and is thus an actual constituency).

Box 2. Audiences and constituencies (Saward 2010: 50)

	Intended	Actual
Constituency	The group the claimant claims to speak *for* (and as part of that, speaks *about*). Maker-driven	The group whose members recognize the claim as being for and about them, who see their interests as being implicated in a claim. May accept, reject, contest, or ignore the claim. Recipient-driven.
Audience	The group *to* which the claim is addressed. Maker-driven.	The group whose members are conscious of receiving (e.g. hearing and reading) the claim. May accept, reject, contest, or ignore the claim. Recipient-driven.

Audiences may play a role in the evaluation of claims by constituencies. The media, for example, may comment and judge on the representative claims of political actors (claim-makers and subjects), and this may play a part in the evaluation of these claims by potential constituencies, and even the latter's self-recognition (ibid. 150).

3.6 The cultural resources of representation: claims and their reception

If Saward's framework of representation is accepted, it means both electoral and non-electoral claims to representation become viewed as representation – or more precisely: as representative claim-making. It also means that, in theory, both democratic and non-democratic claims to representation become viewed as instances of representative claim-making. Like participation can be undemocratic when it is taken to mean a neutral activity that only becomes democratic in certain contexts, representative claim-making no longer requires democratic norms in order to *be* representative claim-making. This is a major departure from political theory.

In order to accept such a radical view, a take on representation is required that sees it as a phenomenon that is not strictly limited to democratic, or even to political domains. Saward argues that ultimately, claims to representation are a matter of *culture* (ibid. 73-77). Culture can be defined as the shared meanings or 'truths' (between brackets) in social contexts. These meanings and 'truths' determine what is, and what is not, perceived or accepted as representative in a certain culture. Politics is embedded in culture, and in different political cultures (and it can be argued: historical time periods), different meanings may be attached to what counts as representative, and what not.[35] Cultural codes, then, provide both resources and constraints to representative claim-makers. Their options to construct constituencies in a certain manner, and to advocate subject roles, are not unlimited: they are bound by the (political) culture they and the audience are embedded in. Audiences must share cultural notions of the claim-maker in order to be receptive of representative claims – or start to become so (ibid. 76-77).[36] This applies to the electoral as well as to the non-electoral realm.

Electoral and non-electoral representative claims

In contemporary democratic cultures, the regularity, formality, publicity and transparency of free and fair elections may be seen as strong and important cultural resources for representative claim-makers (ibid. 85). Elections are rooted in the principle of political

35 Historically, only the 'best' members of society were thought capable of performing a role as representative (De Haan 2003). In the late nineteenth century, this classical liberal conception of representation shifted to notions of descriptive representation, with the emergence of working-class parties and their practice of delegating 'true' labourers to parliaments.

36 Representative claims may, of course, also challenge or defy accepted cultural notions, as has happened many times in political history.

equality, of 'one person, one vote', which currently holds strong cultural resonance in the West and elsewhere. Claim-makers and audiences here widely share the adherence to political equality and the formality of elections. Politicians launched into parliaments via the electoral process may so point to them being elected, and successfully claim: 'I am your representative, because I am elected.' Audiences and constituencies are likely to at least partly accept such a claim, because they share the cultural notions of the claim-maker. Yet elections do not exhaust the possibilities for representation, nor guarantee a 'full' or 'complete' representation. Electoral systems differ, and this may lead to different opinions about the strength of electoral representative claims.[37] Many people today distrust politicians or do not feel represented by them, despite their elected status.[38] In the political world, moreover, different kinds of representative claims co-exist, and different ways by which constituencies feel represented. These are encountered in both the electoral sphere and domains outside of it. Saward distinguishes three types of non-electoral representative claims, although they do not exhaust all possibilities. It is the core of his argument that these should be recognized *as* representative claims, while interpretation of, first, their reception, and second, their democratic legitimacy (see below) should come later (ibid. 95).

Non-electoral representative claims are, for instance, often staked on the supposed core aspects of a group's identity. This constitutes a cultural resource for claims. This identity is claimed to be shared by claim-maker and audience. Such 'deeper roots' claims, Saward argues, are often encountered in the politics of religion, but also in monarchical or state traditions (ibid. 95-96). The pope, for instance, is seen by many as the representative of the Catholic Church (or as representative of God on Earth), without him being elected by his entire constituency. Similarly, the Dalai Lama is seen, in the West, as the representative of the Tibetan political and religious community. In constitutional monarchies, the monarch, standing above the party political fray, for some represents the entire nation undivided – him or her being *unelected* constitutes a cultural resource that strengthens his representative claim. Similarly, the foreign service, the executive or the bureaucracy are sometimes thought of as representing the more permanent or long-term interests of the nation or the state (cf. Rosanvallon 2011).[39]

'Wider interest and new voices' representative claims, secondly, are based on supposed interests or constituencies not represented in conventional (for instance: electoral) political structures (Saward 2010: 98-102; cf. Kröger and Friedrich 2013). These are often spoken or acted for by extra-parliamentary interest groups, NGOs, social movements, stakeholder associations, activists, celebrities and so on. As cultural resources

37 In first-past-the-post voting systems, for instance, a minority as large as 49 percent may consider itself not represented due to the peculiarities of the electoral process.

38 According to some, therefore, the formality, transparency and equality of elections as a cultural resource for representative claims is on the wane (Van Reybrouck 2013).

39 Obviously, electoral claim-makers may very much employ such non-electoral resources as well. This is the case when political parties and politicians organize on the basis of religion, as in European Christian Democracy, and stake their representative claims on a mixture of electoral and religious cultural resources. Likewise, representative claim-makers beyond parliament may employ the cultural resource of elections. Trade union leaders, for example, are often elected by their constituency, and interest groups frequently have internal elections as well.

to back up their representative claims, these actors may employ intra-organisational means of authorization and accountability, demonstrations of support such as protests or petitions, mass membership, grassroots activism, descriptive similarity, and so on. Extra-parliamentary or societal groups may claim to represent the disempowered or voiceless (poor farmers, homeless people, animals, nature), material or financial interests (as in the case of interest, business or stakeholder groups), or even perspectives or discourses (as in deliberative experiments or polls). U2 singer Bono, for instance, in 2004 as cited by Saward claimed to 'represent a lot of people who have no voice at all. They haven't asked me to represent them. It's cheeky but I hope they're glad I do.' (ibid. 82)

'Expertise' can constitute a cultural resource for non-electoral representative claims as well. Scientists, professionals, practitioners or specialists, for instance, often claim authoritative knowledge purportedly lending a peculiar insight into the interests of a group or collective (ibid. 98). A climatologist, or an authority such as the Intergovernmental Panel on Climate Change (IPCC), may make science-based arguments about the threat of global warming as endangering the interests of coastal communities. A biologist may warn against the extinction of animal species or nature out of regard for the inherent value of their existence. Scientific policy arguments for sustainability contain a regard for or representation of the interests of future generations. However indirectly, experts so position themselves as representatives, backed up by substantive knowledge, of the interests they speak about. Based on this same insight, the French philosopher Bruno Latour has argued that specialists should henceforth more explicitly argue in the interests of certain constituencies and posit as representatives when making public policy pronouncements (Disch 2008). Scientific assertions, of course, do not always involve representative claims (Häikiö 2007; Saward 2010: 79). When political debate and professional expertise intersect, however – when specialists or practitioners become involved in public policy-making or when politicians claim to employ expertise – the distinction between both can become blurred (cf. Braun-Poppelaars, Berkhout and Hanegraaff 2011). Attention to possible implicit representative claims by experts and specialists can then be warranted, as technocracy all too often is a way to position arguments beyond dispute.

Patterns of audience claim reception

Saward argues the way there exist, in the real world, many types of representative claims – both electoral and non-electoral – backed up by various cultural resources – 'one person, one vote', shared identity, wider interests, expertise – there are many ways for audiences to *receive* representative claims. He distinguishes between two broad 'patterns of audience reception' of representative claims in the contemporary political world. They, like the examples of non-electoral representative claims, do not exhaust all possibilities (Saward 2010: 103). These patterns are also not be equated with the democratic legitimacy of representative claims (see below), but constitute audience reception of representative claims nonetheless.

One pattern of audience claim reception that according to Saward is often encountered, in both electoral and non-electoral contexts, is that focused on the 'authorization' of the representative claim-maker (or subject) (ibid. 104-106). Audiences and constituencies may evaluate the claims of makers by scrutinizing their institutional positioning. Is he or she perceived to be authorized in any way to make the claims he makes? Is he being held accountable? Institutional mechanisms such as elections, but also non-electoral, intra-organisational means of authorization and accountability, may constitute a cultural resource for representative claims; and they likewise play a role in audience claim reception. The connectedness of a representative claim-maker (or subject) to democratic institutions or processes, or his or her embeddedness in a network of organisational ties (or that of the subject), may play a positive role in the audience reception of claims. For example: the claims of interest groups – and their spokespeople – to represent constituencies may be scrutinized by evaluating their internal authorization and accountability mechanisms.

On the other hand, a position *outside* these institutions or process may play a role in the audience reception of representative claims as well. Another pattern of audience reception Saward distinguishes is one focused on the 'independence' of the representative claim-maker (or subject) (ibid. 106-109). Audiences and constituencies then evaluate the representative claims of makers by scrutinizing their perceived authenticity. Is he or she perceived to be not beholden to certain 'special' interests? Is he or she not influenced in any way? Is he or she knowledgeable? If representative claim-makers (or subjects) occupy a position outside of electoral, or statal, or any other kind of organisational connections, this may enhance in the eyes of certain audiences the credibility of their claims (ibid. 125). They are then not marred by the deficiencies of traditional systems. The Occupy movement, for instance, disavowed any connection to the electoral realm in its claims to speak for the '99 percent' (*Foreign Affairs* 2011). Claiming to represent a constituency that is not (adequately) represented in conventional structures, but also: being removed from traditional politics, claiming impartiality, being disinterested, may be cultural resources for representative claim-makers to employ and for audiences to evaluate. Ombudsmen, for instance, are positioned outside of electoral politics in order to represent citizen interests vis-à-vis the government. The judiciary, likewise, is part of the state fabric yet independent in order to distribute justice and so represent the law (Rosanvallon 2011).[40]

It could be argued there exist as many cultural resources for representative claims as there are patterns of audience claim reception. Their invocation and evaluation are both bounded by culture (although representative claims may also thwart or defy established cultural notions). Patterns of audience reception not focusing on either the authorization or, conversely, the independence of representative claim-makers (and subjects) could therefore in theory also be envisaged. Saward's important point,

40 In the American context, however, judges, like juries, sometimes are elected in order to represent the will of the people. Their evaluation by audiences then shifts to the first pattern of reception, that of authorization and accountability. In the American cultural context, this apparently constitutes a cultural resource considered stronger in representative claims than independence.

however, is that audience representative claim reception, in practice, often incorporates more cultural notions than just the electoral (or even democratic) ones. This is to be recognized *as* an aspect of political representation, while outside judgment of the democratic legitimacy of it (see below) is to be deferred until later (Saward 2010: 95).

3.7 Varieties of representative claim-making: opportunities for strategizing

As a last building block to complete his conceptual framework for representation as a systemic process of claim-making and receiving occurring in the political world at large, Saward proposes a number of axes along which representative claims, be they electoral or non-electoral, formal or informal, may vary (ibid. 58-66).

One axis of variation in representative claims is 'singular-multiple' (ibid. 58). Claims can be made by individual (single) or collective (multiple) makers in the RCF (see Box 1): individuals or political parties, interest groups, extra-parliamentary bodies, and so on. They can likewise feature individual or collective subjects in the RCF (see Box 1): individuals or political parties, interest groups, extra-parliamentary bodies, and so on. Representative claims can also be made by individuals acting within organisations, while the latter have their own representative claims.[41] The former are so 'nested' in the latter: individuals claim to speak on behalf of organisations and constituencies, *through* the claim of organisations to represent constituencies. Objects in the RCF (see Box 1) can also be constructed as individual or collective entities. Audiences, in turn, can be multiple as well: they can include the intended constituency, but also outside observers. Mixing and matching can happen in all cases, even in single representative claims. Claims can, for example, have an ostensibly narrow constituency focus, but be strategically intended for larger audiences to hear (ibid. 58).

Another axis of variation in representative claims is 'particular-general' (ibid. 59-60). Claims can concern very specific constituencies, but also very broad-based interests, nations or polities. They can have a place in the constitution of political systems. The Founding Fathers of the US political system (makers), for instance, made the broad-based representative claim that the presidency and the Congress (subject) stood for the entire American nation (object) towards this nation and outside observers (constituency and audience). In many constitutions around the world, similar representative claims can be found. Saward proposes to name such constitutive or founding representative claims, historical 'framing' claims: these 'delimit and define the contours of the basic system and constitutionalize or "encode" it' (ibid. 59). The political institutions founded

41 This could be considered a 'dual' representative claim. An individual claims to be a spokesperson of an organisation (be its representative), while this organisation claims to represent constituency interests. In this way, the representative claims of elected politicians, or interest group delegates, build on the representative claims of their political parties or organisations. The representative claims of political parties, in turn, partially build on the representative claims of parliaments.

on such broad-based representative claims henceforth embody them: parliaments, for instance, are enduringly seen as bodies representative of the people or the nation ('the people's representative body'), and this ancient claim is periodically 'refreshed' through elections.[42] The 'nesting' of individual claims in organisational claims occurs here as well: politicians in their representative claims can point to their election, which is embedded in the broader constitutional representative claim of national parliaments. The parliamentary scene so becomes a 'stage' for politicians to enact their representative role on (ibid. 65, 76). Similar patterns are likely to be observed in non-electoral representative political domains.

A *third* axis of variation in representative claims is 'implicit-explicit' (ibid. 60). Claims can be obscured by rhetoric and actions, or can be made very explicitly. A very explicit representative claim is one in which a maker utters the words: '[I/he/she] represent(s) [him/her/them/this/that] because of [X].' This is the most literal form of the representative claim, most closely resembling the RCF (see Box 1). Political rhetoric however, which often involves an exchange of different portrayals of constituencies and their interests, and of whom is their best representative (and of what action benefits them most), is not always so literal. Claim-makers such as politicians often have an interest in obscuring or hiding the constructions of constituencies and their interests they make; in de-emphasizing the constructedness of their representative claims (ibid. 54, 69, 71). They may paint a constituency and its interests as 'naturally' being this or that way, as unproblematically knowable or given. Populist politicians, for instance, often argue as if the interests of the people or the 'common man' are natural givens (ibid. 77). While, for purposes of analysis, a family of terms often indicating a representative relationship between subject and object in claims has been identified (verbs like 'standing for', 'acting for', 'embodying', 'symbolizing', 'working for', 'acting on behalf of', et cetera), the nature of political rhetoric as one involving constructions makes that representative claims are often made implicitly (ibid. 125). A speaker advocating a certain public policy – offering, for instance, his own representative credentials or substantive knowledge, or that of others, as a cultural resource – inadvertently or intentionally paints a picture of the beneficiaries (the object) of this policy as well. They are portrayed as requiring this or that, as having this or that set of interests, as having a certain nature (ibid. 71, 78). All political or public policy speech can so be seen as involving, to some extents, an exchange of representative claim portrayals, with varying degrees of explicitness or implicitness (ibid. 79).[43] It is up for audiences –

42 As argued above, regular, free and fair elections in democratic systems constitute a cultural resource to employ in representative claims by individual politicians, and play a role in patterns of audience reception as well.

43 It can be argued that the nature of language – the use of signifiers and concepts to signify empirical entities and objects – necessitates the making of representations. In speech, humans make use of rhetorical constructions to signify real-world entities, making representations of them. This necessarily creates a partial image of empirical reality (which may be sufficient for communication, but is partial nonetheless, as the entirety of an entity can never be wholly conveyed through speech). In Saward's re-conceptualization of representation as a matter of human performance and speech, this constitutes the essence of representation. Political speech and rhetoric are therefore full of representations, which can be uttered either explicitly, or more implicitly. Constituencies are never wholly representable, but always partially represented.

and constituencies – to decide which depictions they consider most accurate – and for researchers to describe which representative claims are made.

One of the most interesting implications of viewing representation as a matter of contestable claims, which can vary along the axes above, is that it may create a sensitivity on the part of researchers (and political observers generally) to the opportunities claim-makers have for *strategizing*. Representative claims are contestable and often are contested; constituencies are constructed and always only partially represented (ibid. 77-80). Representation is a matter of performance and rhetoric, and claim-makers – constrained, however, by the cultural codes they and audiences share – are more or less free to pick and choose how or what to represent (ibid. 44, 70, 73-77). They must, nevertheless, sway audiences and constituencies in order to be successful. Representative claim-makers may therefore, along the lines of variation, strategize and, for instance, cloak claims for specific constituencies in very general terms (ibid. 65).[44] A lobbyist, for example, may claim the corporation he represents stands for sustainable business practices. An elected politician may claim to stand for the good of the country. Representative claim-makers may also resort to the broader or deeper claims of the institutions or organisations in which they are nested, and employ these as a cultural resource in their claims (ibid. 65). A senior bureaucrat, for instance, could thwart a politician's wishes and claim to have done so in the general interest. These representative claims can all be contested by other claim-makers, and be adjudicated by audiences and constituencies alike. A last strategic action may be to claim to be not a representative at all, but just to 'do the right thing'; or to claim to not make representations at all, but act in certain interests depicted as 'real', 'true' or 'general' (ibid. 77-78). Here, too, however, constituency constructions are always invoked, and subject role conceptions offered. Political actors are to be considered as having an interest in hiding the artificiality of claims, and appeals to 'truths', or attempts to come across as 'authentic', are to be regarded with suspicion. The requirements of language, and the necessity of a division of labour make that there is, in politics at least, no 'place beyond representation' (ibid. 79-81).

3.8 Representative claims and democratic legitimation?

Saward's proposal to henceforth examine representative claims in electoral and non-electoral, formal and informal manifestations – adopted in this thesis with respect to IRAs – while, in the view of the author of this study, ontologically correct and hugely

44 Conceptually, it can be argued that the opportunities for strategizing for representative claim-makers stem from the impossibility of wholly representing – or portraying – a real-world entity in its fullness. This includes people and constituencies. Because of the nature of language, they are always only partially represented. This 'gap' between the referent and the represented object can be creatively employed by representative claim-makers. From this gap stem their opportunities for constituency construction. From it also stem their opportunities for strategizing, for depicting and portraying constituencies, their nature and their interests in a manner that is to sway both audiences and constituencies. In the non-electoral realm, this can be argued to be the essence of 'lobbying' or public affairs consultancy.

promising for empirical investigations, leaves an obvious elephant in the room: the question of democratic legitimacy. If representative claims and audience reception can occur in electoral and non-electoral, democratic and non-democratic political domains (and elsewhere), which claims can still count as democratically legitimate? Saward's initial answer is that he does not offer a foundational argument about democracy; he instead offers an account about political representation in which democratic norms may or may not figure (ibid. 144). This may be disappointing for normative theorists, but it adequately reflects the versatility and dynamism of political life, and the claims to representation in it. To turn to the three accounts of the legitimacy of IRAs identified in Chapter 1: these may co-exist with an account of IRAs that focuses on their representative claims. *In* these claims, notions of (democratic) legitimacy may of course figure; representation, however, does not equate to democracy (or legitimacy). In Chapter 9, nevertheless, the relevance of a representative-claim approach to IRAs, as developed in the remainder of this thesis, to the three accounts of the legitimacy of these institutions will be defended. Saward himself, meanwhile, does make a closing argument about democratic ways of *judging* representative claims and their reception.

Saward's proposal for provisional judgments of the democratic legitimacy of representative claims and their reception hinges on a further refinement of his distinctions between actual and intended audiences and constituencies (see Box 2) (ibid. 143-151). According to Saward, in an open society, the only true democratic judges of the legitimacy of representative claims can be the 'appropriate constituency' (ibid. 148). This appropriate constituency consists of the intended constituency – those a claim-maker *intends* to represent – plus the actual constituency – those audience members who *recognize themselves* and their interests as implicated in a representative claim. The combination of this makes for the appropriate constituency. In an open society, the demonstrable acceptance by this appropriate constituency of a representative claim about them – backed up by whatever cultural resources claim-makers employ, and constituencies consider appropriate, be they elections, authorization and accountability mechanisms, notions of shared identity, wider interest claims or substantive expertise – should principally count as the 'first-order' judgment of the democratic legitimacy of a claim (ibid. 146). It is for researchers, after description and analysis of representative claims and their acceptance (or not) by audiences and constituencies, to make 'second-order' judgments about their legitimation: to consider *why* and *how* representative claims become invested with democratic legitimation (ibid. 145-149).

The role of political researchers as 'adjudicators of occurrence' – as pre-determiners of what 'is' representation, and as judges of what counts as normatively or democratically legitimate representation – is therefore pushed to the background, in order to make room for a conceptualization of political representation revolving around representative claims, that is more attuned to its real-life political versatility and dynamism.

3.9 Conclusion: towards researching IRAs

In the fragmented domain of politics today, in which acts of political expression and authority increasingly take place beyond the electoral-parliamentary realm, and invocations of constituencies are a staple of political life, Saward's conceptualization of representation offers a richer toolkit for empirical analyses of representational practices than older ones. This is applicable, it will be argued in the remainder of this thesis, in the domain of IRAs. Representation – or more precisely put: representative claim-making and reception – is not limited to elections and parliaments. It is an ubiquitous phenomenon stretching out across all domains of political and societal life. Consisting of claims to act or speak for others – necessary in complex societies where a division of labour is a fact of life – and invocations of constituencies – unavoidable because of the centrality of language in politics – representation is, and will continue to be, a property of politics, including in non-electoral domains. In the next chapter, the application of the RCF to IRAs will be explained.

Chapter 4

From representation theory to researching IRA practices

In the previous chapter, Saward's representative claim theorization has been discussed. Claims to speak or act for others, and invocations of constituencies, are often representative claims, which can be described by means of the heuristic tool of the representative claim framework (RCF). Yet this tool can potentially be applied to a great variety of domains, practices and processes. Representative claim-making, conceived of as a matter of human performance and rhetoric, can be found in law, in policy documents, and in political and administrative practices. It can be found in action and speech. In this chapter, therefore, choices are made. After a discussion on the necessity of a qualitative approach to the study of representative claims, and the selection of four case studies, a distinction into levels of analysis of IRAs is made. The tool of the RCF can be fruitfully applied to three levels of analysis of IRAs, which correspond to the realities of regulatory governance. The chapter subsequently discusses ways of identifying representative claims on these three levels, as well as the data sources that were scrutinized for them. As such, it provides a bridge from representation theory to researching IRA practices, as well as the setup for the following, empirical chapters.

4.1 Case studies

A study of representation conceived of as a process, a product of human performance and rhetoric, necessitates a qualitative approach. Human performance and rhetoric are difficult to capture in quantitative terms. They manifest themselves in speech and action, or leave traces in the form of text, documents and recordings. In addition, representative claim-making and reception are context-bound activities. Representative claims are only understandable in a specific time and context, when made sense of by an external observer. The representative claim framework (RCF) of Saward (2010), moreover, has so far only rarely been applied empirically (cf. Hendriks 2009; Marochi 2010; De Wilde 2013). This makes the present study necessarily an exploratory undertaking.

For these reasons, *case study research* was adopted as the method of research. Case study research is particularly suited for qualitative, context-sensitive and exploratory research. A case, first, is a 'spatially limited phenomenon (a unit) observed at a single point in time or over some period of time' (Gerring 2007: 19). In case study research, cases are studied for the purpose of understanding a larger population of cases. Multiple cases can be studied in the scope of one research project in order to broaden understanding and compare results. Independent regulatory authorities (IRAs) were the cases of interest in the present study. Qualitative case studies have the additional advantage of context-sensitivity. They convey a measure of intimate and detailed knowledge about the object of study to the researcher. Lastly, case studies are well-suited to research of an exploratory nature (idem: 39-41). While future research into representative claim-making may be hypothesis-driven, the aim at present is to describe it and to provide contextual understanding, on the basis of empirically grounded and corroborated systematical observations. This will provide an answer to the main research question inquiring into the representative character of IRAs.

Case selection: four independent regulatory authorities

Four cases were deliberately selected from a larger population of IRAs. Since random selection could have resulted in too much variance between the cases and the larger population, the four cases were selected on the basis of criteria (cf. idem 2007: 87).

IRAs were defined in Chapter 2 as specialist non-majoritarian institutions (NMIs) possessing a certain measure of formal independence. They are involved in regulation, which includes supervision: they exercise sustained and focused control over activities that are valued by a community. Their independence is twofold: they are formally autonomous in individual decision-making from both the electoral political sphere and the bureaucracy, as well as from affected interests. IRAs are a global phenomenon: they have existed in the United States since the late nineteenth century, and have proliferated in Europe and across the world in the last three decades.

The four cases selected for study therefore needed to conform to at least three criteria to be typical of the population of IRAs. They were to be:

- formally independent in individual decision-making from both the political sphere and affected interests
- involved in regulation and/or supervision
- a public authority or agency

A selection on the basis of at least these three criteria guaranteed an initial measure of external validity (idem 2007: 12, 20). These traits constituted the cross-case characteristics of the four selected cases, reflecting those characteristics shared by the population at large.

Case selection was further informed by the need to represent variety within the population at large. A small number of cases does not need to be a perfect statistical representation of the variety within the population, nor to mirror exactly the distribution of this variety. They should, however, be diverse (idem: 89). In Chapter 2, three ideal types of IRAs were distinguished: competition authorities, sectoral regulators, and those set up to secure or advance economic or societal desiderata in certain domains. IRAs usually possess three types of powers: (quasi-) legislative, executive, and (quasi-) judicial powers. Often, they also have advisory or more undefined powers.[45] In reality, however, these types and powers frequently overlap. Care was put, nonetheless, in making sure the four selected cases reflected the ideal typical variety of IRAs.

These criteria led to the following selection of cases:

- the *Onafhankelijke Post en Telecommunicatie Autoriteit* ('Independent Mail and Telecommunications Authority') (OPTA): a sectoral regulator in the Netherlands

45 Undefined powers of IRAs are those they exercise in transnational regulatory or supervisory networks, where they deliberate on the formulation or interpretation of delegated powers. They also include the powers IRAs exercise when they informally address external parties, or speak out in public. See Chapter 2.

- the *Nederlandse Mededingingsautoriteit Energiekamer* ('Netherlands Competition Authority Energy Chamber') (NMa Energy Chamber): a sectoral regulatory directorate of the competition authority of the Netherlands
- the *Autoriteit Financiële Markten* ('Financial Markets Authority') (AFM): an authority set up to secure or advance economic or societal desiderata in the Netherlands
- the *Nederlandse Zorgautoriteit* ('Netherlands Healthcare Authority') (NZa): a sectoral regulator and authority set up to secure or advance economic or societal desiderata in the Netherlands

All four IRAs possess(ed) (quasi-) legislative, executive, and (quasi-) judicial powers, as well as advisory and more undefined powers. Three of them – OPTA, NMa Energy Chamber and NZa – had or have *ex ante* regulatory powers, while one – AFM – is an *ex post* supervisor.

In the course of the research, however, two of the cases were merged in real life. In April 2013, the telecommunications regulator OPTA was institutionally merged with the competition authority NMa and its Energy Chamber to form a new IRA: the *Autoriteit Consument en Markt* ('Consumers and Market Authority') (ACM).[46] The cut-off point of research into the two cases OPTA and NMa Energy Chamber is therefore at this date. All analysis of them pertains to the period before.

In addition to reflecting the ideal typical variety of IRAs, these four cases reflect(ed) variety in regulated and supervised domains. They independently regulate(d) and supervise(d) four different economic or societal domains in their country of operation: the telecommunications, energy, financial markets and healthcare sectors. These sectors are markedly different in the types of goods and services produced, historical trajectory of liberalization and marketization, and constellation of affected interests. In this way, these cases reflect(ed) variety in the population at large, as well as in the context in which they function(ed).

All four IRAs, lastly, were and are located in the Netherlands. As the researcher was based here, immersion in the home country had the advantage of familiarity with the political-administrative history and context of the cases at hand. This choice also facilitated the conduct of interviews with respondents in various places in the country. Yet the Netherlands also was an interesting area for research in itself. Compared to other continental European countries, the Netherlands are considered at the 'forefront' of privatization and liberalization policies in such domains as telecommunications, energy, railways and healthcare (Dan et al. 2012). Secondly, Dutch IRAs display medium to high levels of formal independence compared to their counterparts in other European countries. While agencification in the Netherlands has not progressed as much as in Sweden or the United Kingdom, and while Dutch IRAs do not display the levels of independence and public decision-making power of their American counterparts, they are usually considered more independent than, for example, those in neighbouring

46 Since, OPTA and Energy Chamber are known as the ACM directorates Telecom and Energy. Their regulatory and supervisory tasks have remained unchanged.

Germany (Gilardi 2008). Thirdly, Dutch IRAs have in recent years been subject to domestic public controversy and debate over the issues at the heart of this study: their independence and their relationship to representative democracy (see Chapter 2).

4.2 Three levels of analysis of representative claim-making

After case selection, three *levels of analysis* of the four IRAs were distinguished (see Figure 5). These levels were a way to focus the analysis on the features and practices of IRAs most relevant in light of the main question of this study: '*What is the representative character of independent regulatory authorities?*' For each level, a sub question was formulated.

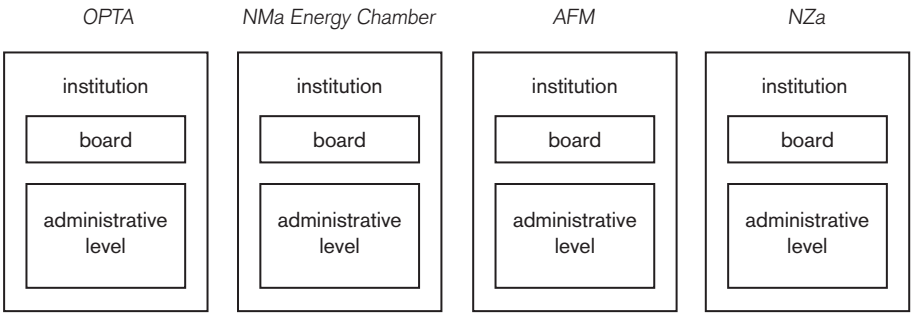
The representative claim framework (RCF) of Michael Saward (2010) is the analytical framework adopted in this study. Representative claim-making and reception have in the previous chapter been argued to possess a number of properties. Representative claim-making is:

- a matter of performance and rhetoric;
- systemic: an ubiquitous phenomenon stretching out across all domains of political and societal life;
- consisting of events categorized as *claims* to representation and their reception;
- potentially electoral and non-electoral, democratic and non-democratic, formal and informal;
- entailing the construction of constituencies, and their necessarily limited and partial portrayal;
- offering opportunities for strategizing

In politics and administration, claims to speak or act for others, and invocations of constituencies, are very often representative claims: assertions in which a *maker* ('M') puts forward a *subject* ('S') which stands for an *object* ('O') that is related to a *referent* ('R') and is offered to an *audience* ('A') (see Box 1 and Figure 3 in Chapter 3). Such claims can be described by means of the heuristic tool of the RCF.

In this study, the tool of the RCF was applied to describe claims to act or speak for others, and invocations of constituencies, at three different levels of the four selected IRAs. In this way, the main question could be answered. In the remainder of this thesis, the results are discussed. Although the levels are conceptual constructs, they correspond to the reality of IRAs as working institutions. IRAs, first, are public institutions (level 1). Yet they often also have leadership boards (level 2). On the administrative or work-floor level of IRAs, thirdly, in preparing and implementing decisions, staffers stand in daily interaction with external parties in the regulatory space, including affected interests (level 3). The argument of this study is that representative claim-making on, by or around IRAs can be observed at all three levels of analysis.

Figure 5. Three levels of analysis of independent regulatory authorities



The first level of analysis is the *institutional level*. This concerns IRAs as formal-legal entities in the polity. Established by a lawmaking body, the independent bodies are claimed to stand or act for something, or some people. A constituency is constructed at the same time an IRA is set up. The bodies are founded with the purpose to benefit this constituency. In order to achieve this purpose, IRAs are bestowed with certain tasks, instruments and a measure of institutional autonomy. Acts of formal delegation to IRAs entail representative claims by lawmaking bodies about the independent bodies. Post-delegation, moreover, the independent bodies themselves in the public sphere reproduce these representative claims.

The second level of analysis is the *board level*. IRAs often have collegiate boards. These formally take the decisions of the independent bodies. Some have supervisory or advisory boards as well. The right to appoint board members, however, is usually reserved to the electoral political sphere and seen as one of its remaining control mechanisms. At the same time, collegiate boards occupy a public figurehead position for IRAs, and what these are claimed to stand or act for. Board constitutions contain representative claims by lawmaking bodies and IRAs themselves about the leadership of the independent bodies.

The third level of analysis is the *administrative level*. The independent regulatory and supervisory decisions of IRA boards are usually prepared and implemented by lower-level managers and staffers. At the administrative level, these stand in daily interaction with the broader regulatory environment of the independent bodies. A subset of this environment is constituted by entities in regulated domains who claim they are affected by IRA decisions. Administrative-level interaction with affected interests, and their organisations and associations, too, involve representative claim-making and receiving.

For each of the three levels, a sub question was formulated:

1. *To what extent can representative claims by identified at the institutional level of independent regulatory authorities?*
2. *To what extent can representative claims by identified at the board level of independent regulatory authorities?*
3. *To what extent can representative claims by identified at the administrative level of independent regulatory authorities?*

The answers to the sub questions together constitute the answer to the main question of this study.

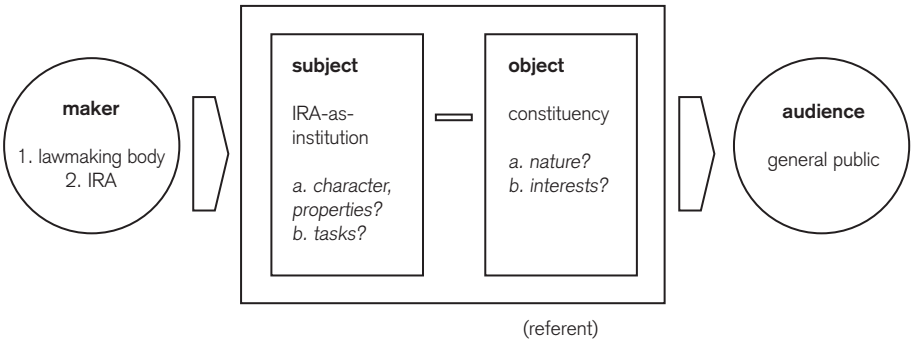
In the remainder of the present chapter, the application of the RCF tool and its five components to the institutional, board and administrative levels will be discussed in a more detailed manner. These sections will also discuss data sources and collection.

4.3 The institutional level of independent regulatory authorities: application of the RCF tool and data collection

IRAs are institutions. They usually also have collegiate boards, as well as lower-level administrative organisations (see Figure 5). Yet first and perhaps foremost, they are impersonal public authorities. When founded through an act of legislation, they are formal-legal entities occupying a place in the polity.

In order to identify representative claims at the institutional level of IRAs, and answer the main question of this study, we should look for possible claims in which *IRAs-as-institutions* feature as the purportedly representing *subject* ('S') (see Figure 6). Representative claims in which IRAs-as-institutions feature as subjects will be claims by certain makers in which their character, properties and tasks *as* public institutions are constructed.

Figure 6. The institutional representative claim



Pre-eminent *makers* ('M') of such institutional-representative claims are *lawmaking bodies*. Depending on the constitutional context, these can be parliaments, or parliaments in combination with governments (the latter is the case in the Netherlands). The institutional-representative claims of the lawmaking bodies concern the purposes of IRAs-as-institutions, and the tasks delegated to them to achieve these purposes. They contain arguments about the institutional autonomy and instruments necessary for IRAs to achieve their goals.

In the goals and purposes the lawmaking bodies draw up for IRAs, moreover, *constituencies* and their interests – *objects* ('O') – are constructed. This is what makes the institutional-level claim representative, or representational. It contains the construction of a subject (IRAs) in relation to an object: its constituencies, those claimed to benefit from its establishment and activities. These, however, are always limited and partial portrayals of a *referent* ('R'). The referent consists of real-life people, who can be represented in myriad ways, but whose nature and interests are depicted by the claim-maker in such as a manner as to fit the properties and goals of the subject (see Chapter 3).

The intended *audience* ('A') of these institutional-representative claims about IRAs is the *general public*. When lawmaking bodies make representative claims about IRAs-as-institutions in acts of foundation or accompanying texts, this is addressed to the public at large. Of course, parts of this general audience could be the intended constituency (or object) of these representative claims (see Box 2). This, however, can only become clear once these object constructions are described.

Such legislative-representative claims about IRAs-as-institutions can be seen as the 'constitutive' or 'founding' representative claims of the independent bodies. Such historical 'framing' claims, Saward has theorized, 'delimit and define the contours of the basic system and constitutionalize or "encode" it' (Saward 2010: 59).[47] A lawmaking body's (maker) representative claim about an IRA defines what they *are* and are *for* (subject), and *whom* or *what* they represent (object). The event here is a government or parliament making the claim that the institution it creates has certain special properties that will enable it to act, work or speak for a group of people. The nature of this group and its interests are portrayed in such a manner as to validate the representative claim.

Post-delegation, institutions may in the public sphere seek to reproduce the representative claim made about them. A second set of relevant *makers* ('M') to explore therefore consists of the four IRAs themselves (see Figure 6). How do these institutions – independent from the electoral sphere as they are – publicly rationalize or promote their existence and activities (subject)? Who or what do they claim to represent (object)? Again, the intended *audience* ('A') is the general public. When IRAs publicly project an image of themselves, and the goods they claim to stand or work for, this is addressed to the public at large. Part of this general public (audience) could consist of the constituencies (object) the IRAs claim to represent, but whether this is so can only become clear once these object constructions are described.

Data sources and collection

For this study, relevant legislative frameworks were scrutinized for subject and object constructions. These consisted of the Dutch *acts of establishment* of the four IRAs (the

47 The great example in the electoral realm is parliament itself: established in one historical time period by certain founders (makers) claiming it (subject) to be the people's (object) representative body, parliament itself subsequently embodies this representative claim, while periodically refreshing it through elections.

1997 OPTA Act, 1998 Telecommunications Act, 1998 Electricity Act, 2000 Gas Act, 2006 Financial Supervision Act and 2006 Healthcare Market Structuring Act) and important *amendment acts* (the 2004 acts renewing the Telecommunications, Electricity, and Gas Acts, the 2005 act making formally independent the competition authority NMa). For all these acts, official *proclamations* and supplemental *explanatory memorandums* were extensively studied as well. *Parliamentary records* such as minutes of parliamentary debates on the establishment of the four IRAs were scrutinized for additional information on subject and object constructions. *Government reports* (for instance 2000, 2001 and 2004 reports on market regulation, and the 2001 report on financial supervision reform) and influential reports of *advisory bodies* (for instance of the Council of State and the Scientific Council for Government Policy) on IRAs in the Netherlands provided similar material. *Secondary literature* on the liberalization and marketization of economic and societal domains and the establishment of IRAs in the Netherlands provided contextual information.

Institutional-level representative claims made by the four IRAs themselves, secondly, were found in public organisational documents. Their *mission statements*, *annual reports* from establishment until the present, public *policy documents* and *websites* were scrutinized for subject and object constructions crafted by the independent bodies themselves.

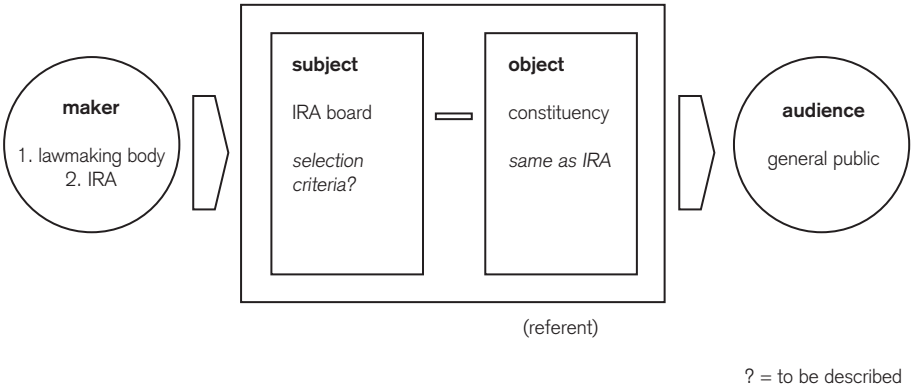
4.4 The board level of independent regulatory authorities: application of the RCF tool and data collection

IRAs have boards. Often these are collegiate: composed of multiple persons who collectively make decisions (Rosanvallon 2011: 92-94). The independence of the regulatory bodies is expressed in these very decisions. Board members, however, are appointed by political government. Yet they also have a public figurehead position: they represent the institution, and everything it may stand for, to the outside world. Boards are therefore a separate factor to consider in the representative claims about and by IRAs.

In order to identify representative claims at the board level, we should look for possible claims in which *IRA boards* or their *members* feature as the purportedly representing *subject* ('S') (see Figure 7). Representative claims in which IRA boards figure as subjects will be claims by certain makers in which their character and properties as decision-makers are constructed.

Pre-eminent *makers* ('M') of such claims are, once more, lawmaking bodies and IRAs themselves. The *objects* ('O') or intended constituencies in board-level representative claims are similar to those in institutional-level claims. Boards ostensibly further the same constituencies and interests as IRAs-as-institutions do. The intended *audience* ('A') of board-level representative claims is the general public.

Figure 7. The board-level representative claim



The difference between boards and institutions, then, is that the former consist of *persons*. The representative claims about boards and their members are about qualities they must possess as persons. These personal qualities ostensibly enable them to act as would-be representatives (subject). This happens against the background of a larger institutional context, shaped by the institutional-representative claims about IRAs (see Figure 5). Yet it should not automatically be assumed that board-level and institutional-level claims align. Certain (un)desirable qualities for board members may harbour the potential for a clash with institutional-level representative claims about the independent bodies. This will be explored in Chapter 7.

A source to find expressions of (un)desirable qualities in IRA board members are *selection criteria*. These may be formally contained in acts of establishment, making the lawmaking body their creator. Or they may be informally drawn up by IRAs themselves, making them the creator. Since formal selection criteria for boards of non-majoritarian institutions (NMIs) or ZBOs in the Netherlands are not common (Raad voor openbaar bestuur 2006: 52), but do exist for IRAs, in light of the research aims they are a relevant body of data to explore.

As an extension of the research into selection criteria, *actual* board appointments at the four IRAs from their establishment until the present (2014) were studied as well. The study in this respect ventured beyond the representative claim framework (RCF), which stresses claims and rhetoric, to look into real-life board appointments at IRAs. Who gets appointed to the boards of these powerful independent bodies? How can the composition of board membership at the four selected IRAs be described? In order to answer this question, descriptive variables were drawn from the selection criteria as well as from explanatory theories on leadership appointments at public organisations: resource dependency theory and classic representative bureaucracy theory. These variables were subsequently applied to descriptively analyse, for the first time, the 73-person executive and non-executive board membership of the four IRAs from the past until the

present. This invited reflection on its composition in light of the broader institutional-level representative claims about these independent bodies.

Data sources and collection

Formal selection criteria for the four IRA boards were found in their *acts of establishment* and *amendment acts*. Additional criteria were found in specific laws pertaining to the boards of some IRAs (for example the 2011 DNB and AFM Strengthening of Governance Act). General framework acts for independent authorities (the 2006 Autonomous Administrative Authorities Framework Act) were also consulted. For all these acts, supplemental *explanatory memorandums* and *parliamentary records* such as minutes of parliamentary debates were investigated for additional statements on board selection criteria. Organisational documents such as *organisational charters* (in the case of AFM), *board regulations*, public *candidate profile sketches* and *websites* of the four IRAs were scrutinized for informal selection criteria.

Data on board appointments at the four IRAs were traced in the public record. Organisational documents such as *annual reports* and *websites* of the four IRAs provided information on who got appointed to their boards in specific time periods. These documents along with *newspaper reports* and *websites* such as LinkedIn were subsequently scrutinized for background information on the 73 board members. This supplied the empirical data to analyze the membership in terms of the descriptive variables selected for this purpose.

4.5 The administrative level of independent regulatory authorities: application of the RCF tool and data collection

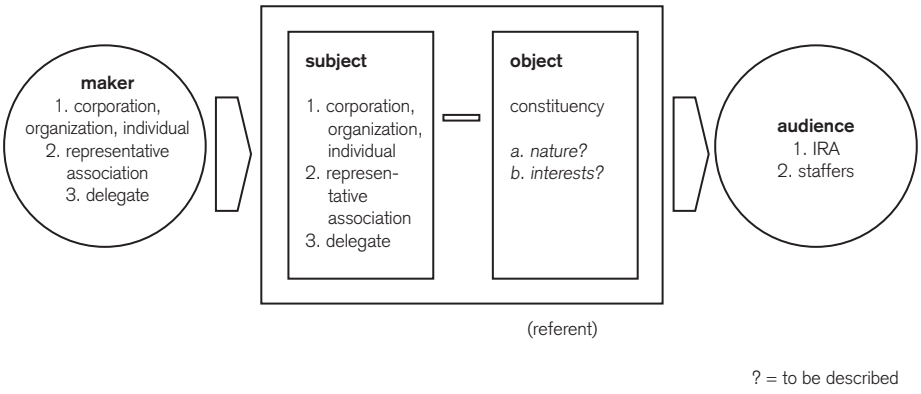
IRAs have administrative organisations. Lower-level managers and staffers prepare and implement the independent decisions taken by boards. At the administrative level, they stand in daily interaction with many external actors in regulatory space: political government, ministerial departments, administrative bodies, European and transnational networks, as well as affected interests. IRAs often have consultation procedures to involve regulated and supervised corporations, practitioners, consumers and their representative associations in independent decision-making (Scott 2000; Lodge 2004; Lavrijssen 2006; Croley 2008).

In order to identify representative claim-making at the administrative level, an approach different from that applied to the institutional and board levels was required. Consultation procedures often take place behind closed doors: a good part of it is not captured in public documents, but occurs in interaction between IRA staffers and delegates of affected corporations and associations. In the Netherlands, no account of consultation procedures between IRAs and affected interests was available. For this

reason, interviews with participants on both sides of the aisle were conducted. This provided information on the topic of consultation procedures, as well as on the process of representative claim-making as it takes place inside these procedures. It would also, for the first time, provide an inside view on IRA-affected interest interaction inside consultative procedures.

In the conceptual framework of the RCF, *IRAs* and their *staffers* at the administrative level now feature as *audience* ('A') (see Figure 8). While being representative claimants at the institutional level (see above), in consultation with external parties, they also receive, evaluate and judge the representative claims of affected interests. IRAs and their staffers (audience) must first pass judgment on the organisational claims of external entities to represent relevant interests, and decide on their inclusion in consultations. Subsequently, they must evaluate the representative claims – the subject and object constructions – that affected interest delegates make *during* consultations.

Figure 8. The administrative-level representative claim



Affected interests and their delegates in domains regulated and supervised by the IRAs are *makers* ('M') of representative claims. The choice was made to focus on them, and not on other entities external to the IRA, because regulated and supervised corporations and professions, as well as consumers, are of specific relevance in this study. They constitute the entities most directly affected by the independent decisions of IRAs – or so they claim. Since IRAs are formally independent from affected interests but nevertheless non-bindingly consult them (Lavrijssen 2006), the topic of representative claim-making in interaction with this group was considered very relevant. Claim-makers, then, can be corporations, organisations, and practitioner or consumer individuals, as well as their representative associations, or their delegates (see Figure 8).

As representing *subject* ('S'), these claimants either posit themselves, or other entities. A corporation (maker) may claim it represents (subject) its own interests. An interest group (maker) may claim it represents (subject) a constituency of affected

interests. Delegates from either (makers) may claim to represent (subject) the corporation or the interest group and its constituency. Representative claims so exhibit a 'nested' structure (see Chapter 3): the representative claim of a person may be embedded in the representative claim of an organisation.

As represented *objects* ('O'), these claimants depict the affected constituencies and their interests. This, however, is often done in a strategic manner. As discussed in Chapter 3, portrayals of interests and constituencies are highly variable. These can be attuned to the claim-maker's needs, or be adjusted to how he or she expects the audience (IRAs and staffers) to respond. Representative claim-makers have opportunities to strategize, to cloak claims for specific groups as concerning very general interests, or even to deny the constructedness of their portrayals. In the regulatory process, such opportunities may be employed. This process is better known as 'public affairs' or 'regulatory affairs' consultancy.

Participant interviews, then, provided information on interaction procedures, and the process of representative claim-making as it occurs during these procedures. How, according to participants on both sides of the aisle, are representing subject roles enacted, constituencies constructed, and representative claim-making strategies employed? How do IRAs and their staffers receive and evaluate such representative claims? What is the role of representative claim-making inside the regulatory process?

Data sources and collection

For this study, *acts of establishment* of the four IRAs were first consulted to chart the extent to which consultative procedures with affected interests are mandated. *Administrative law* (the General Administrative Law Act or *Algemene wet bestuursrecht*) was studied as well, to garner information on general consultative procedures at public authorities. Organisational documents of the four IRAs such as *annual reports*, *public documents* and *websites* were studied to garner available information on processes of interaction and consultation.

Subsequently, interviews were conducted with participants in administrative-level consultative processes at the four IRAs. Care was taken to include both IRA staffers and delegates of affected interests in the four regulated domains. In total, 45 interviews with participants on both sides of the aisle were conducted. Twenty of these were staffers of the four IRAs; 25 of these were delegates of affected interests. A grounded, multi-person view on the process of representative claim-making or regulatory affairs lobbying as observed by participants on both sides of the aisle could thus be obtained.

The setup of the interviews was as follows. First, respondents were questioned about the structure and organisation of the consultation procedures in which they were involved. Subsequently, in the case of IRA staffers, questions were asked about the place of these procedures in the process of decision-making at the respective IRA. In the case of affected interest delegates, questions were asked about the internal decision-making structure at the corporation or organisation. Secondly, questions were asked

about inclusion. Are all affected interests, in the eyes of respondents, represented? Thirdly, respondents were probed about the process of representative claim-making inside stages for interaction. How do affected interests put forward their interest? Which portrayals do they give of their constituencies? How, in pressing their case on regulatory and supervisory policies, do they attempt to convince the IRA of their representations? And on the other side of the aisle: how do IRAs and their staffers respond? Which representations do they find convincing, which information is taken along in decision-making procedures? Fourthly, the perceived added value of affected-interest representation in IRA stages for interaction was a topic for questioning.

Interviews were semi-structured, and lasted 45 minutes to 1,5 hours each. Sometimes, multiple respondents were interviewed at once. Interviews usually took place at the offices of the four IRAs, or offices of affected interests (corporations, organisations) or their representative associations. In a few cases, interviews were conducted at the academic department of the researcher or in public places such as cafés. All interviews were digitally recorded and subsequently transcribed. This was either done by the researcher, or a student assistant. The interview transcripts were subsequently analyzed to find common themes. Interview data was then grouped according to theme, and compared across cases. In this way, within-case information from different respondents, and information from respondents with relevance across cases could be corroborated and compared. Lastly, respondents were made anonymous and provided numbers. Interviewed IRA staffers were coded as 'IRs' (IRA respondents), while affected interest delegates were coded as 'SRs' (stakeholder respondents). They are referred to in this way in the text.

In appendix C of this thesis, a topic list for the interviews can be found.

4.6 Conclusion: a multilevel analysis of representative claim-making in the domain of IRAs

These three levels of analysis of representative claim-making are conceptual constructs based on the formal organisation and working realities of the four IRAs. The remainder of this study will treat the three levels separately. In real life, however, they are related to each other. Interaction effects may occur between the three levels. Throughout this study, attention will therefore be paid to the interrelationship of representative claims encountered at the various levels. Board-level representative claims, for example, may be derived from institutional-level claims, but – as will be shown – may also be contradictory to them. Institutional-level representative claims may likewise play a role in staffer interaction with affected interests at the administrative level. The case study approach adopted in this thesis allowed for a holistic study of the three levels and their interaction at each of the four IRAs (cf. Gerring 2007: 49). At the same time, it allowed for comparison between the levels of the four cases. The following chapters thus feature *within-case* as well as *cross-case* analysis. This distinction in three levels, lastly,

allowed for a study of IRAs as public institutions operating in a dynamic environment. The independent bodies constantly interact with their external environment as a feature of the regulatory process, but much of this interaction takes place in processes at the institutions themselves. The addition of the administrative level captures IRA interaction with external parties and allows for studying it in terms of representative claim-making, while keeping the analytical focus on the institutions themselves.

The remainder of this thesis is set up as follows. *Chapters 5* and *6* will discuss representative claim-making at the institutional level of the four IRAs. Both chapters are set up as *within-case analyses* of the four IRAs, to firmly establish the representative claims made about them in their individual contexts. The first chapter will be devoted to representative claims made by the Dutch lawmaking body about the four IRAs at the time of their establishment, and afterwards. It will therefore also explore the dynamic and historically changing content of representative claims (see Chapter 3). The second chapter will be devoted to the reproduction in the public sphere of these representative claims by the four IRAs themselves.

Chapter 7 will discuss representative claim-making at the board level of the four IRAs. As an extension, it will discuss actual board appointments at the four cases from their establishment until the present. This chapter features a combination of *cross-case analysis* for the first part, and *within-case analysis* for the second part.

Chapter 8 will discuss representative claim-making at the administrative level of the four IRAs. This chapter is set up as a *cross-case analysis* of the four IRAs. It offers an inside view on the interaction between staffers and affected interests in consultative procedures inside the four IRAs.

In *Chapter 9*, the answer to the main question of this study will be presented. In addition, this chapter will discuss the positive and normative benefits of a representative claim-making approach to the study of IRAs. These are discussed in light of the three approaches to the legitimacy of IRAs identified in Chapter 1. The thesis will conclude with a consideration of the democratic legitimation of IRAs from a representative claim-making perspective.

Chapter 5

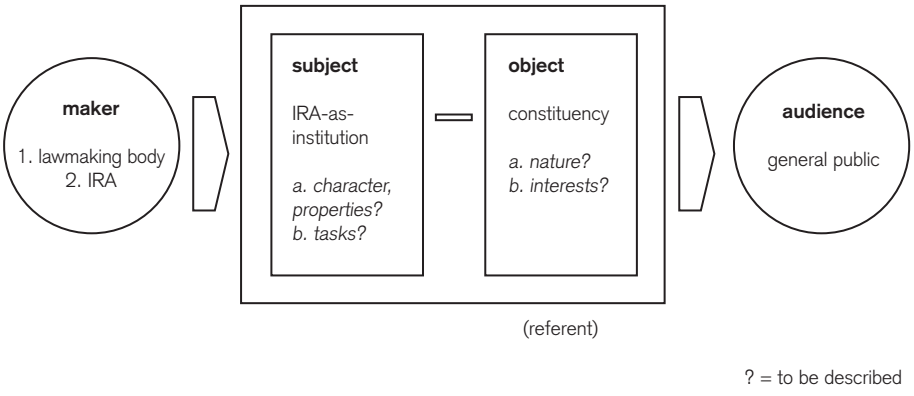
In pursuit of the public interest: legislative claims about independent regulatory authorities

Independent regulatory authorities (IRAs) are public institutions. Established by an act of delegation, as formal-legal entities they occupy a place in the polity. This chapter will concentrate on the identification and explication of representative claims made about IRAs-as-institutions. The question it seeks to answer is: *'To what extent can representative claims be identified at the institutional level of independent regulatory authorities?'*

Claims to speak or act for others, and invocations of constituencies, are very often representative claims: assertions in which a *maker* ('M') puts forward a *subject* ('S') which stands for an *object* ('O') that is related to a *referent* ('R') and is offered to an *audience* ('A') (see Box 1 in Chapter 3). These are claims about the character and properties of a subject, the nature and interests of an object or constituency, and the representational connection between the two.

In this chapter, representative claims in which the four selected IRAs-as-institutions (OPTA, NMa Energy Chamber, AFM, NZa) feature as purportedly representing *subjects* ('S') will be described. Such claims concern their character and properties, their tasks and their instruments, *as* public institutions (see Figure 6).

Figure 6 (reprint). The institutional representative claim



Pre-eminent *makers* ('M') of such institutional-representative claims are lawmaking bodies. In this chapter, representative claims made by the *Dutch* lawmaking body about the four selected IRAs will be explored. In the Netherlands, this body (called *wetgever*) formally consists of the government and legislature both. Acts of legislation and their explanatory memoranda are often drawn up by the government, then amended and adopted by a majority in the parliament. Where necessary, the exact claim-maker will be described.

In the formal acts of delegation to IRAs, in the goals and purposes delineated for them, *objects* ('O') or intended constituencies are constructed. This is what makes the claim representative, or representational. The four IRAs are claimed to work, speak or act on their behalf: to represent them. As depictions of *referents* ('R'), however, who can be represented in many ways, these are deliberate portrayals of the nature and interests of

people, constructed in such a manner as to fit the character and properties of the subject.

The *audience* ('A') of these legislative-representative claims, lastly, is the general public. An important part of this public is the citizenry of the Netherlands.

The present chapter consists of within-case analyses of the institutional-level representative claims made about the four selected IRAs. After discussing two of the first IRAs established in the Netherlands, the chapter moves to a discussion of turn-of-the-century political and policy debates about IRAs. In these debates, a constituency for independent regulatory authorities was formulated. Next, the chapter explores the subsequent representative claims made about the four selected IRAs. Two of these IRAs will therefore be discussed twice; this serves to demonstrate the dynamic and historically changing content of representative claims (cf. Saward 2010: 160).

In Chapter 6, institutional-level representative claims made by the four IRAs themselves will be discussed.

5.1 The first independent regulatory authorities in the Netherlands: temporary arbiters in a general economic interest

The first IRAs in the Netherlands were established at a time when the delegation of tasks to independent bodies in this polity, as described in Chapter 2, became increasingly contested. The centrist 'Purple' Social Democratic-liberal government that, upon taking office in 1994, wanted to embark on an ambitious EU-driven policy program of liberalizing and marketizing various economic domains in order to stimulate economic growth, was soon confronted with a domestic advisory report that criticized the 'uncontrolled growth' of *zelfstandige bestuursorganen* ('autonomous administrative organs') (ZBOs). The delegation of individual decision-making authority to independent bodies was argued to contribute to the 'hollowing-out' of parliamentary democracy (Algemene Rekenkamer 1995). For this reason, when the Dutch lawmaking body in 1997 established its first IRA – an authority to accompany the liberalization and marketization of the domestic telecommunications sector – it put extra care in motivating and justifying this act. It made a representative claim about the body.

The Independent Mail and Telecommunications Authority (OPTA): the pioneer

The telecommunications sector was the first Dutch networked utility domain to be opened up and liberalized. The state postal services and telephony monopolist PTT had already been privatized in 1994, creating a private monopoly in which the state retained shares, called KPN. Now, also prompted by an EU directive (90/387/EEC), competing telephony providers such as Tele2 would be allowed in the sector. To be able to compete, however, these new entrants would need access to the fixed telephony infrastructure of the

dominant market party KPN.[48] To ensure a continuing flow of communications between multiple telephony providers, moreover, 'interconnection' between their networks would have to be mandated. In 1997 and 1998, therefore, two acts of legislation were adopted by the Dutch legislature. The first act established an IRA for the telecommunications sector; the second act provided the regulatory framework for liberalization, for the identification and regulation of dominant market parties, and to ensure some other goals (see below). The second act bestowed regulatory and supervisory tasks to the IRA already created by the first act, called *Onafhankelijke Post- en Telecommunicatie Autoriteit* ('Independent Mail and Telecommunications Authority') (OPTA).[49]

The Dutch lawmaking body positioned the newfound telecommunications IRA, to which it bestowed regulatory and supervisory tasks, as independent from the electoral-representative political sphere in its individual decisions. It was a ZBO. Even though political control and accountability mechanisms over it would be retained, enabling the government to exercise a formal 'system' responsibility over it scrutinized by the parliament, the possibility of electoral control would be removed from OPTA's individual decisions. These could only be checked by the judiciary. In the 1997 act of foundation and the accompanying explanatory memorandum, the lawmaking body (maker) argued OPTA's independence (subject) would enable it to further certain 'interests' (object) in a way the electoral sphere could not. It stated:

> *The societal and economic interest* (object) *involved in the tasks is* best *served* (…) *with a division of tasks between a minister and an* arms-length *specialized administrative organ* (subject). (Second Chamber (SC) 1996-1997a: 2; cf. ibid. 3) (emphases added)

This representative claim – about an independent body (subject) claimed to *better* serve societal and economic interests (object) than an electorally controlled body – was made in law. Its *audience* ('A') was the citizenry of the Netherlands.

The Dutch lawmaking body motivated the independence of the newfound IRA from the political sphere with reference to the state shareholdership in KPN. Electoral control over the body's individual decisions, or the possibility thereof, was argued to endanger its impartiality (subject) in the eyes of new market parties. OPTA was among other tasks to act as umpire in disputes between market parties about interconnection, and to force dominant parties to grant competitors access to their network in a non-discriminatory and cost-oriented manner. Any semblance of a conflict with state interests in KPN was

48 It would be too costly for these new entrants to create a fixed telephony network themselves. If KPN did not allow them to use its network, market competition would never get off the ground. Therefore KPN was to be forced to grant access.

49 The OPTA would be given regulatory and supervisory tasks in the postal services sector as well. The act aimed at the liberalization and regulation of this sector was adopted in 2000. Because the key legislative-representative claim about this IRA was made at its establishment in 1997, however, only the telecommunications acts will be discussed here.

therefore to be avoided, the more – so the Dutch lawmaking body argued – because a good investment climate had to be created in the telecommunications sector. OPTA's individual decisions were therefore to be made formally independent from sectoral interests as well. The lawmaking body claimed that the decisions of the independent body would instead be based solely on 'specialized expertise' (subject) regarding the sector (ibid. 5).

In the memorandum to the 1997 act of delegation, however, the Dutch lawmaking body claimed that OPTA was independent 'in a more general political sense' as well (ibid. 3). It likened the newfound body's role, next to umpire (subject) and market maker (subject), to that of the central bank: a 'guardian (subject) of general societal and consumer interests (object)' (ibid. 2). A year later, in the 1998 Telecommunications Act, the Dutch lawmaking body further delineated these interests and their constituencies as the *object* in its representative claim about OPTA. In this second act, the goals of the legislative framework, the role of OPTA in it, and who would benefit from it were explicated.

The liberalization and marketization of the telecommunications sector – a 'cornerstone of economic activity in our country (object)' – was here claimed by the lawmaking body to be in the interest of the economic 'competitiveness of the Netherlands (object)' (SC 1996-1997b: 2). Yet the regulatory framework that would warrant the accessibility and quality of the existing networks was claimed to be of 'economic and societal interest (object)' both (ibid. 3). In the use of and access to telecommunications services, certain interests specifically portrayed by the lawmaking body as 'societal' (object) had to be protected (ibid. 4). These interests of society were portrayed as:

- universal service provision (a guaranteed access to basic telecommunications services for everyone)
- 'real' freedom of choice to users of telecommunications providers[50]
- privacy
- state security

The lawmaking body therefore portrayed the objects in the representative claim about OPTA, although rather vaguely and implicitly, as the national 'economy' (economic actors) and 'society' (societal actors). The national economy would benefit from the liberalization legislative package, and the IRA's tasks in it, but certain 'societal' interests had to be protected.[51] The *referents* ('R') of these objects were, ultimately, human beings, but portrayed as either economic or societal actors.[52] In terms of the rationales for

50 Somewhat confusingly, the lawmaking body portrayed user freedom of choice in telecommunication providers as a 'societal' interest rather than a primarily 'economic' one.

51 In the preamble to the act of delegation to OPTA, its tasks, too, were claimed to be in the interest of the economic 'efficiency' of the postal and telecommunications services (OPTA Act 1997).

52 Which constituency or interest should take precedence in the case of a conflict in an individual decision, however, was not clearly delineated.

regulation discussed in Chapter 2: the Dutch lawmaking body employed an economical-theoretical market failure rationale together with a rationale in which non-economic, societal interests were to be protected.

To independently further these interests so portrayed, OPTA would oversee and enforce market compliance to the Telecommunication Act's regulatory framework. It would:

- identify and regulate dominant parties (*in casu* KPN) by compelling them to grant network access to competitors in a non-discriminatory, transparent and cost-oriented manner
- act as umpire in interconnection disputes between market parties
- set maximum end user tariffs
- appoint one market party (*in casu* KPN) to universally provide basic telecommunications services
- perform a number of executive tasks related to market access
- provide advice to the Ministry of Transport, Public Works and Water Management on regulatory and supervisory policy

The newfound IRA would thus stand or act for economic and societal actors – and in its decisions, represent their interests – in ways the traditional electoral sphere would – or so the lawmaking body claimed: could – not.

The Electricity Act Implementation and Supervision Service (DTe): the unwanted child

The electricity and gas sectors in 1998 and 2000 were the following domains in the Netherlands to be opened up and liberalized. At the time, virtually all domestic energy supply companies were publicly (co-)owned by provinces and municipalities, while electricity generation was coordinated by four production companies cooperating with the state in a national association.[53] Energy distribution networks were vertically integrated in production and supply companies. Although the marketization and liberalization of the domestic energy sector had been discussed since 1995, two EU directives – the Electricity directive (96/92/EC) and Gas directive (98/30/EC) – now required implementation. In an inverse trajectory as followed in the telecommunications sector, privatization in the energy sector would follow market liberalization. In 1998, the Dutch legislature therefore adopted an act that would first allow new market entrants to energy production, distribution and supply, and hive off independent energy *netbeheerders* ('network operators') from their parent companies. Then, the industrial and household consumer markets would be opened up in steps. The Electricity Act – and in 2000, the Gas Act – contained a regulatory framework to implement these changes, and to compel

53 The production of natural gas from the Groningen gas field was – and is – organized in a state-market monopolist partnership as well.

the newly formed independent energy network operators to grant supply companies access to their networks. To these ends, and others as well (see below), in 1998 another IRA was established: the *Dienst toezicht en uitvoering Elektriciteitswet* ('Electricity Act Implementation and Supervision Service') (DTe).[54]

The initial representative claim made by the Dutch lawmaking body about this IRA was only limited, however. DTe, first, was positioned as *not* fully *de jure* independent from the political sphere in its regulatory and supervisory individual decisions. The government, scrutinized by the parliament, would formally retain the capacity to give special instructions to the authority. This was to be done with reluctance, making DTe *de facto* independent (De Rijke 2002: 63; Lavrijssen 2006: 136; De Jong 2006: 9). In the memorandum to the Electricity Act, the lawmaking body expressed regret that yet another 'special' IRA, at odds with the proclaimed current 'hesitance' to establish such separate bodies, had to be set up (SC 1997-1998: 7). It was considered prudent, nevertheless, to not bother the general competition authority NMa with energy regulatory tasks. Still the legislature wanted the government to remain fully politically responsible for certain of these tasks, such as energy supply to 'captive' customers (SC 1997-1998: 7-8).[55] In addition, the Minister of Economic Affairs was not a direct shareholding party in the energy sector. The DTe was therefore not made a formal ZBO.

The energy authority was, however, positioned as independent from sectoral interests. As one of its tasks would be to compel network operators to grant supply companies access to their networks, this position was claimed by the lawmaking body (maker) to guarantee DTe 'neutrality' (subject) in individual decisions. Still, this *ex ante* regulatory task would be performed in formal consultation with the energy sector, on the basis of their proposals (SC 1997-1998: 7). The representative claim about the DTe as independent body was therefore limited in this regard as well. The Dutch lawmaking body in 1998 seemed to consider the representation of the interests of certain constituencies best off with *de jure* electoral control, in addition to formal input from sectoral interests.

The constituencies whose interests DTe through its task performance was to act or work for were, in the memorandum to the Electricity Act, not very clearly portrayed either. The stated goal of the legislative framework was to give 'individual customers and suppliers' (object) through liberalization more 'freedom of choice' on the energy market (SC 1997-1998: 1). Yet this was not argued for in terms of any benefits to them, only stated as such. In addition, a regulatory framework was installed aimed at a 'reliable', 'sustainable' and 'efficient' energy supply despite liberalization, but no clear-cut constituencies of these interests were delineated either. Captive customers (object) were portrayed as a constituency to be protected against cut-offs and price hikes.

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54 The name of this IRA has been subject to constant change since its inception. At its foundation, it was called like this, but with the later adoption of the Gas Act in 2000, its name was changed to *'Energy' Implementation and Supervision Service* (DTe). Because the key legislative-representative claim about this IRA was made at its establishment in 1998, only the Electricity Act will be discussed here.

55 'Captive' customers are customers bound to a monopolistic network, without an option to switch to another network. This creates the potential for monopolistic abuse, such as price hikes.

At least for energy customers and suppliers, and captive customers (objects), then, DTe (subject) would oversee and enforce compliance to the Electricity Act's regulatory framework. It would carry out activities to implement this framework as well. The IRA would:

- check the newly formed network operators' independence, and compel them to grant network access to supply companies in a non-discriminatory and transparent manner
- in consultation with the sector, set technical conditions and tariff structures for network access, while applying an efficiency bonus to tariffs (the so-called 'x' factor).
- prepare supply licenses
- regulate supply tariffs during the phased opening-up of the consumer market
- advise the Minister of Economic Affairs on energy regulatory and supervisory policy

The IRA – *de facto* but not *de jure* independent – would in its individual decisions represent the interests of energy (captive) customers and suppliers in ways the electoral sphere henceforth would not.

Temporary and exceptional independent bodies in a general economic interest

In both cases, the Dutch lawmaking body pictured the new IRAs set up in the late 1990s as temporary and exceptional bodies. Their formal or *de facto* independent powers were claimed to only be needed during a transitional period towards fully liberalized economic domains (SC 1996-1997a: 9-10; SC 1997-1998: 6-7). Once telecommunications and energy sectors with full marketplace competition would have been realized, OPTA and DTe would either cease to exist, or be merged with the general competition authority *Nederlandse Mededingingsautoriteit* ('Netherlands Competition Authority') (NMa). The NMa – a third IRA, but not a case in this study – was established in 1998 as well, to oversee market compliance to competition law, to investigate and disband economic cartels, and to prevent the abuse of economically dominant positions in the entire Dutch economy.

The Dutch lawmaking body portrayed the tasks and independence of the two sectoral IRAs as limited and circumscribed. The independence of OPTA was claimed to consist only of an 'executive application of rules to individual, concrete cases' (SC 1996-1997a: 2; cf. ibid. 6, 12). This was written even though the telecommunications authority would weigh interests, as it would in its umpire decisions on interconnection. In the words of one scholar, the OPTA was made an IRA with 'limited elbow room' (Ottow 2003: 14). DTe had to formally consult with sectoral interests, and was not made formally

independent from politics at all. Neither, it should be noted, was NMa.[56] From 1999 onwards, the energy regulator was re-positioned as a 'chamber' of the competition authority to improve mutual coordination (SC 1998-1999).[57]

The independent powers of the two exceptional but temporary sectoral IRAs were exercised in the name of rather general economic and societal interests (or no clearly formulated interests at all). Made in a context of 1990s-era marketization and liberalization, the national economy and society were portrayed as constituencies in the representative claims about the newly independent bodies. This rather general representative portrayal, however, would soon give way to a more intricate one.

5.2 The public and its interests: constructing a constituency for IRAs in policy debate

At the turn of the twenty-first century, the privatization and marketization policies undertaken by various Dutch governments since the 1980s became increasingly subject to public criticism in the Netherlands. While this criticism had for years been primarily voiced by smaller left-wing political parties and trade unions, a flurry of critical media reports now made these policies a matter of more widespread controversy (Stellinga 2012: 52). The autonomization of the Dutch national railways (not discussed in this chapter) was by many considered a failure, the liberalization of the taxi sector likewise, and the privatization of energy companies was anxiously awaited. The independent decisions of the telecommunications authority OPTA were regularly blocked by courts, while the energy authority DTe was confronted with many difficulties in its attempts at regulation in consultation with the sector (Lavrijssen 2006). The 'Purple' government had already decided not to proceed with its planned privatization of water supply companies.

In Dutch policy-making circles, a number of important advisory bodies too joined the critical chorus. This initiated a period of refinement and entrenchment of the institutional-level representative claims about IRAs. In the ensuing political and policy debate – described below – a new, rhetorical constituency for IRAs was constructed: the 'public' and its interests. The notion of public interests – rather than general economic or societal ones – to be represented by independent bodies in privatized and marketized economic domains would turn out to be an influential rhetorical construct. The exact nature of this public and its interests, however, was a topic of contestation.

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56 The NMa in 1998 had not been made *de jure* independent because of the expected political sensitivity of some of its *ex post* supervisory decisions in its application of competition law. Yet like at DTe, the government stated it would be reluctant in giving directions in individual decisions (SC 2000-2001a: 2-3).

57 Since the energy authority as formal-legal entity would continue to exist, this merger created a hybrid energy-competition authority consisting of two IRAs that were *de facto*, but not *de jure* independent from the electoral political sphere, but completely independent from market interests. This situation would continue to exist until 2005 (see below).

Advisory body criticism

The period of refinement and entrenchment of the institutional-level representative claims about IRAs was kicked off when the *Raad van State* ('Council of State') – the foremost constitutional advisory body to the Dutch government – in 2000 signalled a 'turning point' in the societal debate about the privatization and liberalization of networked utility domains (Raad van State 2000: 50). The Council urged the government to 'rethink the balance' between the ongoing marketization of these domains and the guaranteeing of certain 'interests', such as the continuous availability, quality and reasonable price of goods and services (ibid. 49). After years of privatization and marketization policies in the name of market efficiency and lower prices, the role of the state in liberalized domains, so the Council stated, had to be rethought. This included the 'important' role of IRAs (ibid. 50).[58]

Another important advisory body to the government – the *Wetenschappelijke Raad voor het Regeringsbeleid* ('Scientific Council for Government Policy') (WRR) – that same year went into more detail about the role it desired of IRAs in marketized domains. The council stated that the Dutch government 'too often too unthinkingly and too unprepared had made a choice for marketization, without having been sufficiently aware of the (necessity of guaranteeing) the public interests at stake' (Wetenschappelijke Raad voor het Regeringsbeleid 2000: 162). It also took a stance in the debate about rationales for regulation and their (exclusive) basis in economic theory (see Chapter 2). In the view of the WRR, it was up to the democratic polity – the standard model of representative democracy – to decide which 'interests' it considered to be of 'societal' importance. If these interests according to this same polity would require government intervention, they became 'public' interests.[59] Economic theory could be a helpful aide in making this decision, but should not be the exclusive basis for determining regulations.

The WRR then staked out various options for public interest realization: from a direct provision of goods and services by democratic government itself, to a marketized delivery of goods and services supervised by the state. Marketization, either way, it considered a means to an end. Public interests, moreover, could be conceived of as the desired end result, a boundary condition, or an incentive of the production of goods and services. They could be formulated from either an economic rationale – as resulting from an economic analysis of market failure – or a non-economic rationale: as valuable goods or boundary conditions to be pursued in and of themselves, for instance as the result of citizenship rights (ibid. 46-48). The 'public' (object) in liberalized domains could therefore consist of people (referent) defined as economic actors (object), or defined as non-economic actors (object).

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58 Other than urging a general 'rethinking', however, the Council of State did not go into detail.

59 The WRR thus considered 'public' interests to be those interests of which the democratic polity had decided that the state should be involved in their realization. What made something a public interest, in the view of the WRR, was that a democratic public *decided* that something was in its interest.

Whatever the chosen rationale, IRAs, according to the advisory body, had an important role to play in guaranteeing, securing, furthering or advancing public interests.[60] This role, indeed, it argued had already grown in recent years, although the importance of IRAs in this respect was not yet acknowledged by the political sphere (ibid. 84-85, 102-103). The WRR therefore called on the Dutch legislature to henceforth more explicitly formulate *within the law itself* the public interests at stake in economic and societal domains such as telecommunications, energy and other ones; to delineate the hierarchy and mutual relationship of these public interests (and whether they were considered end products, boundary conditions or incentives); to stake out by which mix of marketization, privatization and regulatory instruments they were to be achieved; and to elucidate in which way these public interests were to be guaranteed, advanced or promoted by IRAs (ibid. 55-56).[61]

This advisory report, and the constituency construction in it, incited a government response (cf. De Pree 2008: 292).

Government response

The centrist Social Democrat-liberal government responded to these advisory reports and the ensuing parliamentary questions in a number of notes. In these, it delineated the position of IRAs and the constituency they represented with increasing clarity. In two notes issued in 2000 and 2001, the government offered a list of public interests to be guaranteed in networked utility domains, such as telecommunications, energy, water services and public transport (SC 1999-2000). It agreed with the WRR's position that the task of identifying public interests should be reserved to the democratic polity, and in viewing marketization as a means to the end goal of their realization (SC 2000-2001b: 5-6). The interests were:

- an efficient market structuring
- universal service provision
- protection of captive customers
- security of continuous supply
- quality, environmental-friendliness, safety, public health
- efficient supervision

60 The WRR here applied the Dutch verb *borgen*. This literally translates as: 'to guarantee' or 'to secure'. This verb does not necessarily imply active intervention. Rather, it implies making sure that something – a desideratum – is there, with various options to attain this state. According to the WRR, *borgen* was the right verb to describe the role of government in securing public interests, and the role of IRAs as well.

61 The WRR stated that it would not suffice to 'articulate public interests merely in a vague and symbolic manner in an Explanatory Memorandum' to an act of legislation. Public interests were henceforth as much as possible to be formulated within the law itself (Wetenschappelijke Raad voor het Regeringsbeleid 2000: 56). These suggestions, however, seemed to run counter to what has been described by legal scholars as the Dutch legal tradition to *not* explicitly mention goals, or frameworks for weighing them, in legislation and accompanying texts (Dommering et al. 2003: 26).

The 'Purple' government did not make clear which interests it considered essentially economic ones, and which ones non-economic interests.[62] Yet it proclaimed supervision to compliance to regulations to secure public interests 'indispensable'. This, the government (maker) claimed, was to be performed by 'specialized' (subject) agencies independent from both the political sphere and sectoral interests: IRAs. Only then, an 'objective' (subject) securing of public interests (object) would be possible (SC 1999-2000: 11). Sometimes, moreover, IRAs were to be given room to detail legal norms themselves.

The proclaimed central role of independent bodies in public interest representation in liberalized economic and societal domains was confirmed in a third government note, appearing in 2001. Independent supervision to compliance to regulations securing public interests was here depicted as a distinctive state function (SC 2000-2001c). The Dutch government now defined independence as a desirable trait, rather than as just a position vis-à-vis central government. To be independent meant being 'objective' (subject), 'fact-based' (subject), 'professional' (subject) and 'transparent' (subject). If the state held interests in economic and societal domains, supervisory bodies were to be *de jure* independent from the political sphere as well. This was the case in the telecommunications, energy, and also the financial sectors. The decisions of IRAs were to be based on 'specific expertise' (subject) rather than political involvement (ibid. 12).

According to De Pree (2008), this newfound emphasis on the constituency of the public and its interests in Dutch policy-making circles around 2000 influenced draft legislative frameworks for the liberalization of certain economic or societal domains. The draft Passenger Traffic Act was to bring about market competition in regional public transport services, and to establish a *Vervoerskamer* ('Transport Chamber') at the competition authority NMa. While in the draft explanatory memorandum to the law, no mention of public interests was made, in the later memorandum they were explicitly defined.

A vision on market supervision

After the demise of the centrist Social Democrat-liberal government in 2002, and the coming into office of a new centre-right Christian Democrat-liberal government, the Second Chamber of the parliament in 2003 once more passed a motion asking for a formal position by the government on the proliferation of IRAs in the Netherlands. In addition to telecommunications, competition, energy and public transport authorities, in the early 2000s new financial market authorities had been set up, while healthcare and consumer authorities were in the process of establishment (these will be discussed below). Midway 2004 a response appeared in the form of a new government note entitled 'Vision on market supervision' (SC 2003-2004a). In this report, after a period of refinement and entrenchment, a representative claim about IRAs was made – about

62 The government employed the terms 'citizens', 'consumers' and 'customers' interchangeably throughout the documents.

independent authorities (subject) regulating and supervising compliance to legislative frameworks meant to represent public interests (object) – the basic form of which would be influential to the claims made about existing and new bodies studied in this chapter.

The government, the 2004 report held, in the past years had created IRAs with increasing frequency. These, it was claimed, 'guide the market process and secure public interests' (ibid. 1). IRAs were portrayed as having an 'umpire' function: they made sure that citizens and businesses kept by the rules set for the playing-field by the electoral realm. Together, the electoral political sphere and IRAs secured interests of the public (ibid. 3).

The principle of the political independence of IRA individual decision-making, moreover, the government at this point proclaimed 'uncontested' in the Netherlands (ibid. 15). Although it would retain political control and accountability mechanisms to enable a system responsibility scrutinized by the parliament, and create the regulatory frameworks, the individual decisions of IRAs were to be made beyond full electoral control. Instead of on 'today's thinking in politics' (ibid. 8), IRA decisions were to be made on the basis of expertise (subject) (ibid. 15). The state ownership of shares in utility domains such as telecommunications and energy was now considered an 'additional' motivation for independence.[63] Naturally, because any semblance of a conflict of interests in decisions was to be avoided, IRAs were to be independent from sectoral interests as well (ibid. 3, 12).

Yet, the government held, the independence of IRAs from the electoral political sphere had to be restricted as much as possible to individual decisions. Still it admitted that regulatory frameworks 'by definition' contained open norms, which offered the independent bodies freedom of interpretation. The government claimed it sometimes was desirable when IRAs detailed these open norms themselves (ibid. 16). The political sphere, however, would through additional rules have to prescribe how IRAs were to weigh public interests against each other (ibid. 17).[64] IRAs were not to balance various public interests out themselves; this the government considered a 'political' task (ibid 9).

The public interests to be represented by politically independent and expertise-based IRAs, and their basis in economic or non-economic rationales, in the 2004 note also were clearly delineated. Markets, the government stated, when functioning well, through a more efficient allocation of resources enlarged the general welfare. They so contributed to 'the' public interest (meaning the general interest) (ibid. 2). IRAs, then, were to ensure markets functioned well, by removing impediments to competition and combating consumer information asymmetry. A welfare economic analysis of the costs of market failure was to be balanced against the (possible) costs of public intervention. How the value of the public interest at stake would be weighed against the costs of

63 In the Explanatory Memorandum to the 1998 act of delegation to OPTA, this was considered the primary motivation for its independence from the political sphere.

64 The example the government gave was the interest of market competition versus 'other' public interests (SC 2003-2004a: 17).

intervention, however, was considered a political question.[65] The represented public on the one hand so was economically defined: people (referents) were depicted *as* economic actors benefiting from enlarged welfare (object). On the other hand, IRAs were also to represent not necessarily economic public interests, such as universal service provision, or the quality and safety of products and services.[66] Rather than influencing market processes with the goal of improving competition, in these cases IRAs were to help condition the *outcomes* of market processes so that non-economic public interests would be secured (ibid. 6). The latter interests had a non-economic basic: they belonged to people (referents) defined and represented – for instance – as citizens (object).

The economic sub constituency of 'the consumer', moreover – depicted as the 'demand side' (object) of the market mechanism (ibid. 3) – according to the government had recently come under more specific attention. Strengthening the marketplace position of consumers in liberalized economic or societal domains was increasingly considered an important task for IRAs. This could be done by consumer information provision, either actively or to be mandated for market parties, and by reducing switching costs (ibid. 5). A more complex picture of the represented constituency had thus been constructed: a public of economic and non-economic actors, in which the consumer constituted a special sub constituency.

Permanent independent bodies in an economic and non-economic public interest

The public criticism of the liberalization and marketization policies of the 1990s prompted a period of refinement and entrenchment of the representative claims about IRAs in the early 2000s. In political and policy debates, a constituency was constructed: the public and its interests. IRAs in the Netherlands could henceforth be set up to secure economic public interests (efficient market competition, consumer transparency) or non-economic public interests (universal delivery, the quality and safety of networks). They could do either or both; the electoral political sphere was to determine this in legislative frameworks. The independence of regulatory and supervisory bodies, moreover, was increasingly defined as an institutional trait: as being objective,

65 The government here seemed to respond to a 2003 report issued by an economic advisory bureau issued in critical response to the aforementioned WRR study. This report, entitled 'Calculus of the public interest', claimed a welfare economic analysis of the costs of market failure and government intervention could be the *only* rationale to justify intervention. It conceptualized public interests as 'complex external effects' to be mitigated by the state if, and only if, the economic costs of non-intervention were higher than those of intervention. While the government did not adopt this reasoning in its ultimate justification of intervention (which it considered to be the democratic process), it agreed that a welfare economic analysis could be an aide in decision-making (Teulings, Bovenberg and Van Dalen 2003; De Pree 2008: 312-313; Stellinga 2012: 65-66).

66 In the 2004 report, the government displayed ambiguity in the question of whether the improvement of market functioning should be considered a public interest or not. Some sentences are literally framed this way: 'Market supervision also consists of overseeing compliance to laws and regulations that have the securing of (other) public interests (next to improved market competition) as their goal.' (SC 2003-2004a: 6). The zest of the report, however, indicates the government viewed the improvement of market functioning as one public interest to be secured among other, non-economic public interests, such as universal service provision or the quality and safety of goods and services.

professional and expertise-based. The political independence of regulatory agencies in domains in which the state held interests was now considered an established principle. IRAs were awarded a more permanent place in the polity: as independent representatives of the public adjacent to the elected parliament in domains transformed in previous years by liberalization and marketization policies.

5.3 Independent regulatory authorities as public interest representative claimants

During the period of refinement and entrenchment of the institutional-level representative claims about IRAs, and since, the existing independent bodies were delegated new regulatory and supervisory tasks, while additional bodies were set up in other economic and societal domains. Public transport, privacy, financial markets, healthcare, consumer rights, gambling and emissions authorities were now established in the Netherlands. The telecommunications and energy IRAs OPTA and DTe had been given new functions, while the general competition authority NMa was made *de jure* independent. As will be shown, the constructed constituency of a public, its nature and interests economically as well as non-economically defined, now featured prominently in the institutional-level representative claims about the four IRAs selected for analysis in this chapter. Nearing the present day, moreover, the economic constituency of the consumer increasingly became a purportedly represented object on its own.

The Independent Mail and Telecommunications Authority (OPTA): more pronounced, more important

New EU directives of 2002 prompted the Dutch lawmaking body in 2004 to revise and amend the existing telecommunications legislative framework.[67] While the Telecommunications Act of 1998 had been primarily aimed at opening up the fixed telephony market dominated by KPN – a task which OPTA had found difficult to realize (Ottow 2003) – it did not account for the emergence of the internet, nor did it entirely encompass the television cable sector (Dommering et al. 2001). Technological developments, however, now made 'convergence' – offering multiple telecommunications services on a single network – increasingly possible. If market dominances were removed, this would increasingly enable market competition between various networks.[68] For this, however, the existing regulatory framework had to be broadened in application and be made 'technology neutral', in order to potentially

67 These included, among others, the Access Directive (2002/19/EC), the Framework Directive (2002/21/EC), Universal Service Directive (2002/22/EC) and the Competition Directive (2002/77/EC).

68 Internet, for instance, could by 2004 be delivered via the fixed telephony network, but also via television cable and other broadband networks, as well as – increasingly – mobile phones. Telephone services could likewise be delivered via television cable or the internet, while television, in turn, could – increasingly – be watched online. This lessened the emphasis of the legislation on fixed telephony networks only.

affect *all* electronic communications networks and services. Member state IRAs such as OPTA, acting on advice of the European Commission (EC) would henceforth be able to demarcate, analyse and regulate a variety of electronic communications submarkets in terms of market dominance, and impose the obligations they considered 'appropriate' (SC 2002-2003: 7). IRAs would also retain their role as protectors of consumer interests. This lead to a new and more striking legislative-representative claim by the Dutch lawmaking body about the independent telecommunications authority OPTA.

In the explanatory memorandum to the 2004 revision of the Telecommunications Act, the Dutch lawmaking body described the coming role of the IRA in the sector as 'more pronounced' and 'more important' (ibid. 10, 12). No new claims were made regarding the independence of the authority from the electoral political sphere and sectoral interests; it would remain a ZBO. Yet OPTA would now receive 'broad competences' and the ability to determine 'how and in which measure' its instruments would be used (ibid. 10). The lawmaking body (maker) stated the IRA had to be 'well-equipped' (subject) with 'sufficient room for manoeuvre' (subject) to enable a more 'flexible' (subject) and 'effective' (subject) performance of its regulatory tasks. Such attributes of 'well-functioning supervision' (subject) the Dutch lawmaking body (maker) claimed was 'indispensable' to a 'vital sector' (object) (ibid. 12). One part of the representative claim on OPTA regarding the telecommunications sector was now explicitly inserted in a novel legislative article. By law, OPTA (subject) through its independent decisions was to 'contribute to the realization' of the goals of the EU directives by 'promoting competition' (object), 'developing the internal market' (object) and 'furthering the interests of end users (object) in terms of choice, price and quality' (Telecommunications Act Revision Act 2004 Art. I art. 1.3).

These purportedly represented interests and their constituencies were in the memorandum to the 2004 revision act more clearly delineated than in 1998. The Dutch lawmaking body now explicitly claimed to put the 'interests of citizens (object) and businesses (object)' central (SC 2002-2003: 11). The chances of new market entrants against dominant providers had to be advanced, while the latter's investments in networks were not to be discouraged (ibid. 6, 9). The revamped OPTA would in its independent decisions have to weigh the opposing interests against each other, and decide in the interest of the economic development of the sector (object) – which was in the interest of the economic competitiveness of the Netherlands (object) (ibid. 11). OPTA would also represent various non-economic 'general' interests in its decisions, however, which could not be realized through market competition alone (ibid. 7). Universal provision of a number of telecommunications services against a reasonable price, as well as privacy and state security, were claimed to be in the interest of every individual citizen (object) (ibid. 9, 11). Interestingly, very low prices were claimed not to be in the long-term interest of citizens, as they would also benefit from corporate profit-based investments in the quality and capacity of networks (ibid. 12).

The economic sub constituency of the consumer (object), as stated in the 2004 government report 'Vision on market supervision' (see above), was more clearly delineated than before. His interests in the present-day telecommunication sector were depicted as

consumer market transparency – in terms of more transparent provider contracts and supply of information – and the ability to switch telecommunications providers at low costs (ibid. 11). Consumers were so distinguished from citizens – being both depictions of people (referent) – and their interests variously represented by OPTA.

For the economy, sector, telecommunications businesses and consumers, and citizens, then, the enhanced OPTA would independently perform a number of new and existing tasks. It would:

- based on EC recommendations, demarcate domestic electronic communications markets, identify dominant market parties, and decide on appropriate regulations for them; these could now vary from tariff controls to non-discriminatory and transparent network access
- continue to appoint a universal service provider (*in casu* KPN)
- monitor end user tariffs
- continue to act as umpire in interconnection disputes
- continue to perform executive tasks related to market access
- continue to advise the Minister of Economic Affairs on telecommunications
- regulatory and supervisory policy
- participate in the EU regulatory network BEREC
- actively publish consumer information in order to reduce information asymmetry

OPTA would – so the lawmaking body claimed – independently from the electoral sphere represent public interests in its decisions.

The NMa Energy Supervisory Service (NMa-DTe): confirming an expanded role

New EU directives prompted the Dutch lawmaking body in 2004 to also revise the existing energy legislative framework.[69] The aim of these directives was to harmonize domestic energy regulatory frameworks, speed up consumer market liberalization, and create cross-border wholesale markets. In the Netherlands, however, many domestic energy production and supply companies in the past six years were privatized and sold to foreign corporations. Power black-outs and consumer complaints had created public controversy (De Jong 2006: 23). The two energy acts had been in a state of constant re-amendment, as the lawmaking body from 1998 onwards had implemented many new rules, some of which in order to open up the consumer market years earlier than planned.[70] DTe – a chamber of the competition authority NMa – amidst sectoral hostility had had to act in a regulatory fashion not envisioned by the original acts, and was frequently blocked by the judiciary (Lavrijssen 2006). Yet the IRA had also

69 These consisted of a new Electricity Directive (2003/54/EC) and a new Gas Directive (2003/55/EC).

70 Originally, this was planned for 2008, but the political decision was made to liberalize the household consumer market already in 2004 (De Jong 2006: 8).

advised the government on further liberalization, started with quality regulation of the energy networks, structurally monitored the markets, arbitrated in disputes and set up consumer helpdesks (De Jong 2006). This expanded task performance was confirmed in the 2004 revision, which coincided with the political decision to make NMa *de jure* independent.[71] This lead to a new and more explicit representative claim regarding DTe.

Regarding NMa, first, the Dutch lawmaking body stated the competition authority henceforth had to be formally 'free from political interference'. Its decisions entailed a discretionary weighing of interests, and 'submitting to all kinds of partial interests' were claimed to 'hurt the Dutch economy as a whole'. They had to be based on 'specific expertise': on market analyses and the 'economic' consequences of competition impediments, rather than on political considerations (SC 2000-2001a: 3). These same arguments for independence from the electoral political sphere were stated to apply to the energy sector, the more so since the state through the 2005 nationalization of the national electricity network operator TenneT had become an interested party (Lavrijssen 2006: 136). The Dutch lawmaking body considered it necessary, however, to retain the 'specific expertise' (subject) of the energy chamber DTe (SC 2003-2004b: 3). A 'powerful and well-equipped' energy authority (subject) was depicted a 'necessary precondition' to the further economic development of the energy sector (object) (ibid. 8). DTe would therefore continue to exist as organizational unit with a distinct identity within the competition authority (ibid. 3). One part of the representative claim about NMa-DTe was explicitly inserted in a new legislative article. By law, the independent energy authority (subject) in its task performance was to 'take account of the interest of the advancement of a non-discriminatory and transparent electricity market and gas market characterized by real and efficient competition (object)' (Electricity and Gas Act Revision Act 2004 Art. ID).

These purportedly represented interests and their constituencies were in the memorandum to the 2004 revision act, too, more clearly delineated than in 1998. The Dutch lawmaking body claimed the EU directives constituted a 'further improvement in securing the public interests' (object) on the domestic energy market. They would also 'strengthen the position of consumers' (object) (SC 2003-2004b: 1). According to the lawmaking body, multiple public interests were secured by creating a competitive marketplace, setting a regulatory framework for it, and delegating independent tasks to NMa-DTe (ibid. 4). Marketization was argued to already have furthered the interests of increased competition, improved services and more efficiency (ibid. 5). The revised regulatory framework, and NMa-DTe's tasks in it, would ensure that energy network operators would continue to grant non-discriminatory access. They would also secure other public interests: the economically efficient operation and societally acceptable quality and safety of the energy networks. These would, in turn, guarantee the non-economic public interests of supply security and continuous availability of energy. Lastly, in line with the 2004 government

71 The legislative process to make the NMa *de jure* independent had started in 2001, but for various reasons was only completed in 2005. The 2004 revision in the energy legislative framework therefore preceded the formal change in status of NMa, and its chamber DTe, by a year. From 2005 onwards the energy revisions, already implemented, pertained to the DTe as fully integrated directorate of the NMa.

report 'Vision on market supervision' (see above), the economic constituency of the consumer (object) was more clearly delineated than before. The lawmaking body claimed the position of household consumers was strengthened by new regulations for the quality of service to them, opportunities for dispute resolution with energy companies, and by more transparent market information (ibid. 6).

In all these matters, NMa-DTe, newly independent, would through its task performance act as representative of the public and of the consumer constituency. The IRA would:

- continue to compel energy network operators to grant non-discriminatory access against tariffs that, next to economic efficiency (the 'x factor'), would now also reward quality (the so-called 'q factor')
- act as umpire in access or tariff disputes between network operators, or between operators and end users
- check energy network quality and transport capacity
- structurally monitor energy supply security and the state of competition in the sector
- monitor and, if necessary, set maximum supply tariffs in the liberalized consumer market
- continue to advise the Minister of Economic Affairs on energy regulatory and supervisory policy
- further the integration of a regional wholesale market through participation in international regulatory networks
- actively publish consumer market information

In its decisions on these tasks, it would represent public and consumer interests independently from the electoral political sphere.

The Financial Markets Authority (AFM): protecting the self-responsible consumer

The financial sector in 2002 was the first comprehensive non-utility domain in the Netherlands in which a new IRA was set up: the 'conduct-of-business' supervisor *Autoriteit Financiële Markten* ('Financial Markets Authority') (AFM). This was not directly prompted by EU directives. Up until then, the banking, insurance and pension funds sectors had been supervised by three different sectoral authorities. The increasing growth, internationalization and conglomerization of the Dutch financial sector since the early 1990s, however, according to the 'Purple' government in 2001 necessitated a reform of the financial supervision model (SC 2001-2002a). In the domestic financial sector, four financial conglomerates dominated, while the sector as a whole was sized four or five times the gross national product. Although financial products and services were increasingly offered as single packages by these conglomerates, the regulatory framework was still dispersed between nine different sectoral laws. In addition, financial sector integrity and consumer protection were increasingly considered important (Prast and Van Lelyveld 2004).

The 'Purple' government in 2001 therefore issued a note on the basis of which

the Dutch legislature adopted piecemeal legislation entailing a reform of financial supervision into a functional model. 'Prudential' supervision – on the liquidity and solvability of financial institutions – on the entire sector would henceforth be the task of the central bank *De Nederlandsche Bank* ('The Bank of the Netherlands') (DNB). Conduct-of-business supervision, on the other hand – on financial market party behavior towards each other and towards customers – would be the task of a new IRA: the AFM. The nine sectoral laws were amended from 2001 onwards, and in 2006 replaced by a single law: the Financial Supervision Act. The AFM was already established in 2002.[72] The 'Purple' government claimed in the 2001 note that this reform of the financial supervision model would increase the efficacy, 'market orientation' and efficiency of independent supervision. It lauded the traditional market orientation of Dutch financial supervision as a positive contribution to the conglomerization, internationalization and innovation of the financial sector since the early 1990s. Dutch financial supervisors were to continue to offer financial institutions 'all available space' to 'innovate' and compete (SC 2001-2002a: 2-3). It also argued that the 'self-responsible, unbounded and cross-sectoral consumer rightly expects a well-functioning marketplace and a clear level of consumer protection' (ibid. 14). In this context, a representative claim about AFM was made.

In the 2001 note, the Dutch government (maker) first argued that the 'concept' of supervision at an arm's length from the electoral political sphere was 'of unabated value to independent (subject) and expertise-based (subject) supervision' (ibid. 35).[73] Political control and accountability mechanisms would ensure system responsibility, but the individual decisions of AFM would be made beyond electoral control. These could only be checked by the judiciary. The independent conduct-of-business supervisor was to base its decisions on 'specific expertise' (subject) about the financial sector (ibid.). The government made the additional representative claim that 'efficacious' (subject), 'market oriented' (subject) and 'efficient' (in the sense of imposing low administrative burdens on market parties) (subject) supervision was 'crucial' to both the economic competitiveness of Dutch financial institutions (object) and the 'self-responsible' position of Dutch financial consumers (object). An economically competitive financial sector, in turn, the government claimed to be of 'special interest' to the Dutch economy as a whole (object) (ibid. 9).

These constituencies – the national economy, financial institutions, and consumers – were further delineated in the memorandum to the 2006 Financial Supervision Act. Here, their interests were marked as 'public'. The Dutch lawmaking body made the representative claim that the independent task performance of AFM was 'in the interest

72 The AFM was the successor to the sectoral supervisor to the securities markets: the Stichting Toezicht Effectenverkeer ('Securities Supervision Foundation') (STE). In addition to powers pertaining to the securities markets, it was now delegated independent conduct-of-business supervisory powers over the financial sector as a whole.

73 This phrase was repeated by the lawmaking body in the memorandum to the 2006 Financial Supervision Act, which was by and large a copy of the 2001 note (SC 2003-2004c: 14). In neither document, explicit additional arguments were made *why* financial market supervision would have to be exercised beyond full electoral control. Rather, government and lawmaking body alluded to the 'concept' (SC 2001-2002a: 35) or 'principle' (SC 2003-2004c: 14) of supervision independent from the political sphere.

of the protection of customers of financial services (object)' and therefore a 'contribution to securing the public interest involved in the financial market sector (object)' (SC 2003-2004c: 30). These public interests were in a legislative article (art. 1.25) defined as follows:

- orderly and transparent financial market processes
- proper relations between market parties
- a careful treatment of customers

The presence of these would, in the words of the Dutch lawmaking body, constitute an efficient financial marketplace; lack of them 'market imperfection' with consequences to the economy as a whole (ibid. 28). AFM was to 'guard' and 'further' them (ibid. 29). In its explanation of these goals or public interests, the lawmaking body portrayed constituencies. 'Orderliness' and transparency, first, it defined as 'any' conditions necessary for the financial marketplace to bring together supply and demand, and access to relevant information. This was claimed to be of interest to all financial market participants (object) (ibid. 28). The regulatory framework, secondly, would ensure proper relations between them.

A careful treatment of financial customers, third, was considered to have 'inherent' meaning for consumers (object) as a form of protection in the face of information asymmetry on the financial marketplace. Yet it also was of interest to this financial marketplace at large (object), as it would enhance trust in the sector. Interestingly, the integrity or trustworthiness of financial corporations was not elevated to a goal or public interest in itself, but was considered of interest in attaining the other three goals (ibid. 9).

For these public economic constituencies and in their interests, then, the AFM would make independent supervisory decisions. It would:

- issue business licenses checking the trustworthiness, integrity and expertise of applicants, and so decide on financial market entry
- oversee and regulate financial market party behavior for its transparency and clarity, and to prevent an abuse of market power
- oversee and regulate financial market party behavior towards financial consumers in terms of transparent information supply and careful treatment
- advise the Minister of Finance on financial supervisory policy
- participate in international networks such as CESR and IOSCO

Through supervisory decisions made beyond the reach of the electoral political sphere, AFM would – so it was claimed – independently represent public interests in the financial sector.

The Netherlands Healthcare Authority (NZa): putting the consumer interest first

The healthcare sector in 2006 was the next comprehensive non-utility domain in the Netherlands in which a new IRA was set up: the *Nederlandse Zorgautoriteit* ('Netherlands Healthcare Authority') (NZa). This was an entirely domestic affair, not prompted by EU directives. In an overhaul embarked on by a centre-right Christian Democrat-liberal government, the governmentally-steered civil-society run healthcare sector was to be transformed into a regulated competitive marketplace. This the Dutch lawmaking body argued for because of rising healthcare costs in the previous decades, not successfully contained by state-corporatist tariff and budget controls. A process of healthcare marketization and liberalization was therefore initiated. A basic healthcare insurance for everyone would be mandated, while insurers were to compete for supplemental packages. Healthcare provision subdomains would be marketized in steps, and the remaining ones regulated for tariffs. Practitioners were to compete for contracts with insurers. Consumer (or patient/policyholder) market transparency, lastly, was to be improved. All this was claimed to increase and improve the efficiency, quality and innovation of healthcare, and to reduce costs. In the 2006 Healthcare Market Structuring Act, a regulatory framework was installed to implement this reform process, and in this context an IRA was established: the NZa.[74]

The Dutch lawmaking body positioned the newfound healthcare IRA, to which it bestowed regulatory and supervisory powers, as independent from the electoral political sphere in its individual decision-making. Even though political control and accountability mechanisms over it would be retained, enabling the government to exercise a formal 'system' responsibility over it scrutinized by the parliament, the possibility of electoral control would be removed from NZa's individual decisions.[75] These could only be checked by the judiciary. The Minister of Health, Well-being and Sport would retain the power to decide which healthcare subdomain would be marketized, although the NZa would advise on the matter. In the memorandum to the 2006 Healthcare Market Structuring Act, the Dutch lawmaking body (maker) made the representative claim that the newfound healthcare authority needed to be a 'real' IRA in order to be 'effective' (subject). It was therefore granted 'proper' administrative-legal status as ZBO. This status, along with various juridical instruments and a certain 'style' of supervision and governance, were claimed to bestow three properties to the IRA: 'authority' (subject), 'decisiveness' (subject) and 'independence' (subject) (SC 2004-2005: 34).[76]

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74 The NZa was also delegated supervisory tasks on the basis of two other healthcare laws. Since the Healthcare Market Structuring Act is its act of delegation and contains its key legislative-representative claim, only this act is discussed here.

75 In 2010, the independent decision-making power of NZa was partially curbed. A majority in the parliament that year voted to reinstate the power of the Minister of Health to destroy decisions of the IRA if they clashed with the 'general interest' (*Trouw* 2010).

76 The representative subject property of 'authority' the lawmaking body defined as being an expert, being trustworthy and having a 'sense of perspective'. The subject property of 'decisiveness' was defined as knowing when to act fast and when to act reluctantly. The subject property of 'independence', lastly, was defined as basing judgments on 'relevant' facts and interests' (SC 2004-2005: 34).

The Dutch lawmaking body argued the NZa required independence from the electoral political sphere and sectoral interests in order to prevent 'conflicts of interest' and political interference in its individual decisions and broader judgments. The Minister of Health was considered 'too much a party' in healthcare steering, and the general political sphere too susceptible to interest group lobbying, to incorporate the NZa in the hierarchical bureaucracy. This, the lawmaking body claimed, would hurt NZa's authority (subject), decisiveness (subject) and independence (subject). Regarding interaction with sectoral parties in particular, the lawmaking body wrote: 'It should be clear right from the start that the healthcare authority is not to be messed with, and lobbying behaviour is doomed to fail' (ibid.). The IRA would instead base its decisions on 'specific expertise' (subject): about the healthcare sector in general, and the regulatory or supervisory demands for each subdomain to develop markets and secure 'public interests' (object) in particular (ibid. 4, 12). A bundling of sectoral expertise and regulatory and supervisory instruments in one IRA was claimed to result in a more effective (subject), efficient (subject) and 'flexible' (subject) securing of public interests (object) (ibid. 13). For the last independent authority discussed in this chapter, and one of the most recent to be established, the *subject* part of the legislative-representative claim about it was now fully formed.

The public depicted in the memorandum to its act of delegation, however, was a non-economic one. Portrayed as the Dutch citizenry (object), its interests were defined as the 'accessibility', 'quality' and 'affordability' of healthcare (ibid. 7). All citizens, their economic status notwithstanding, had a right to access to quality healthcare. The government would remain responsible for these interests, but, so the lawmaking body claimed, they would best be secured *through* the marketization and liberalization of healthcare. Healthcare practitioners and insurers were to be stimulated to 'best serve their customers', while patients and policyholders (object) were depicted as having an interest in getting 'more to choose'. This was argued to improve the service, quality, innovation, efficiency, transparency and 'value for money' of healthcare – and therewith to secure the non-economic public interests at stake (ibid. 2). Yet market imperfections such as dominant market parties, and more structural forms of 'market failure' in healthcare such as consumer information asymmetry, would require a regulatory framework.[77] The representative claim the Dutch lawmaking body (maker) made about the NZa (subject), then, was that it would intervene in the sector when the public interests (object) would be demonstrably in danger (ibid. 2). Through its regulatory and supervisory task performance, the IRA would – within the legal framework – 'make' markets and 'guard' them, while securing the public interests of accessibility, quality and affordability of healthcare (ibid. 5). According to the lawmaking body, the NZa in its individual decisions would have to 'find the right balance' between developing markets and guarding public interests (ibid. 12-13).

77 Other structural forms of 'market failure' identified in the healthcare sector were the necessity of insurance companies, information asymmetry among patients as well as insurance companies, and the fact that demand for healthcare results from medical necessity, rather than free choice.

Yet a slightly divergent representative claim was inserted in a legislative article to the NZa's act of foundation. According to this article, it is to 'put the general consumer interest (object) first' in its task performance (Healthcare Market Structuring Act 2006 art. 3.4). In the parliamentary motion accompanying this article, the lawmaking body – or rather, a majority in the parliament – stated this insertion would clarify what was depicted as the 'ultimate' goal of the law: a better position of the 'consumer/patient' (sic) in terms of information symmetry in healthcare (SC 2005-2006a).[78] Alongside the citizenry, patients or policyholders portrayed *as* healthcare consumers emerged as purportedly represented economic constituency; their interest was framed as information symmetry, enabling them to choose on the healthcare marketplace. The government in its interpretation of the article stated, however, that the NZa was not to 'always let the consumer interest prevail'. Rather, for every decision it would have to 'empathically reflect' to which extent it would contribute to consumer interests (SC 2004-2005: 52). The economic constituency of the consumer, having been awarded increased attention in the representative claims about IRAs in the past years, was now formally enshrined in law.

For the non-economic public of the citizenry, and patients or policyholders portrayed as healthcare consumers, then, the IRA – so the lawmaking body claimed – would independently perform regulatory and supervisory tasks in the process of healthcare marketization. It would:

- regulate healthcare tariffs in non-marketized subdomains, rewarding efficiency and quality of healthcare practitioners
- monitor marketized healthcare subdomains, identify dominant market parties, and decide on regulations for them; these could legally vary from non-discrimination obligations to an enforced delivery of certain goods and services.
- regulate performances and product descriptions, contract conditions and the transparency of information supply to consumers throughout the entire healthcare sector
- actively publish consumer information
- advise the Minister of Health on the marketization of healthcare subdomains, and on regulatory and supervisory policy

As independent representative of public and consumer interests – so it was claimed – the NZa would outside of the electoral political sphere make decisions regarding these tasks.

78 With this same parliamentary motion, in the preamble to the law, too, it was, in light of the 'information gap' of consumers and the 'power differences' between healthcare parties, proclaimed 'desirable' to 'protect' and 'advance' the position of the consumer (SC 2005-2006a).

5.4 Conclusion: an institutional fragmentation of interests and representative claims

Representative claim-making has in this chapter been analyzed at the institutional level of independent regulatory authorities. Through application of the RCF tool, it was demonstrated that IRAs as purportedly representing *subject* in marketized and liberalized domains are portrayed as independent and expertise-based bodies. The underlying meaning of independence, however, has been shown to have shifted. While independence was initially defined as a necessary distance from the government because the state held interests in utility domains, and only hesitatingly applied, throughout the years it came to be defined more as a desirable institutional characteristic: as being 'objective', 'fact-based' and removed from 'today's thinking in politics'. Independent market regulation defined by these traits has increasingly been emphasized as a novel and distinctive state function in the Netherlands.

The RCF tool has, moreover, also demonstrated *whom* and *what* the independent regulatory authorities are claimed to work and act for; whom they are claimed to non-electorally represent. This is the new rhetorical constituency of the 'public' and its economic and non-economic interests in liberalized and marketized domains. In the Dutch polity, a string of independent bodies has been set up to represent interests the electoral sphere no longer fully represents. OPTA and DTe were set up in the 1990s to guide the process of market liberalization and benefit primarily the interests of people defined as economic actors. Yet in addition to the economic interest of market efficiency, they were – and are – increasingly also to represent non-economic public interests, such as the quality and safety of networks, and the universal provision of goods and services to citizens. Variations exist: while OPTA and DTe were to represent both economic (producer and consumer) and non-economic interests, AFM would only represent economic interests (including the consumer interest). NZa, however, was set up to represent non-economic public interests (healthcare accessibility, quality, affordability) in a domain it nonetheless had to help make a marketplace.

In all domains, moreover, consumers have increasingly taken centre stage as a purportedly represented constituency of IRAs. At the NZa, the most recently established agency in this study (2006), the consumer constituency was even explicitly enshrined in the law. The latter development in 2013 seems to have been continued with the establishment of the comprehensive *Autoriteit Consument en Markt* ('Consumer and Market Authority') (ACM), which as a merger of NMa, OPTa and DTe according to its act of foundation is to protect the 'interest of the consumer' (Consumer and Market Authority Establishment Act 2013).

The historical reconfiguration of state, society and market responsibilities in the provision of goods and services described in Chapter 2 has therefore lead to a deviation of the standard model of electoral-representative democracy. While an elected parliament, and the government and bureaucracy it controlled, would in the past represent the 'general' interest, in the last decades non-electoral bodies have been set

up to *independently* represent – through their regulatory and supervisory decisions – concretized 'public' interests in liberalized and marketized domains. And here, citizens are henceforth portrayed and represented partially as consumers. The marketization of economic and societal domains, and the changing role of the state in these sectors, is thus accompanied by a partial transformation in the nature of the constituency represented: from citizens to consumers. In the most recent cases, this is even enshrined in law.

In the next chapter, the role of IRAs themselves in perpetuating these portrayals will be explored.

Chapter 6

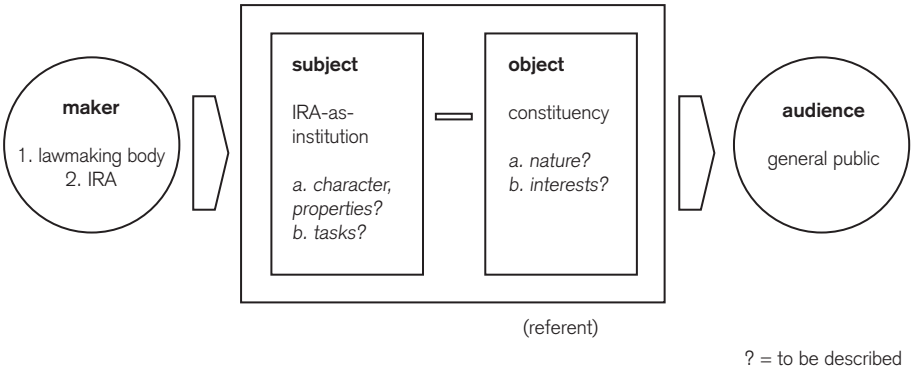
Focusing on the consumer. The self-presentation of independent regulatory authorities

The four independent regulatory authorities (IRAs) OPTA, NMa Energy Chamber, AFM and NZa were in the previous chapter demonstrated to have been claimed by the Dutch lawmaking body to independently represent public interests. The consumer constituency, moreover, nearing the present day (2014) was awarded an increasingly prominent place in the legislative-representative claims about these institutions. The question that will be considered next is how these independent agencies have since represented themselves to the outside world.

This chapter therefore focuses on the representative claims the four IRAs make about themselves, and on the constituency constructions in these assertions. Along with the previous chapter, the question this chapter seeks to answer is: '*To what extent can representative claims be identified at the institutional level of independent regulatory authorities?*'

The *makers* ('M') of these representative claims now are the four IRAs themselves (see Figure 6). Being public agencies, they project a constructed image of themselves into the public sphere. They do this on corporate websites, in annual reports, and in public documents. In such depictions of themselves, they rationalize and promote their own existence and activities.

Figure 6 (reprint). The institutional representative claim



Such public self-portrayals contain images of their institutional characteristics: the *subject* ('S') part of the representative claim. Being bodies defined by independence, how do they convey this institutional feature to the public at large? How do they position themselves vis-à-vis the outside world, and in particular vis-à-vis sectoral interests? How do they present their tasks in liberalized and marketized domains, complex and technical, to the general public?

In such assertions, IRAs also make depictions of those they claim to act and work for: the *objects* ('O') or constituencies they intend to represent. Although these constituencies were pre-constructed by the lawmaking body, the agencies themselves may put emphasis on different aspects of this construction. Representative claims can change through time, and some of the constituencies to which IRAs were initially linked may rise to prominence, while others recede to the background. How do regulatory

agencies describe the nature and interests of their constituencies?[79] How do they frame their own role based on this portrayal?

The *audience* ('A') of these self-representative claims is the general public. Naturally, IRAs may target various audiences and constituencies in their public proclamations. It is very difficult to pinpoint which part of a public message is targeted to a specific audience, however. Therefore, in this chapter, the citizenry of the Netherlands is considered the general audience of the public self-presentation of IRAs.

The present chapter thus seeks to trace the self-portrayal of the four selected IRAs after their establishment, which was described in Chapter 5. From an analysis of law of legislative claims, it will turn to visual and rhetorical analysis. It so touches on the issue of self-legitimation. How do bodies independent from the electoral political sphere and sectoral interests seek to present themselves, their missions, and those they work or act for? What, aside from legislative frameworks, is their own institutional claim to representation?

6.1 The Independent Mail and Telecommunications Authority (OPTA): forward-looking in the interest of the consumer

Until April 2013, when the telecommunications regulator OPTA was subsumed into the Consumer and Market Authority (ACM), visitor's to the IRA's website would be treated to a picture of a man sitting on a bench. Mobile telephone in hand while working on his laptop, he was accompanied by the claim that 'OPTA is concerned today with the problems of tomorrow' (OPTA 2013a) (see Figure 9.1). This forward-looking portrayal was elucidated elsewhere on the website, where the world of telecommunications was depicted as being in rapid development, which was claimed to create opportunities as well as risks (idem 2013b). In this volatile world of telecommunications, the independent body (maker) represented its position and its tasks (subject), and its constituency (object) in a certain manner to outside audiences.

Figure 9.1. OPTA's public self-presentation: depicting the subject

Source: OPTA website, http://www.opta.nl, April 2013

79 As in other chapters, the *referent* ('R'), being real-world people that can potentially be portrayed in myriad ways, will not be independently described.

OPTA (maker) on its public website and in annual reports always mentioned its independent status (subject). Its insulation from the electoral political sphere was described as the capacity of the IRA board to make independent decisions. Its independence from sectoral interests was described as a matter of integrity: of OPTA personnel not having interests in telecommunications corporations (idem 2013c). In its task performance, the IRA portrayed itself as strict (subject) where necessary but flexible (subject) where possible. Its supervisory strategy was one of putting trust in market actors (idem 2013a; idem 2013d). OPTA also portrayed itself as open and communicative (subject) to the outside world, in particular to market parties. The IRA stated it would inform these about regulations and its own expectations of them, while it would simultaneously involve them and other interested parties in its task performance. Consultations, so the IRA claimed, would allow external actors to 'think along' and 'exercise influence' (idem 2009: 49; idem 2011: 69; idem 2013c) (this will be explored in more detail in Chapter 8).

The Dutch lawmaking body in 2004 had put the economic public interests of businesses and consumers, and non-economic public interests of citizens at the heart of its representative claim about OPTA (see Chapter 5). In OPTA's annual report of the same year, the promotion of marketplace competition was still depicted as the primary mission of the IRA. 'End user' protection would only follow if, after the promotion of marketplace competition, consumer choice would still be insufficient:

> *The interest of the consumer will be pursued primarily through market supervision and stimulating competition, but in a number of cases also by direct actions to protect the consumer.* (idem 2005: 45)

An example of a limited case in which consumers would be directly protected by the IRA was its combat of spam.

A year later, however, OPTA's new chairman Chris Fonteijn (maker) in his first annual report claimed the independent authority (subject) worked for both marketplace (object) and consumer (object) (idem 2006: 5). Consumer protection and internet safety were claimed to have become 'more important for the development of the marketplace'. Before the IRA's mission statement now was inserted a line that described it (subject) as 'stimulating market functioning (…) *in the eventual interest of the consumer* (object)' (emphasis added) (ibid: 12).

Three years later, OPTA's annual report (2008) was laced with pictures of consumers and accompanying texts, showing their purported dependence on electronic communications (see Figure 9.2).

Figure 9.2. OPTA's public self-presentation: depicting the object

Source: OPTA annual report 2008

Its first chapter solely concerned consumer protection, examples of which were the combat of spam and unwanted telephone marketing, and the removal of barriers to switch telephone providers. The active provision of consumer information via the IRA's new website *ConsuWijzer* (ConsuGuide) was described here as well (idem 2009: 19). In 2013, then, virtually each OPTA task – market regulation and supervision, executive tasks, the website ConsuGuide – was claimed to be 'in the interest of the consumer' (idem 2013b).

The consumer constituency (object) as purportedly represented constituency over time was more directly engaged by OPTA (maker-subject) as well. In 2007, together with the general competition authority NMa and the Consumer Authority, the telecommunications IRA established the website ConsuGuide as a central node for IRA-consumer interaction (ConsuWijzer 2014).[80] The goal of this website according to OPTA was to 'strengthen the consumer' by providing him with relevant information, such as his rights vis-à-vis telecommunications providers. Yet ConsuGuide also provided the consumer with tools to 'get to work' himself, such as format letters to cancel subscriptions or issue complaints to companies. Consumers – users of telecommunications services –

80 Today, the website is run by ACM.

were depicted by the IRA as economic actors who required information to pick up their desired role on the liberalized marketplace:

> *The consumer has an important role in making the communications markets work well. If he knows his rights, he can more easily choose for service and quality. And if necessary obtain redress.* (OPTA 2013e)

The ConsuGuide employees of OPTA therefore would assist individual consumers with questions – although they would not, it was emphasized, directly *solve* their problems.[81] Consumers could nevertheless file complaints and so signal marketplace problems to the IRA. OPTA (maker) claimed that ConsuGuide was of great importance in this regard: enough signals and complaints would lead to direct interventions on the part of the independent authority (subject) 'to improve the position of the consumer' (object). As 'tens of thousands' of reports were claimed to come in annually, such interventions had occurred many times (ibid.).

In its public self-presentation, OPTA (maker) so portrayed itself as an independent, high-trust, flexible and communicative IRA, open to marketplace input and consumer signals (subject). Over time, it started to depict its entire regulatory and supervisory mission – 'taking care of competition and trust in the communications sector' (idem 2013b) – as being in the eventual interest of the consumer (object). Consumers themselves, meanwhile, over time were also more directly addressed by their representative on the liberalized marketplace. The IRA provided them with information, and would intervene on their behalf in case of collective complaints. In doing so, however, OPTA also depicted consumers as *needing* information in order to help themselves, and so to fulfill their role on the liberalized marketplace. Consumers were thus represented in the double sense of acted for, and portrayed. The IRA could pitch itself as an information-providing consumer representative by presenting the citizenry as in need of consumer information on the telecommunications market.

6.2 The NMa Energy Chamber: a lighthouse surrounded by a rough sea

Until NMa's 2013 merger with OPTA and Consumer Authority to form the ACM, its website featured an alternating front page banner presenting the NMa as 'overseeing competition on the free market' and its Energy Chamber – against the backdrop of an electricity transmission tower against a clear blue sky – as having the mission 'to make energy markets work and protect consumers' (NMa 2013b) (see Figure 10.1).

81 In this respect, the role of the IRA as consumer representative differs from that of civil society consumer organizations. IRAs claim to represent consumers as a force on the marketplace. Rather than acting on behalf of individual consumers and their complaints, they act on behalf of the collective consumer constituency conceived of as one part of the supply and demand mechanism.

Figure 10.1. NMa Energy Chamber's public-presentation: depicting the subject

Source: NMa website, http://www.nma.nl, April 2013

Three years after its 2005 merger with NMa, the energy regulator DTe had been renamed NMa *Energiekamer* ('Energy Chamber'), and shortly after been subsumed into the NMa Energy and Transport Regulation directorate (see Appendix A of this thesis). Although the Energy Chamber was still presented as a distinct entity on the NMa's corporate website until 2013, three years before that separate mention disappeared from annual reports. The former energy authority's separate identity was largely incorporated into that of the NMa.[82] NMa and its Energy Chamber for a long time nevertheless represented themselves (subject), their tasks and purported constituency (object) in a certain manner to the world outside.

In its public self-presentation, the NMa (maker) presented itself as authority independent (subject) from both the political sphere and sectoral interests in its individual decisions (idem 2013a: 4; idem 2013c). It emphasized that about 400 highly educated people worked for the organization (subject), who gathered as much information about various economic sectors as possible (ibid.; idem d). NMa and – in 2004 – DTe presented themselves as open and communicative IRAs (subject). In their 2004 joined annual report themed 'Societal relevance', they stressed the involvement of market parties, interest groups and scientists in their collaborative task performance (NMa and DTe 2004) (this will be further explored in Chapter 8).[83] The IRAs also emphasized their own alleged public guidance and advocacy role. In the context of the global financial crisis (2008), NMa and its Energy Chamber likened themselves to a 'lighthouse in a rough sea as a symbol of visible, guiding supervision'. The competition authority now depicted its

82 The energy regulatory and supervisory tasks of the Electricity and Gas Acts had in 2005 been attributed to the NMa. Organization-wise, these tasks were performed by its regulatory chamber DTe.

83 Themes of other NMa annual reports were 'choice' (2008), 'weighing interests' (2009), 'cooperation' (2010) and 'border zones' of market competition and public interests, market competition and quality in healthcare, and affordability and reliability in energy (2011).

mission as 'restoring' public trust in free markets. Market competition was proclaimed to be not an impediment to, but part of the solution to the crisis (NMa 2008: 5).

The free marketplace and its actors featured prominently in the self-presentation of the IRAs. The NMa and – then – DTe from 2004 onwards claimed their 'origin, goal and purpose' to be the realization of a healthily functioning marketplace (NMa and DTe 2004: 6). The energy authority added to this 'the protection of consumers' (ibid. 51). 'Making markets work' was the slogan through which the NMa after the merger with DTe presented its mission – by supervising and, in the energy and transport sectors, 'simulating' a market situation (NMa 2013a: 4; idem 2013d). According to the competition authority, one part of its mission was to demonstrate that consumers and corporations profited from well-functioning marketplaces. Yet it also had to show what could go 'wrong' on the marketplace, thus creating 'understanding' for its mission (ibid.). The Energy Chamber on its part claimed to be '(contributing to) creating conditions for the marketplace to function effectively and efficaciously, and to do justice (or to let justice be done) to consumer interests' (idem 2013a: 46; idem 2013e).

Like at the telecommunications authority OPTA, the economic constituency of the consumer (object) occupied an important place in the representative claim of the competition-energy authority. In 1997, the NMa's first chairman Anne-Willem Kist had already called the new competition authority a 'watchdog of economic democracy' and an 'ally of the consumer' (*Forum* 1997).[84] Fifteen years later, market competition, to which the NMa contributed, for consumers was claimed to ensure low prices, quality, freedom of choice and getting one's money's worth (NMa 2013a: 4; idem 2013d). The independent competition authority in 2013 claimed that 'all our efforts are aimed at benefits for the consumer', its 'ultimate goal' to 'create as much economic benefits to consumers as possible' (ibid.; idem 2013f). This economic rendering of the consumer benefit was made concrete: for 2010, the NMa claimed to have contributed 284 million euros to consumer welfare (idem 2013g). The Energy Chamber, on the other hand, also claimed to contribute to guaranteeing public interests: energy affordability, reliability and sustainability, of interest to society as a whole (object) (idem 2009: 46), as well as trust, network safety and consumer protection (idem 2008: 27; idem 2009: 35; idem 2010: 35). It claimed energy network regulation and the advancement of an integrated European wholesale market to be in the interest of consumers (idem 2013a: 47; idem 2013h and i).

Like at OPTA, active provision of information to consumers (object) was part of the way in which the NMa Energy Chamber represented them. On the website ConsuGuide, and its sister site *EnergieWijzer* ('EnergyGuide'), the consumer could obtain 'transparent' and 'comparable' information on energy supply companies, which would enable him to switch from one to the other. The various desired activities for the consumer were visually depicted (see Figure 10.2). He would be 'made aware of his rights and obligations', and be able to ask questions and file complaints at the IRA (idem 2013a: 46, 58). Thus, the consumer could be emancipated:

84 Mr. Kist contextualized his remark by stating that he considered the consumer to be the force that determined market positions on a free marketplace.

> *ConsuGuide strives to make the consumer assertive, and to allow him to obtain redress. Consumers get free advice. Thus he is aided in conquering (alleged) obstacles.* (ibid. 58)

Figure 10.2. The NMa Energy Chamber's public self-presentation: depicting the object

Source: ACM ConsuWijzer website, http://www.consuwijzer.nl, April 2013

Helping the consumer in general to 'conquer obstacles' were downloadable scripts to practice conversations with shopkeepers and telephone salesmen, as well as, for energy in particular, the *Overstapcoach* ('Switch Coach'). This NMa-developed feature actively promoted (and promotes) consumer switching between energy companies, while aiding them in the process:

> *The Switch Coach guides consumers in four steps through the switching process. Thus consumers experience for themselves how easy a switch can be, and become aware of the amount of money that can eventually be saved through switching.* (ibid. 60)

Consumers were so recruited to help make the energy sector into a fully competitive marketplace.

The competition authority NMa and its Energy Chamber (makers) thus, like OPTA, presented themselves as independent, expertise-based and communicative regulatory bodies (subjects). During the financial crisis of 2007-2008, they pictured themselves as guiding lights for free market competition in a time of its contestation. Like OPTA they did this, however, by making the consumer constituency (object) a key element in their public self-presentation. NMa presented and quantified its task performance as a major contribution to consumer welfare. The Energy Chamber also claimed to represent public interests, such as energy safety and reliability. Both claimed to represent the consumer interest. Like at OPTA, online information provision, opening up a forum for complaints, and stimulating the consumer to obtain redress and employ his options was

how this representation was performed. The IRAs were in this way involved in a project to 'make' the consumer on liberalized marketplaces.

6.3 The Financial Markets Authority (AFM): putting the customer interest first

The financial markets authority (AFM) was established in 2002. Upon entering the IRA's website in 2014, a visitor encounters a 'Financial markets notification point' for consumers and a 'Business Point'. The front page is divided into separate sections for consumers and business professionals and prominently reads: 'AFM furthers fair and transparent financial markets' (AFM 2014a) (see Figure 11.1). On this website and in annual reports, the IRA (maker) represents itself (subject), its tasks and its purported constituency (object) in a certain manner to the general public.

Figure 11.1. AFM's public self-presentation: depicting the subject

Source: AFM website, http://www.afm.nl, April 2013

AFM (maker) presents itself as authority independent (subject) from the political sphere. This it describes as an 'application in practice' of supervisory rules, limited to individual decisions (idem 2014b; idem c). The IRA professes to act from certain 'core values': those of responsibility, vigor, care, 'being a landmark', and efficiency (idem 2009: 13; idem 2013a: 19; idem 2014d). Where AFM considers corporations and consumers trustworthy enough to act responsibly, it will – so it claims – keep at a distance (subject), but where necessary it will act with vigor (subject). The authority claims to act with care (subject): to collect all facts before going into action, while carefully weighing the interests of consumers, individual market parties and the financial sector. The IRA wants to fulfill a role of landmark (subject): providing clarity on the rules, while also engaging into dialogue with supervisees and other interested parties. As a last core value, it claims to want to be efficient (subject) by not exacting too high an administrative burden on financial market parties.

In its public self-presentation, AFM emphasizes its communicativeness (subject). It claims to shape supervision in practice through its dialogue with financial market parties, the political sphere and the general public (idem 2009: 36-38; idem 2013a: 73; idem 2014e) (this will be further explored in Chapter 8). As the IRA supervises the integrity of financial market parties, it stresses its own organizational integrity (subject) policy as well

(idem 2013a: 76). AFM, moreover, claims to be a 'point of contact' (subject) for financial consumers (object), in part by running its own consumer website (idem 2014f).

Since its establishment, AFM has been consistent in its depiction of the various constituencies of its independent representative role. In its first annual report (2003), it claimed its conduct-of-business supervisory tasks served not just the interests of financial customers (object), but those of the entire Dutch economy (object). The IRA depicted the general public (object), the private sector (object) and the state (object) as ultimately dependent on financial market products. Independent supervision to these products it portrayed as therefore 'crucial' to their trust in the orderliness and transparency of the financial marketplace (idem 2004: 2). Three years later, the IRA justified its existence by its 'systematic approach to market inefficiencies', among which consumer information asymmetry (idem 2007a: 27). In recent years, the AFM constructs its supervision as a contribution to the 'public interest' of well-functioning financial markets (idem 2014g). Since the 2007-2008 financial crisis, the IRA emphasizes its seeks to 'restore' the trust of the public (object), consumers (object), the private sector (object) and government (object) in the orderly and fair workings of the financial markets, on which all are still dependent (idem 2011a: 2; idem 2013a: 3, 5, 19; idem 2014g; idem h; idem i).

On specific areas, moreover, the AFM singles out clear-cut sub constituencies as well. Throughout the years, it has claimed to further three substantive goals: fair and transparent financial markets, careful financial services to consumers, and fair and efficient capital markets; and as such, to contribute to the nation's welfare and economic reputation (idem 2003: 79; idem 2009: 12; idem 2011a: 2; idem 2013a: 18; idem 2014i). More recently, the IRA has portrayed its tasks as divided between two broad domains: capital markets and financial services. In the former domain, it depicts itself as furthering the interests of financial investors (objects). The AFM oversees that required information about issuers of securities is available to them. This it portrays as in the interest of said issuers (object) too, as it enhances trust which leads to lower costs. On the task area of financial services, the IRA claims to further the interests of financial consumers (object). Fair and careful services to them are in their direct interest, but, so AFM claims, also in the interest of society (object) and in the long-term interest of the financial sector itself (object), since it will restore trust (idem 2011a: 2; idem 2013a: 19; idem 2014i). The IRA therefore oversees and regulates the information supply of financial institutions to consumers, but, like OPTA and NMa Energy Chamber, also actively provides it itself online.

On a special section of its corporate website, indeed, the AFM directly addresses the financial consumer constituency (object) and in doing so construes it. In an 'ideal financial world', so the IRA sketches, consumers possess understandable information that enables them to buy those financial products that meet their needs and expectations. But:

> *You, the consumer, do not possess the information that is possessed by corporations, and in practice will never be as informed and educated as the professional* (idem 2014f; cf. idem 2013a: 18).

Yet not all financial professionals possess the same information, while their interests may also 'clash' with those of their customers. Financial professionals are, moreover, 'not necessarily oriented to the collective interest of an effective and efficient marketplace' (idem 2014f; cf. idem 2013a: 18). To counter this tendency, AFM runs various programs to represent the consumers' interest in transparent information. As of 2010, its supervisory project 'Putting the customer interest first' is meant to instill a 'cultural change' in financial market parties. According to the AFM:

> *If 'focus on the customer' can be described as 'give the customer what he* wants', *putting the customer* interest *first can be described as 'give the customer what he* needs (emphases added). (idem 2014j)

Financial institutions are pushed by AFM to do this by providing the consumer with honest information, in order to better represent his 'true' interest, rather than what he thinks (or can be told) is best. An example of this is a mortgage a consumer in the long run cannot afford. Engaging into dialogue with financial market parties and monitoring their progress, AFM explicitly claims this cultural change is the best way of ensuring that customers are treated fairly. In the context of the financial crisis, this change would restore consumer trust in the financial markets, and in light of the 'societal pressure to implement these changes', the IRA depicts itself as having a role in stimulating them (idem 2014k).

Figure 11.2. AFM's public self-presentation: aiding the object

Source: AFM website, http://www.afm.nl, April 2013

Yet the AFM, in addition to adopting a protective role, also castigates the alleged lack of responsibility of many financial consumers. In its supervisory project 'Improve the quality of financial services', a 'large' group of consumers is singled out that 'still takes insufficient responsibility in making financial decisions'. AFM's proclaimed point on the horizon will be reached when financial advisors have embraced their role 'in the spirit of the pure market model', while consumers on their part 'adopt a critical attitude' (idem 2013b). On its consumer website, therefore, in addition to information about financial products, rights and risks, the IRA offers tools and games to train financial consumers to make 'rational' money choices. The game 'More choice with money', for instance, teaches consumers how to make rational choices in risky situations. The game 'One euro is not the same as another euro' teaches consumers about irrational behavior (AFM 2014l) (see Figure 11.2).

Thus positioning itself as independent, acting on the basis of core values, and communicative, the financial markets authority in its public self-presentation is keen to depict clear-cut constituencies of its supervision. The economy, the financial sector, individual corporations, investors and financial consumers are all claimed to be acted and spoken for. The AFM publicly admonishes financial market parties and consumers to embrace a critical, self-interested role in the ideal of a well-functioning marketplace; yet also pushes the former to take the 'true' interest of the latter at heart. The financial markets IRA so acts as representative of an ideal typical – or its own words: 'utopian' (idem 2014f) – vision of a financial marketplace. Through its independent conduct, it claims to bring this world a little closer about.

6.4 The Netherlands Healthcare Authority (NZa): a self-described guardian angel

The healthcare regulator NZa was established in 2006. Eight years later, on the IRA's corporate website a blue sword-wielding angel is displayed. While this logo represents the healthcare authority's preferred self-image (discussed below), the authority publicly frames its mission as 'to create and guard well-functioning healthcare markets' (NZa 2014a). On this website and in annual reports, the NZa (maker) represents itself (subject), its tasks and its purported constituency (object) in a certain manner to the public at large.

The NZa presents itself as authority independent from the political sphere and sectoral interests. More specifically, it describes its various roles in the healthcare sector as 'independent market master', 'regulator, 'independent supervisor' and 'independent advisor' to the Minister of Health (idem 2008: 8-9; idem 2010a: 11; idem 2012: 8; idem 2014b). In its first annual report (2007), the NZa professed it would act on the basis of certain core values: independence (of judgment from both politics and sectoral interests) (subject), expertise (required for this judgment) (subject), transparency (of decision-making, including consultations) (subject), consistency (subject), decisiveness (subject), and reliability (subject) (idem 2008: 9-10; see also idem 2012: 9). The IRA on its website emphasizes it performs its tasks 'together with' the healthcare sector (idem 2014b) (this will be discussed in Chapter 8).

The Dutch lawmaking body in its act of delegation claimed the NZa would independently represent the non-economic public interests of healthcare accessibility, quality and affordability in its task performance. The IRA was also legally admonished to 'put the general consumer interest' in information symmetry 'first' (see Chapter 5). On its website, the NZa likewise claims to supervise the 'three public interests in healthcare' (object). These interests the IRA depicts as, first, 'transparent information' about the costs and quality of healthcare for both insurers and policyholders. 'Accessibility' it defines as universal access to healthcare within a reasonable distance, time and on reasonable conditions. 'Affordability' of healthcare, third, it portrays as both an individual and a collective interest in the present and in the future (idem 2014c).[85] Elsewhere on the site, the NZa claims that its mission 'to create and guard well-functioning healthcare markets' furthers the interests of consumers (object). If these are stake, the IRA will intervene (idem 2014b and d). These interests it further defines as short-term and long-term efficiency, market transparency, freedom of choice, access to care and quality. Thus the consumer receives 'value for money' in healthcare (idem 2010a: 7; idem 2014d).

The legal admonishment by the lawmaking body to the IRA to put the general consumer interest first is echoed in its mission statement:

> *In everything the NZa does the interest of the consumer is central. With every advice, with each policy change, in all her supervision the NZa asks itself: 'How does this benefit the consumer?'* (idem 2010a: 7; idem 2014d)

Consumer benefits are then equated to the three public interests of healthcare quality, accessibility and affordability, to which transparent information and freedom of choice are proclaimed essential. All are guarded by NZa 'in the interest of the consumer' (ibid.).

The IRA, moreover, on its website pays specific attention to its organizational logo (see Figure 12).

Figure 12. NZa's public self-presentation: depicting the subject

Source: NZa website, http://www.nza.nl, April 2013

85 Notably, the 'quality' of healthcare is absent as a public interest to be represented by NZa. In the Netherlands, this specific public interest is represented by other authorities, such as the Healthcare Inspection. The task of NZa regarding this interest is interpreted as a responsibility for the availability of transparent information *about* the quality of healthcare.

This, the IRA explains, is a 'modern guardian angel':

> *This angel symbolizes the protective role of the NZa regarding the interests of the healthcare consumer. At the same time the angel symbolizes the authority and expertise of the NZa, by which it gives insurers and practitioners the right incentives to provide the consumer with efficient and good healthcare* (ibid.; see also idem 2008: 8).

In this organizational logo, and the NZa's choice to explicate its meaning, the non-electoral representative claim of the IRA is contained. The angel is said to symbolize the institutional characteristics of the independent authority: its authority (subject) and its expertise (subject). Through these faculties, it works and acts for the constituency it claims to represent: the citizen, patient or policyholder portrayed *as* healthcare consumer (object) on a liberalized marketplace. This is done by regulation and supervision, which incentivizes third parties to guarantee that the healthcare consumer receives efficient and good quality healthcare. The NZa (maker) paints a picture of this object; and subsequently, through its institutional attributes (subject), works towards realization of the object's supposed interests, by speaking or acting for it. This is what representation entails: a dual activity of making representations of a constituency and working towards its constructed interests.

This activity became even clearer when the NZa immediately after its establishment was requested by the Dutch parliament to publicly elaborate the consumer interest, and its own role in it. The IRA responded in a public document (idem 2007). In it, the independent body conceptualized the consumer interest it was charged to represent, and attempted to make it concrete. Entitled '(In) the interest of the consumer', the NZa stressed the public document was developed in consultation with 'society': stakeholders and interested parties (ibid: 5).[86] These had admonished the IRA to be 'clear' about the consumer interest, and particularly about its relation to other interests. This, although it was 'complex and abstract', the independent body set out to do (ibid. 11). In the view of the NZa, the general consumer interest in healthcare consisted of 'transparency', 'freedom of choice', and the 'legal position' of consumers (ibid. 7). This general consumer interest and the three public interests of healthcare accessibility, quality and affordability were 'in accordance' with each other. Yet it was the specific task of the NZa to focus on the general consumer interest. While it – so it stated – in its decisions 'always' would have to weigh public interests against each other, it would let the consumer interest be 'decisive' (ibid. 14). This, the IRA admitted, could sometimes go against the interests of healthcare insurers and practitioners.

The independent body took care to set itself up as representative of the *general* consumer interest, rather than *individual* consumer interests. In the view of NZa, the

86 29 Interest groups, consumer organizations, scientists and administrative bodies had responded to an original consultation document.

general consumer interest on the liberalized healthcare marketplace involved multiple consumers, was 'coherent' across various sub marketplaces, and incorporated both the short and the long term (ibid. 25). The IRA would act as representative of this general consumer interest, rather than on behalf of individual consumers. This it would do in a threefold manner. The NZa would create conditions for healthcare consumer 'self-reliance', by making available transparent information, helping to increase his freedom of choice, and furthering his legal position (ibid. 15-18). It would independently regulate markets where self-reliance was not enough. And it would independently supervise markets to enforce compliance. Interestingly, the IRA distinguished between different 'dimensions' of the consumer (ibid. 16). Policyholders, patients, and groups of patients (the sick, the handicapped) all represented 'types' of consumers with various, possibly clashing interests and demands. The NZa would 'take account' of this variety by providing extra regulatory or supervisory protection for specific consumer groups where needed (ibid. 16-17).

In this way, the most recently established IRA (2006) embarked on the most elaborate effort of all agencies discussed here to publicly conceptualize its purported constituency. While portraying itself as independent, acting on the basis of core values, and cooperative vis-à-vis the healthcare sector, the NZa also made an effort to make sense of the possibly conflicting representative claims made about it by the Dutch lawmaking body (see Chapter 5). According to the independent body, the three public interests and general consumer interest it was all charged to represent were in general alignment with each other. The IRA, nonetheless, in cases of conflict should decide on the basis of consequences to the general consumer interest. It further specified this consumer interest, and claimed to make policies on the basis of the needs and demands of sub constituencies. In this public effort to define its constituency, the NZa pondered the consequences of the Dutch lawmaking body's choice to henceforth portray policyholders, citizens and patients as healthcare consumers. In doing so, it positioned itself as independent representative of the general consumer interest in a healthcare sector it would help make into a marketplace.

6.5 Conclusion: to represent and make the consumer

Representative claims have in this chapter again been examined at the institutional level of independent regulatory authorities. This time, however, the claim-makers were the IRAs themselves. After their establishment, they have all made an effort to present themselves as independent and expertise-based, as well as open and communicative regulatory bodies. Sectoral interests in particular are invited to enter into dialogue with the agencies. All four cases presented themselves as market-makers: as promoters and defenders of the free marketplace in liberalized domains. After the financial crisis of 2007-2008, some have asserted themselves as 'restorers' of trust in market competition. All IRAs make efforts to emphasize their contribution to consumer welfare and the general

economy. The notion of the public interest, despite its basis in legislative-representative claims, does not feature that prominently in the rhetorical self-presentation of the four IRAs. In some cases, however, such as the Energy Chamber, AFM and the NZa, it is mentioned and elaborated on.

Most notable is the rise to prominence of the consumer constituency in the rhetorical and visual self-presentation of the four IRAs. Since their establishment, through shifting emphases in their public presentation, all IRAs have increasingly claimed to represent consumers on liberalized marketplaces. In addition to presenting market competition as in the eventual interest of consumers, they have done so in various ways. Their combat of information asymmetry, in part through the setup of consumer websites, is important in this regard. The four IRAs assert themselves as representatives of the consumer by providing aid on websites such as ConsuGuide, or by stimulating that he helps himself. By creating forums for questions and complaints, and by claiming they will take supervisory action when enough consumer signals are received, the agencies attempt to establish a more direct connection between representative and represented. They now engage consumers, and want to be engaged by them. But by depicting consumers as *in need* of market information, IRAs also take part in 'making' the consumer constituency. While the agencies on the one hand could be said to emancipate the consumer through making him aware of his options and rights, they are also involved in a project to make citizens – in such domains as public healthcare – think of themselves *as* consumers (cf. Anderson 1986). While this portrayal of people is hardly contested in domains such as telecommunications and energy, in other sectors, such as healthcare, this representation may be less well-received.

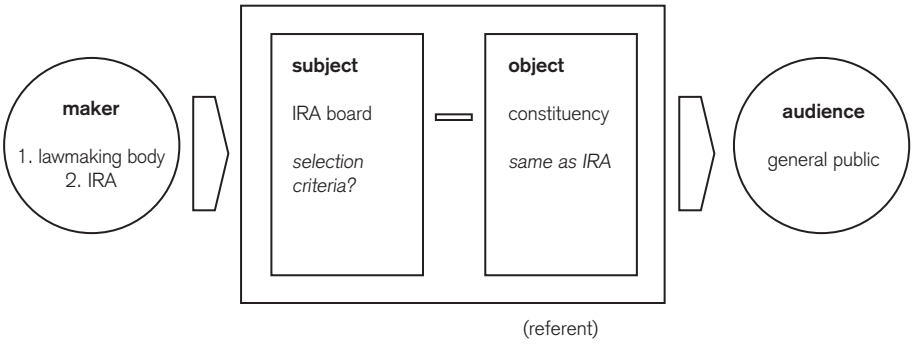
Chapter 7

A paradox of selection criteria. The board level of independent regulatory authorities

Independent regulatory authorities (IRAs) have boards. Often these are collegiate: composed of multiple persons who collectively make decisions (Rosanvallon 2011: 92-94). The very independence of the regulatory bodies is expressed in these board decisions. Board members, however, are appointed by political government. Yet they also have a public figurehead position: they represent the institution, and everything it stands for, to the outside world. In light of these potentially competing pressures, this chapter focuses on representative claims made about the boards of the four IRAs, and their members, as a leadership class. The first question it seeks to answer is: '*To what extent can representative claims be identified at the board level of independent regulatory authorities?*'

IRA boards and their *members* in this chapter feature as the purportedly representing *subjects* ('S') (see Figure 7). Representative claims about them are assertions in which their character and properties as leaders and decision-makers of IRAs are constructed.

Figure 7 (reprint). The board-level representative claim



Pre-eminent *makers* ('M') of such representative claims are, once more, lawmaking bodies and IRAs themselves. The former establish IRAs and their boards, and in doing so make claims about them. The independent bodies themselves afterwards also are important utterers of representative claims about their leadership boards.

The *objects* ('O') or intended constituencies in board-level representative claims are similar to those in institutional-level claims. Board members purportedly represent the same constituencies and interests – as depictions of people as *referents* ('R') – as IRAs-as-institutions do: economic and non-economic public interests, including the consumer interest (see Chapters 5 and 6). The intended *audience* ('A') of board-level claims also is the general public.

The difference between boards and institutions, then, is that the former consist of *persons*. The representative claims about boards and their members are about qualities they must possess as persons. These personal qualities ostensibly enable them to act as would-be-representatives (subject): as leaders and decision-makers in the public interest, including the consumer interest (object). This happens against the background

of a larger institutional context, shaped by the representative claims made about the IRAs-as-institutions. In this institutional context, board leaders have a personal representative function. They embody the institution to the outside world.

Selection criteria are a source to find expressions of (un)desirable qualities in IRA board members. These are formally contained in acts of establishment, making the Dutch lawmaking body their creator. Additional representative claims about board members and (un)desirable qualities were found in explanatory memorandums and parliamentary records. Informally, IRAs themselves also employ selection criteria. These could be found in public documents, making the independent bodies their creator. After a description of the constitution of the boards of the four IRAs (sizes, term limits, appointment procedures), this chapter therefore focuses on formal and informal selection criteria for these leadership bodies. Which qualities should a person possess in order to be considered for IRA board membership?

As an extension of this research, furthermore, actual board appointments at the four independent bodies from their establishment until the present (2014) are analysed in this chapter as well. In this respect, the study ventures beyond the representative claim framework (RCF), which stresses claims and rhetoric, to look into real-life board appointments. The second question it seeks to answer is: '*Who gets appointed to the boards of independent regulatory authorities?*' How can the composition of board membership at the four selected IRAs be described? In order to answer this question, descriptive variables were drawn from selection criteria, as well as from explanatory theories on leadership appointments at public organizations: resource dependency theory and classic representative bureaucracy. These variables are applied to describe the 73-person executive and non-executive board membership of the four IRAs from the past until the present. This invites reflection on its composition in light of the institutional-level representative claims about these independent bodies.

A preliminary remark: before 2005, the energy regulator DTe and the competition authority NMa, while *de facto* autonomous, were not formally independent from the political sphere (see Chapters 2 and 5).[87] Being *de jure* hierarchically subordinate administrative bodies, they lacked formal boards and selection criteria. After 2005, the DTe was subsumed into the NMa, and the latter made formally independent. In this chapter, the NMa board since 2005 is therefore studied for selection criteria and appointments, and – for the sake of completeness – DTe and NMa appointments before 2005 are as well.

87 The competition authority NMa is not an independent case in this study. Because the energy regulator DTe – a case in this study – from 2005 onwards was merged with the NMa, however, the latter's board must be considered the board of DTe as well. The NMa board is therefore studied from 2005 onwards.

7.1 The constitutions of IRA boards

The four IRAs studied in this thesis are all headed by collegiate boards. In formal terms, these boards take the independent regulatory and supervisory decisions of the four agencies. They are also responsible for the day-to-day operation of the IRAs, although the extent of their responsibility in this regard may differ in practice. All four boards are marked by collegiality: decisions are formally taken by a collective. No decision-making rules or voting systems are in place. Of course, the board members may distribute responsibilities for certain task areas among themselves.

The sizes of the four IRA boards are either fixed or variable. In all cases, however, they are between three and five members. The OPTA board consisted of three to five members, the NMa board of three members, the AFM board of three to five members and the NZa board of three members.

All four boards were and are appointed by the government. This is generally the case for all national-level public appointments in the Netherlands, including those at NMIs (Van Thiel 2012). The parliament has no formal say in the matter. The OPTA board was appointed by the Minister of Economic Affairs[88], the NMa board was nominated by the Minister of Economic Affairs and appointed by the cabinet at large[89], the AFM board is nominated by the Minister of Finance and appointed by the cabinet at large, and the NZa board is appointed by the Minister of Health, Well-being and Sport. Such appointment powers are sometimes seen as a political control mechanism (ibid.). While the political sphere cannot formally determine the individual decisions of independent bodies, they may through public appointment of the decision-makers nonetheless seek to exert influence on the course and direction of IRAs.

In all four cases, the board chairman is personally designated by the responsible minister. No other board functions are designated by the government.[90] This included the responsibility for the energy tasks of the NMa. Formally, the NMa board would itself decide which of its members was responsible for these.

The financial markets authority AFM board is unique in that another board-level body – its non-executive supervisory board – also has a role in the board appointment process. This supervisory board can non-bindingly nominate potential AFM governing board members at the Minister of Finance (AFM Charter 2006 art. 4.2).[91]

Members of the four IRA boards cannot be dismissed at will by the government. They are protected against such interference by legal stipulations, which in this respect formally protect their independence (cf. Rosanvallon 2011: 92-94). Resignations and suspensions from the IRA boards are legally only possible at personal request, because

88 Before 2004, the OPTA board was appointed by the Minister of Transport, Public Works and Water Management.

89 In the Netherlands, a cabinet appointment is called an appointment 'per royal decree'. It means that an appointment is formally discussed in the cabinet.

90 Of course, ministers may *de facto* recruit people for specific functions.

91 The AFM supervisory board makes frequent use of this prerogative, lastly in 2014.

of serious incompetence or negligence, or because of 'incompatible' functions or interests. The latter will be discussed below (OPTA Act 1997 art. 3.7; Competition Act Revision Act 2005 Art. IB art. 3.4; Financial Supervision Act 2006 art. 1.26; Healthcare Market Structuring Act 2006 art. 4.5). All suspensions and resignations are handled by the responsible minister.

Term limits for board members are in place. In all cases, these are fixed at four years. Only the NMa chairman could serve for six years.[92] Re-appointment usually was or is possible only for a limited amount of times, but not in every case: OPTA board members could always be re-appointed, NMa board members could be re-appointed once, AFM board members can be re-appointed twice in the same position[93], and NZa board members can be re-appointed twice. No collegiate board is formally re-appointed in full. A new member is appointed once a position becomes vacant.

Unique among IRAs discussed here, a representative claim about the NZa governing board is contained in its formal board regulations. According to these, the board 'puts the general consumer interest first' in the task performance of NZa (NZa board regulations 2011 art. 16). Similar explicit stipulations are not provided for the other IRA boards.

Non-executive boards

Two IRAs discussed in this thesis also have non-executive boards. These are the financial markets authority AFM, and the healthcare authority NZa.

The supervisory board of AFM is rooted in the original foundational charter of this agency, and also has a basis in the 2006 Financial Supervision Act.[94] The official functions of the supervisory board are to 'oversee the policy of the [governing] board, and general affairs', and to advise the governing board (DNB and AFM Strengthening of Governance Act 2012 art. IIC).[95] The AFM supervisory board may also non-bindingly nominate new governing board members at the Minister of Finance. It must lend its approval to governing board decisions on the budget, annual plan, annual account, and changes to the foundational charter of the organization (AFM Charter 2006 art. 6.4).

The AFM supervisory board is directly appointed by the Minister of Finance. It may non-bindingly nominate its own potential new members at the minister. The supervisory board consists of three to five members. The chairman is specifically designated by the minister. Terms are limited to four years. Re-appointment is, and

92 If the NMa chairman was reappointed, however, this could only be for four years.

93 Until 2011, AFM board members could always be re-appointed. In this year, however, an act to 'strengthen the governance' at AFM and the central bank DNB was adopted which limited this to two times (DNB and AFM Strengthening of Governance Act 2012).

94 The AFM is formally a foundation in private law. Because independent tasks have been delegated to it, it also considered a public body: a ZBO.

95 Originally, the AFM supervisory board was to oversee the efficiency and effectiveness of the governing board and advise it (Financial Supervision Act 2006 art. 1.27). As of 2011, with the law to 'strengthen the governance' at this IRA, this role was expanded to a more broadly advisory one.

always has been, possible twice (Financial Supervision Act 2006 art. 1.27). Resignation from the AFM supervisory board is legally only possible at personal request, because of unsuitability or incompetence, or for serious reasons involving a specific member.

The healthcare authority NZa has an advisory board. This advisory board has no basis in the act of establishment of the IRA. It is founded on the basis of the NZa board regulations. These were drawn up by the governing board, and legally approved by the Minister of Health. The function of the NZa advisory board is to provide advice on every topic the governing board considers important to its task performance (NZa board regulations 2011 art. 14). It is stated to function as a 'think tank' with an 'important role in the opinion formation of the NZa [governing] board' (NZa 2014e). Advisory board members are invited by the governing board. Information on appointments, resignations, board size, term limits or selection criteria, however, is not publicly provided.

For the general competition authority NMa, the establishment of an advisory board was in 2001 discussed in the Dutch parliament, yet never materialized. A proposed amendment by the Social Democrat (PvdA) and Christian Democratic (CDA) political parties to provide the newly *de jure* independent NMa with voluntary, non-binding advice by an advisory council for representative organizations – employers' organisations, trade unions, consumer associations – was explicitly rejected by the conservative-liberal (VVD) minister of Economic Affairs. She called an advisory council for this IRA the 'polder model [the Dutch tradition of attempting to establish societal consensus and deliberation on public policy, AV] in its worst manifestation' (SC 2001-2002b: 27-28).

7.2 Selection criteria for IRA boards

To the boards and members of all four IRAs, certain personal qualities as leaders and decision-makers are ascribed. These are expressed in selection criteria for the boards. As *subjects* ('S') in a representative claim, boards and their members on the basis of these criteria are claimed to possess certain personal characteristics – or to lack these – which enable them to – in their function – non-electorally represent economic and non-economic public interests, including the consumer interest (see Figure 7). These constituencies and interests – *objects* ('O') as depictions of *referents* ('R') – are similar to those in institutional-level representative claims about IRAs. The *maker* ('M') of *formal* board selection criteria is the Dutch lawmaking body. *Makers* ('M') of *informal* board selection criteria are the four IRAs themselves. But what are selection criteria, and what do they do?

According to the Constitution of the Netherlands, in principle, every citizen is equally eligible for appointment to public office (Constitution of the Netherlands art. 3). The Dutch civil service – consisting of the bureaucracy and independent bodies – is often characterized as a 'merits' and a 'position' system. Rather than on political spoils, public appointments are formally based on merits: on skills, competences and expertise. And rather than being recruited for a lifelong career, civil servants are recruited for

specific functions. Vacant public positions are often advertised, and formally open to a wide range of candidates (Van Thiel 2012). Yet in acts of establishment, and in practice, incompatible functions and interests, and competency demands for public offices may be stipulated (Raad voor het openbaar bestuur 2006: 18).

For most ZBOs in the Netherlands, no such formal board selection criteria exist (ibid: 52). Yet for the four IRAs discussed in this thesis, they do. This made these selection criteria a relevant body of data to explore in light of the research aims of this study. Formal – and informal – board selection criteria circumscribe appointments to these boards. They narrow down the pool of potential appointees, by stipulating who cannot be appointed to these boards, and which kind of people should. To this pool certain personal qualities are ascribed, and out of it candidates are picked. Their personal qualities are claimed to enable candidates to perform a representative function: as leaders and decision-makers at IRAs. Thus a leadership class is created that is marked by certain characteristics, which are peculiar to it.

A conceptual distinction can in this regard be made between 'negative' and 'positive' selection criteria. A negative selection criterion stipulates what a board member is to be *not*, in the service of what he or she, and the institution he or she heads, is claimed to stand or work for: to independently represent economic and non-economic public interests, including the consumer interest, through regulation and supervision (see Chapters 5 and 6). A positive selection criterion, on the other hand, expresses what a board member is to *be* or to be *capable of*, in the service of what he, and the institution he heads, is claimed to stand or work for. Yet, as will be shown, to certain IRA boards deviant selection criteria apply; while negative and positive selection criteria, moreover, can potentially clash with each other.

Negative board selection criteria: assuring independence, with some exceptions

A negative selection criterion expresses what an IRA collegiate board – and its members – are to be or have *not*, in the service of what they and the institution they head are claimed to stand or work for. Such negative selection criteria are formally contained in their acts of establishment as functions and interests being incompatible with board membership. Notably, this only pertains to incompatible functions and interests *during* IRA board membership. These criteria are silent about functions or interests before or afterwards. Table 4 in Appendix B to this thesis lists these criteria.

Such incompatible functions and interests historically were first laid down for the telecommunications authority OPTA. In the 1997 act of establishment for the pioneer IRA, as functions incompatible with simultaneous board membership were formally named (OPTA Act 1997 art. 4):[96]

96 No provisions were made for elected membership of a provincial representative body or the elected municipal council.

- employment at any entity reporting to a minister or the government
- being elected to the parliament
- being a member of a provincial or municipal government

The government in parliamentary debates about OPTA establishment also emphasized that 'representation or recognition of political currents (should) not play a role' in the newfound body's board (SC 1996-1997c: 21-22). Conversely, OPTA board members were not to be identified with sectoral interests either: having financial or other interests in institutions or corporations 'which may threaten the impartiality of the involved member' were legally considered incompatible with board membership (OPTA Act 1997 art. 4). Instead, the board members of the unelected body were, it was prescribed in the law, to take seat on a personal title and 'not bound by a mandate' (ibid. art. 3.6). This newfound IRA's collegiate body and its members – as *subject* ('S') in a representative claim – were thus positioned as personally independent from the electoral political sphere and sectoral interests during their tenure, and portrayed as therefore impartial. This was in service of their institution's claimed 1998 mission: to represent general economic and societal interests – as *object* ('O') – through regulation and supervision (see Chapter 5). Yet the lawmaking body for OPTA also created 'associate' board membership, about which it made a different representative claim expressed in deviant selection criteria. These will be discussed below.

At the other IRAs, this negative selection criterion of personal independence was repeated. Both NMa and NZa board members according to their acts of establishment were or are not to have any additional functions considered 'undesirable' for a good task performance or the preservation of their 'independence or the trust therein' (Competition Act Revision Act 2005 Art. IB art. 4; Healthcare Market Structuring Act 2006 art. 4.5).[97] In the memoranda to these acts, as examples of such functions or interests are named employment at a ministry or being elected to parliament. Also forbidden for NMa board members were advisory functions or commissionerships at corporations, being an entrepreneur, or practicing a liberal profession (SC 2001-2002a: 12). NZa board members are not simultaneously to be governing or supervisory board members of healthcare institutions or insurers, or to be active healthcare practitioners (idem 2004-2005: 53).[98] Governing board members of both IRAs are furthermore not to have financial or other interests in institutions or corporations 'which may threaten the impartiality of the involved member' (Competition Act Revision Act 2005 Art. IB art. 4.4; Healthcare Market Structuring Act 2006 art. 4.6e). About the advisory board of the healthcare authority

97 A paragraph regarding undesirable additional functions was removed from the NZa act of foundation in 2011 because the general framework act for ZBOs was made applicable to it. The paragraph regarding additional functions in this act stipulates exactly the same (Autonomous Administrative Organs Framework Act 2006 art. 13.1).

98 Originally, board membership at other IRAs was formally mentioned as incompatible with NZa board membership as well, but the paragraph to this effect was removed in 2011 when the general framework act for ZBOs was made applicable to the healthcare authority. The Minister of Health made clear he still considered this a negative selection criterion for the governing board, however (SC 2008-2009: 5).

NZa, however, no such negative selection criteria are public, although according to the IRA's website and board regulations they, too, are 'independent' (NZa 2014e) and take a seat 'without a mandate or instructions' (NZa board regulations 2011 art. 14).

AFM governing board members likewise, on the basis of the IRA's foundational charter may not be employed at (AFM Charter 2006 art 5.1):

- another financial supervisor
- any institution licensed or registered by any financial authority
- corporations issuing securities

No explicit mention is made of employment in the electoral political sphere.[99] The AFM supervisory board must grant permission for any additional functions exercised by governing board members.

To the AFM supervisory board, these same negative selection criteria apply, albeit with one notable exception: its members *are* allowed to have simultaneous functions at corporations issuing securities. This is despite the fact that the AFM oversees the compliance of listed corporations to regulations. Members must, however, report any potentially incompatible interests to the supervisory board chairman (ibid. art. 10). When it is 'plausible' that either an AFM governing or supervisory board member because of an impending conflict of interest will not be able to 'adequately represent the interest of the foundation', he must hand over his tasks to another member and is excluded from deliberations of his board (ibid. art. 5.2 and 10.2). Members of both AFM collegiate boards are legally to perform their tasks 'without a mandate or instruction' and 'exclusively serve the goal of the foundation' (ibid. art. 5.1c and 10.1a). Yet, an exception is again made for the AFM supervisory board: one member is allowed to be 'non-independent' in the sense that he or she may have served as governing board member in the past (ibid. art. 10.1b).

Similar deviations in the negative criteria for personal independence were found in OPTA associate board membership. As mentioned above, to associate members different selection criteria – and a different representative claim – applied. OPTA associate board members, first, could be legally appointed by the regular board itself.[100] Associate members would attend meetings at the invitation of the regular OPTA board, and could be involved in matters in those areas on which they would have a special expertise. In board decisions, associate members would have an advisory voice. The formal negative selection criteria for regular OPTA board members, however, only partly applied to them: while associate members likewise could not be part of the electoral political sphere, they *were* legally allowed to have 'limited' interests in institutions or

99 No negative selection criteria are found in the 2006 Financial Supervision Act.

100 This was changed in 2010, when an act was passed to make authorities falling under the responsibility of the Ministry of Economic Affairs conform to the general framework act for ZBOs. From then onwards, OPTA associate board members were formally to be nominated by the OPTA regular board at the minister, and appointed by the latter (Act to bring establishment acts in Economic Affairs in line with Autonomous Administrative Organs Framework Act 2010 Art. IVF).

corporations in the telecommunications or postal services markets (OPTA Act 1997 art. 7.4). The OPTA regular board itself would 'see to it' that associate members would not be involved in matters in which conflicts of interests could occur (ibid.). Unlike for regular board members, furthermore, in the IRA's act of establishment no legal provisions were drawn up about an obligation for associate board members to take seat on a personal title and without a mandate.

These deviations in the negative selection criteria for the formal personal independence of OPTA associate board members and AFM supervisory board members – and the non-existence of these criteria for the NZa advisory board – stand out in exception. All other IRA governing boards and their members have been positioned – and portrayed – by the lawmaking body as personally independent from the electoral political sphere and sectoral interests, and therefore impartial. Yet these criteria necessarily only apply to the length of their tenure. Positive selection criteria for IRA board members, on the other hand, are not limited in time: these may incorporate demonstrated capabilities as evidenced by previous functions.

Positive board selection criteria: assuring expertise, and more

A positive selection criterion expresses what an IRA collegiate board – and its members – are to *be* or to be *capable of*, in the service of what they and the institution they head are claimed to stand or work for: to represent economic and non-economic public interests, including the consumer interest, through regulation and supervision (see Chapters 5 and 6). Such criteria may be formally contained in acts of establishment, but also informally commented on in parliamentary documents, as well as be put forward by IRAs themselves. Notably, unlike negative selection criteria prescribing incompatible functions or interests during board membership, positive selection criteria are not limited in time. These criteria may incorporate demonstrated capabilities, as evidenced by previous occupations in different functions. Table 5 in Appendix B to this thesis lists these criteria.

Not in all four cases of IRAs, such positive selection criteria are found in their acts of establishment. For the telecommunications authority OPTA, the lawmaking body was formally silent about positive selection criteria for regular board members. The option to insert 'expertise' as a board selection criterion in the law was discussed in the parliament, yet rejected by the government, which did not consider it necessary (SC 1996-1997c: 21-22).[101] Informally, however, expertise was a selection criterion for the regular OPTA board: in the memorandum to the act of establishment, the government stated the board would consist of independent 'experts'. The government mentioned a diversity criterion as well: the experts on the regular OPTA board would hail from

101 The Social Democrat (PvdA) political party proposed to insert an expertise criterion into the law to prevent 'political' appointments. The minister, however, did not consider it necessary and doubted whether it would prevent the chance of political appointments.

'various' disciplines (idem a: 21). Different competences 'related to the marketplace' needed to be present on the newfound IRA's board, such as administrative-juridical knowledge, financial, and economic knowledge (idem c: 21). OPTA associate board members, on the other hand – those who were allowed to have 'limited' interests in the sector – were legally appointed on the exclusive basis of their 'special expertise' on one or more task areas of the institution (OPTA Act 1997 art. 7.1).

In the memorandum, the government stated this choice for OPTA associate board membership had resulted from the 'difficulty' of finding telecommunications experts without '(concrete) interests' in the regulated domain (SC 1996-1997a: 16). This same scarcity of disinterested experts had led the lawmaking body to make OPTA board reappointments unlimitedly possible (idem c: 21). A disadvantage was claimed to be turned into an advantage, however:

> *Through the model of associated board membership the college can have valuable insights from the marketplace at its disposal without being impeded in its independent considerations* (idem a: 16).

The government here made the representative claim that the limited interests of OPTA associate board members in the telecommunications domain would *aid* in the mission of the IRA. This seems at odds with the negative selection criteria that prescribe the formal personal independence of board members from sectoral interests. It therefore led to parliamentary questions. One political party (D66) feared that OPTA associate board membership would hurt the trust in the 'impartiality' of the new IRA 'in the small world of Dutch telecom' (idem d: 14). To this, the government responded that hiring commercial expertise on an irregular basis would enlarge this risk. Compared to this option, the government argued, OPTA associate board membership at least offered legal guarantees against conflicts of interests, and would therefore solely contribute to the quality of and support for IRA decision-making (idem c: 22). A similar deviation, however, it not found in any other IRA governing board discussed here – although it is, as will be shown, in the AFM supervisory board.

The acts of establishment of NMa and NZa contain a similar positive selection criterion. Board members of these IRAs were or are formally appointed on the basis of their 'expertise' in the task areas of the institutions (Competition Act Revision Act 2005 Art. IB art. 3.2; Healthcare Market Structuring Act 2006 art. 4.3). For NMa this did not legally have to relate to energy. In the memorandum to the act establishing the healthcare authority NZa, an informal variety or diversity criterion is also mentioned. The government stated that 'various' areas of expertise would be present in the IRA board (SC 2004-2005: 35). NZa board members are legally not only appointed on the basis of expertise, furthermore, but also on the basis of their 'societal knowledge and experience' (Healthcare Market Structuring Act 2006 art. 4.3). This formal positive selection criterion is unique among IRAs discussed here. About the NZa advisory board, however, no such positive selection criteria are public, although according to the IRA's website they, too, are 'experts' (NZa 2014e).

Lastly, the financial markets authority AFM's foundational charter, and the Financial Supervision Act, were originally silent about positive selection criteria for its boards. Since 2011, however, the latter stipulates as positive selection criteria that both AFM governing and supervisory board members must be 'trustworthy beyond doubt' and 'suited' for their function (DNB and AFM Strengthening of Governance Act 2012 Art. IID art. 1.27a). These criteria according to the government would mirror those applying to executive positions in the financial sector itself (SC 2010-2011: 4). The lawmaking body so aimed to bring formal board regulations for the financial markets authority in line with the Dutch 'Tabaksblat' corporate governance code: a form of voluntary private regulation which since 2004 applies to Dutch corporations listed at the stock exchange. As of 2006, the AFM itself adhered to this code as well (AFM 2007: 37). Unique among IRAs discussed here, the lawmaking body and the authority itself apparently felt the need to subject IRA board members to some of the same positive selection criteria – trustworthiness and suitability – as applying to executive functions in the financial sector itself. The AFM supervisory board is to judge the trustworthiness and suitability of governing board and its own potential nominees on the basis of profile sketches drawn up in consultation with the governing board and approved by the Minister of Finance (DNB and AFM Strengthening of Governance Act 2012 art. IID).

These profile sketches further elaborate on the desired personal qualities of AFM governing and supervisory board members, and therefore merit attention. These personal qualities relate in particular to the IRA's supervisory tasks in the regulated domain, and the function of the board therein. This is not unknown to IRAs discussed here. In 1997, OPTA board members, as stipulated in the law, through negative selection criteria were not to be identified directly with sectoral interests; yet they, according to the minister of Transport in the act's memorandum, were nonetheless to have a certain *reputation* in the regulated domain:

> *Members of the college are recognized as authorities in one of the corporate branches and possess a personal authority on that basis* (SC 1996-1997c: 21).

Although OPTA board members were not to be identified directly with sectoral interests, they were nonetheless to possess broad 'experience' within relevant sectors and 'knowledge' of the actors operating in them. Yet they also had to be 'receptive to new developments in the postal services and telecommunications markets'. The personal representative function of IRA board members vis-à-vis their institution, moreover, was emphasized here as well: they were to be capable and willing to 'authoritatively represent the independent authority to the outside world'. Board members of the IRA were to possess leadership competences and be able to operate 'with a certain distance'. The OPTA chairman, moreover, would have to be:

> *The person* par excellence *who represents the independent authority to the outside world and whose expertise authority will be weighed extremely carefully by the marketplace. (…) The chairman must possess expertise authority and charismatic authority.'* (ibid.)

As *subject* ('S') of a representative claim, IRA board members were to possess certain personal competences – among them charismatic authority vis-à-vis the regulated domain, and the ability to publicly stand for the institution – to aid in the newfound body's institutional position and mission. Thus the lawmaking body highlighted the heightened public visibility of the newfound independent authority's leadership.

Similar and other informally desired personal qualities can be found in the current AFM profile sketches, last revised in 2013. First, both the AFM governing and supervisory boards are, as a whole, striven to be diverse in terms of gender, knowledge, 'background' and 'personality'.[102] These last two attributes unfortunately are not defined further. While the AFM governing board must furthermore also be diverse in terms of 'affinity' – neither is this publicly elaborated on – the supervisory board must be diverse in terms of 'experience with the different stakeholders of the AFM' (AFM 2013c: 1; idem d: 1).

In addition, according to the profile sketches, in both boards certain 'competences must be sufficiently present (…) in order for the AFM board to realize its mission'. These, again, are stated to mirror those applying to executive positions in the financial sector itself (idem c: 1; idem d: 1). Each AFM governing and supervisory board member must at least possess sufficiently and beyond doubt the following competences:

- 'vision/strategy'
- 'morality/integrity'

'Vision/strategy' is for governing board members translated as the personal ability to 'give shape to the position of AFM as independent supervisor' and to employ a 'natural authority' (idem c: 2). For the supervisory board, this natural authority is to 'contribute to the succession of supervision and advice' at AFM (idem d: 2). The obligatory competence of 'morality/integrity', secondly, means AFM governing and supervisory board members must personally serve as examples to the financial sector; yet it is also taken to mean they must be 'capable of upholding the interest of the AFM when it goes against existing (sectoral) interests' (idem c: 2; idem d: 2).

Other desirable competences for AFM governing board members, according to the profile sketches, are knowledge and experience on the area of the financial markets, resoluteness, communication skill to 'garner support and acceptance for opinions and measures', and 'influence/impact' – which is translated as the competence to 'transform empathy for supervisees into strategies for influencing them' (idem 2013c: 3). AFM supervisory board members must possess knowledge and experience on the financial markets as well, but also have previous experience as supervisors to organizations. Some, moreover, must have knowledge about consumers and small investors. Lastly, and interestingly, supervisory board members must possess a 'network' both within and outside of the AFM in order to 'pick up signals' (idem d: 2).

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102 The AFM governing board is striven to be composed for at least 30 percent of women, and 30 percent of men. The supervisory board is striven to be composed for two-fifths of women.

Negative selection criteria, some exceptions aside, must prevent simultaneous functions or interests for IRA board members in order to assure their personal independence and impartiality during the length of their tenure. Yet positive board selection criteria state they are to be experts from various disciplines with experience in the sector, and sometimes to have societal knowledge and experience, to be trustworthy and suitable, or – informally – to possess personal charismatic authority, a reputation, or even a network in the regulated domain. This is all purportedly in the service of the claimed mission of IRAs: to independently represent economic and non-economic public interests, including the consumer interest, through regulation and supervision (see Chapters 5 and 6).

Between these negative and certain positive selection criteria, however, potential tensions can be discerned. The possession of interests, previous experience, or a personal network in the regulated sector – required for expertise – present a possible trade-off with the negative selection criterion of personal independence, which is to ensure impartiality. Although IRA board members are not allowed to have simultaneous functions in the regulated domain (or the political-administrative sphere), a lifetime of previous personal experience in either domain could lead to overt identification with the interests in it. Such identification could even play out on a subconscious level, or be intertwined with the very expertise that board members possess. Likewise, the possession of a personal network in the regulated sector, while potentially beneficial to the relations between IRA and sectoral interests, could also lead to undue influence on or interference with the policies of a regulator. The various qualities ascribed to IRA board members – both independence and expertise, impartiality and experience in the regulated sector – could thus be mutually conflictive.

At this point, the limits of the representative claim framework (RCF) may be reached. The representative claim theorization itself does not account for potentially contradicting aspects of rhetorical representative claims – being independent and an experienced expert, being impartial and having interests in the regulated domain – nor does it account for actual appointments. In order to find out what the leadership class of the four IRAs looks like in real life, therefore, and to compare this with the representative claims made about it, an exploration of actual board appointments is called for.

7.3 Explaining and describing public appointments

What does the leadership class of the four IRAs look like in real life? Which people, of which backgrounds, get appointed in practice to the collegiate boards of the four IRAs?

Any direct relation between the selection criteria and actual appointments, first, is difficult to ascertain. Government decisions on board appointments are made behind closed doors. The real motivations of the appointing body in any given appointment are

therefore not known. And while the literature on public appointments offers various explanatory theories, the number of IRA board members in this study is too small to causally test them. Yet along with the selection criteria, these theories provide variables to describe the composition of board membership at the four IRAs. And they also provide opportunities for reflection on the motivations of governments to appoint these IRA board members. As such, the representative claims about board members can be compared against real-life appointments from the past until the present (2014).

Explaining public appointments

A *first* explanatory theory for public appointments is that those people get appointed who have the best, right or optimal competences for the job. This is usually the 'official' government story on public appointments (Baakman 2004; Raad voor openbaar bestuur 2006; Van Thiel 2012). From the pool of potential appointees, those people are selected that best match the selection criteria stipulated for the function. This theory assumes the representative claims about IRA boards and their members are effectuated in real-life appointments. Yet it could be considered naïve. It presupposes that certain formally non-relevant characteristics of potential appointees, such as being embedded in political and societal networks, having the right contacts, or being member of a political party truly do not matter for their appointment. As demonstrated above, moreover, the possession of a network in the regulated sector in fact is a criterion for some IRA boards.

A *second* explanatory theory for public appointments is that those people get appointed who can bring 'resources' and connections to the organization. Agencies such as IRAs are dependent on external actors to survive and thrive (cf. Aldrich and Pfeffer 1976; Berkhout and Koop 2011). *Politicians* and *ministerial departments* bring funding, competences and information to the agencies. *Regulated domain actors* such as interest groups, corporations and consumer organizations bring them expertise, support, intermediation and compliance. *Academic and scientific institutions*, lastly, bring expertise to the agencies. These external resources may be acquired through board appointments. Through background experience, connections and networks, new board members may help IRAs to survive and thrive.[103]

A *third* explanatory theory for public appointments is rooted in an expanded version of classic representative bureaucracy theory. Various strands of literature have focused on the degree to which the bureaucracy is representative – in the sense of reflective or descriptively-representative – of a population's social class, gender and ethnic diversity (Kingsley 1944; Krislov 1974; Groeneveld and Van de Walle 2010). This may be expanded on to hypothesize that governments feel the need to make IRA boards descriptively representative of various important stakeholder groups. These groups again include the *political-administrative sphere*, the *regulated domain* (including

103 A potential trade-off, obviously, is that board members on the basis of their backgrounds and connections influence the course of the agency (Berkhout and Koop 2011).

consumer groups), *academic institutions* and the *general public*. A representative claim to diversity – evidenced by board appointments – may afford IRAs legitimacy in the eyes of these stakeholder groups, who each see 'one of their own' on the boards.

As the closed-door motivations for public appointments are not known, these explanatory theories in this thesis cannot be put to a causal test.[104] Along with the selection criteria, however, these theories offer variables to describe, for the first time, the leadership class of the four selected IRAs. And after description, they will be employed to reflect on the motivations of the government to appoint this IRA board membership.

Descriptive variables

Since the establishment of the oldest IRA discussed in this thesis – the telecommunications regulator OPTA – 73 persons have been appointed to the boards of the four selected agencies. This happened through 80 acts of appointment, as five persons have been appointed to multiple boards at the four selected cases.[105] This includes executive as well as non-executive boards. Through within-case analyses of the six boards, they will be described below in terms of a number of variables. Figure 18 in Appendix B to this thesis provides an overview.

Gender is the first variable employed to describe this 73-person IRA board membership. As demonstrated above, some IRAs studied in this thesis publicly strive for gender diversity in their boards. The extent to which this is effectuated therefore is of interest, as well as relatively easy to explore.

Political party membership is the second variable employed to describe this IRA board membership. Even though, as demonstrated above, political party affiliation has been claimed by the lawmaking body to not be a selection criterion for IRA boards, literature on patronage and public agencies suggests this for various reasons may still be a relevant *de facto* criterion in appointments, at least in the Netherlands (Baakman 2004). Political parties may seek to distribute public offices among themselves in order to increase their power, reward party members, or establish consensus. Ministers may appoint party members to independent boards in order to increase control or establish mutual trust (Van Thiel 2012). Since a majority of top-level civil servants in the Netherlands currently is a member of a political party (ibid. 5), this is a relevant variable to employ to describe the leadership class of IRAs.[106] To which extent have electoral-representative organizations penetrated the boards of independent-representative agencies?

Professional background is the third variable employed to describe the 73-person board membership at the four IRAs. On the basis of the selection criteria, as well as

104 The various motivations, moreover, do not exclude each other. Any given board appointment may simultaneously be motivated by each rationale: to try to appoint the best candidate for the job, to bring resources and connections to the organization, and to have a descriptive representative of a stakeholder group on board.

105 Three persons have been appointed to two IRA boards, and two persons have been appointed to three IRA boards.

106 To demonstrate that a significant number of IRA collegiate board members is a member of a political party, however, would not prove they behave in a party-political manner (cf. Van Thiel 2012).

the relevant groups identified in the theories on public appointments, this variable is broken down into sub variables.

The first of these is the professional background of *public administration*. IRA board members may need to possess demonstrated competences in public administrative functions (theory 1), the organizations may need connections in ministerial departments (theory 2), or the government may want to see former civil servants represented in agency boards (theory 3). This sub variable can be further refined, as the board members may hail from:

- a ministerial department
- a national-level government advisory body
- an IRA

It will additionally be explored whether the board members previously worked at the home department of the agency or another department, and/or have risen through the ranks of the own organization, or hail from another IRA.

A second relevant professional background for IRA board members is *law*. Various scholars have linked the liberalization and privatization of economic and societal domains, and the establishment of regulatory agencies, to an increasing judicialization of state-societal relations. Conflicts between state and societal actors are increasingly cast in legal terms, and solved in courts (Van Waarden and Hildebrand 2009). IRAs co-formulate competition and sectoral regulatory law and apply it to society, and often end up in court (Lavrijssen 2006). Their board members may therefore require knowledge and experience in the law (theory 1), the organizations may need connections in administrative courts (theory 2), or the government may want to appoint lawyers to enhance the image of impartiality of the agencies (theory 3). This background is further refined, as IRA board members may have a background in societal legal practice, and/or lectured law at a university.

A third relevant professional background is *the private sector or society*. This comprises the regulated domain, as well as other domains. The former is constituted by the businesses and corporations, societal institutions, and consumer groups whose activities are regulated or supervised by the IRAs. As indicated by the selection criteria, board members may need experience in or knowledge of the regulated domain (theory 1), the IRA may need connections or a network in it (theory 2), or the government may want to see descriptive representatives of the regulated sector on board (theory 3). Exploration of this background will also demonstrate to which extent either corporate or consumer backgrounds are represented on the IRA boards. Yet IRA board members may also hail from non-regulated private or societal domains, which will be described below as well.

A fourth relevant professional background is *academic or scientific institutions*. The selection criteria indicate that IRA board members may need scientific expertise (theory 1), or the organizations perhaps needs a network in academia (theory 2), or the government may want to see scientific expert backgrounds represented on the agency

boards (theory 3). Legal scholars are excluded from this category as they are included in the professional background of law.

A fifth and last professional background is *national political institutions*. IRA board members may require competences acquired in politics and administration (theory 1), or the organization may need connections or a network in politics (theory 2). It is unlikely the government wants to see politicians as a descriptively represented stakeholder group on the board (theory 3). This background can be further refined, as former national politicians can hail from the government and/or the parliament.

Naturally, the 73 IRA board members may combine different professional backgrounds. In fact, the very combination of backgrounds – being a legal scholar and having (had) functions or interests in the regulated domain, or being a former politician with experience on the policy domain – may have resulted in their appointment. This is made visible in the tables in the addendums to this thesis. Lastly, the 73 IRA board members may have (had) additional functions: (previous) part-time functions such as supervisory or advisory board memberships at corporations, institutions, associations and foundations. These were scrutinized but not taken up in the tables and figures. In the following analysis, they are mentioned where considered relevant.

The OPTA and NMa boards ceased to exist in April 2013. They were scrutinized until that time. The AFM and NZa boards were scrutinized until February 2014.

7.4 Actual IRA board appointments

The Independent Mail and Telecommunications Authority (OPTA) board: lawyers, captains of industry and scientists

Between 1997 and April 2013, the OPTA board has had eight different members. Table 6 (in Appendix B to this thesis) and Figure 13 (below) display the breakdown of their gender, political party, and professional background characteristics. Seven of eight were regular board members; one (mrs. A.F. Ottow) was associate board member.[107] In terms of *gender* diversity, five of eight OPTA board members were male, and three of eight female. The two chairpersons were both male. One board member was a known member of a *political party*: L.A. Geelhoed of the Social Democratic party PvdA.

In terms of professional backgrounds, four of eight OPTA board members had a previous career in *law*. This was either in legal practice, academically, or both. Three of four jurists in the OPTA board had a background in telecommunications regulatory law, or another kind of competition law. C.A. Fonteijn, for instance, the second OPTA chairman, previously worked as a corporate lawyer representing energy utility companies in court, and lead the energy and utilities group of a Dutch law firm. Mrs. Ottow specialized in telecommunications and competition law, and was professor of public economic law.

107 Mrs. Ottow was however appointed regular board member in 2011.

Mr. Geelhoed was advocate-general of the European Court of Justice (ECJ) and professor of European law. He had also played a large role in the 1990s reform of Dutch competition law as head of the Ministry of Economic Affairs. With that, he also was the only OPTA board member to have a career background in the Netherlands' bureaucracy.[108]

Two of eight OPTA board members had a background in the *private sector*. One, as vice chairman of the Dutch multinational chemical firm AkzoNobel (H.A. van Karnebeek), the other in the *regulated domain*: as director of the corporate strategy and regulatory affairs department, and vice chairman of the mobile telephony division, of the telecommunications incumbent KPN (M.W. de Jong). Mr. De Jong had worked for KPN for thirteen years when he became board member of the telecommunications IRA in 2006. He also held an endowed professorship in service sector economics.

Three of eight OPTA board members had an *academic or scientific* background not directly related to law.[109] J.C. Arnbak, the Danish-born first OPTA chairman, had (had) professorships in telecommunications science, and had advised the Dutch government on the autonomization of the state monopolist PTT (later KPN) in the mid-1980s. Mrs. A.P. Aris was professor of media management at the INSEAD business school in France.

Notably, no OPTA board members had a *political background* in either government or the parliament.

The list of additional functions of OPTA board members (not displayed in Table 6), lastly, both before and during their membership, is long. Mrs. L.Y. Gonçalves-Ho Kang You, in addition to having been a corporate lawyer and vice chair of the national *Commissie Gelijke Behandeling* ('Equal Treatment Committee') (CGB) (a quasi-judicial independent authority against discrimination), was vice chair of Amnesty International, and held many advisory and board memberships in legal foundations and associations. Mr. Arnbak held a number of academic and government policy advisory functions, while Mr. Van Karnebeek and Mrs. Aris held many supervisory board positions in the private sector, including at foreign media companies.[110] Mr. Geelhoed held a number of advisory and supervisory board memberships at corporations and universities.

All OPTA boards, then, have in various configurations consisted of a combination of (competition) jurists, former captains of industry (one in the regulated sector), and scientists; many of them with academic positions. One was also a former top bureaucrat. No board member had a background in the consumer movement.

The relative presence of this many jurists and academics in the board, as will be shown, is notable among the cases explored here.

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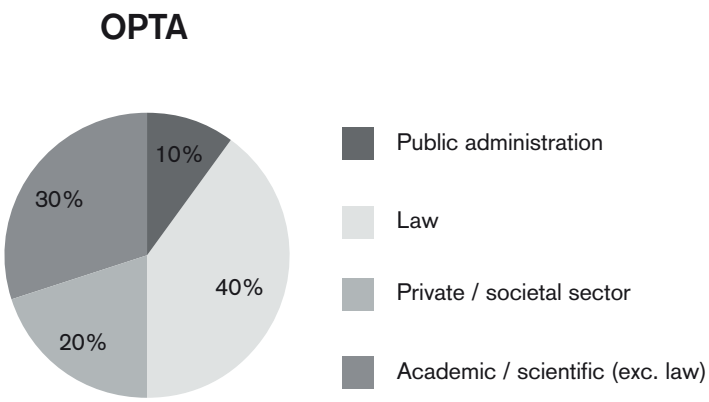
108 Mr. Geelhoed had also been member of the Scientific Council for Government Policy (WRR), and close advisor to Prime Minister Wim Kok (PvdA) as head of the Ministry of General Affairs.

109 In total, five of eight OPTA board members (had) held an academic position.

110 Mrs. Aris in 2011 resigned from the OPTA board because of the impending take-over of a Dutch media corporation by a German one, of which she was a supervisory board member.

Figure 13. Professional backgrounds of OPTA board membership, 1997-2013



Total number of backgrounds: 10
Total number of board members: 8

The Netherlands Competition Authority (NMa), its Energy Chamber and their predecessors' boards: public administrators and lawyers

Between 1998 and 2005, the year in which DTe was fully merged with the competition authority NMa, the *de facto* independent energy authority had two directors. From then onwards until 2012, the Energy Chamber of the NMa had one subordinate director.[111] Between 1998 and 2005, the year in which the NMa was made *de jure* independent, the *de facto* independent competition authority had two director-generals. From then onwards until 2013, it had seven board members.

Table 7 (in Appendix B to this thesis) and Figure 14 (below) display the breakdown of the gender, political party, and professional background characteristics of the board memberships of the two authorities, both while separate and merged (this is marked in the table). In terms of *gender* diversity, nine of ten board members were male, one was female. The directors, directors-general and chairpersons were all male. Two of ten board members were known members of a *political party*: F.J.H. Don and E.J. Mulock Houwer of the Social Democratic party PvdA.

In terms of *professional backgrounds*, six of ten DTe/NMa board members had a previous career in *public administration*. Of these, five were previously involved at an IRA – either at one or two of the authorities themselves (two of five), at the advisory board of the healthcare authority NZa (two of five), or at OPTA (one of five). Two of six previously

111 From June 2012 to April 2013, when the NMa was merged with OPTA and the Consumer Authority into the present-day ACM, the Energy Chamber of the NMa had an acting director.

worked at the home department of the two IRAs, the Ministry of Economic Affairs. J.J. de Jong, for instance, the first director of DTe, had worked for twenty-five years at the energy department of the home ministry, and had been involved in draft energy legislation. So had R.J.P. Jansen, a top civil servant who had co-prepared competition law at this ministry before becoming director – then board member – at NMa. Mr. Don for twelve years lead an important government advisory organ, the *Centraal Planbureau* ('Bureau for Economic Policy Analysis') (CPB). Mr. Fonteijn was already chairman of OPTA, while Mrs. E.J. Mulock Houwer had a top career in public administration, and was together with Mr. Don as additional function involved in the advisory board of NZa.[112]

Four of ten DTe/NMa board members (also) had a previous career in *legal practice*. The first NMa director-general A.W. Kist, for instance, was a corporate lawyer who had been land's advocate (a lawyer representing the state). P. Kalbfleisch, his successor, had been lawyer, judge and vice president of the court in The Hague. Mr. Fonteijn had represented energy utilities companies in court, and lead the energy and utilities group of a Dutch law firm before he became OPTA chairman, and subsequently also NMa chairman (combining the two functions until the merger of the IRAs in 2013). J.Th.A. de Keijzer was a corporate lawyer specializing in competition law and sectoral regulatory law. Until his appointment, he also was the general secretary of the national interest association of corporations listed at the Amsterdam stock exchange (VEUO).[113]

Two of ten DTe/NMa board members, then, had a background in the *private sector*, one of whom directly in the *regulated domain*. G.J.L. Zijl, an engineer, had been director of the national association of the four large electricity generation companies (SEP) and of the national energy distribution network operator TenneT, before he became the second director of DTe. In 2005, he was taken up in the NMa board with responsibility for the energy and transport directorates. In that year, P.J. Plug, who had been a consultant on liberalization and privatization processes in multiple sectors, became subordinate director of NMa-DTe (later Energy Chamber).

Compared to the OPTA board, less DTe/NMa board members held *academic positions*. Only Mr. Don had had a scientific career, as econometrist with professorships at two universities. Neither had DTe/NMa members *political backgrounds* in government or the parliament.

The list of additional functions of DTe/NMa board members *before* their appointment (not displayed in Table 7) is not as prolific as those of OPTA board members.[114] Mr. Don was crown-appointed member of the national tripartite advisory council *Sociaal-Economische Raad* ('Social and Economic Council') (SER) and member of the Scientific Council for

112 Mr. Fonteijn became NMa chairman in 2011. He combined this with his chairmanship of OPTA, and went on to become ACM chairman when the two IRAs were merged in 2013. Mrs. Mulock Houwer previously was director-general at the Ministry of Justice and the Ministry of Social Affairs, and served as interim board member of the NZa in 2009.

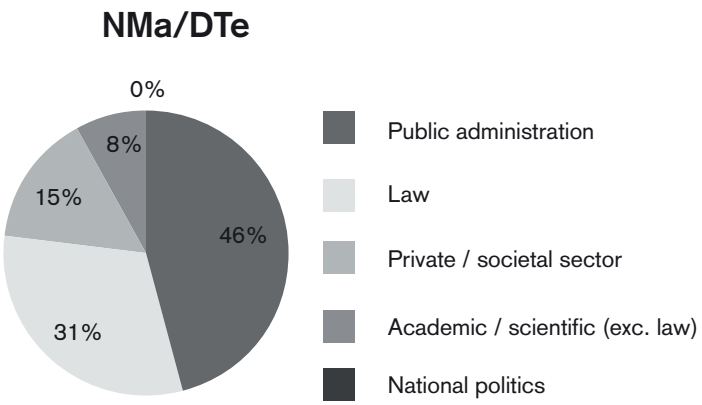
113 Mr. De Keijzer resigned in 2011, two years after his appointment, to return to his previous law firm. That year, Mr. Kalbfleisch had also suspended his activities as NMa chairman because of perjury allegations in his previous career as judge. He was fully acquitted in 2013.

114 Afterwards, this is a different story.

Government Policy WRR. Some members had (had) a few supervisory board positions at corporations and associations, some of which they had to give up on joining the board.

In various configurations, NMa boards consisted of combinations of top legal practitioners (judges and state lawyers) – as chairmen – and former top civil servants (many already involved in IRAs), supplemented with some economic-scientific and private sector experience. The DTe directorship was filled, first, with a former lifelong civil servant at the home ministry, and second, with an energy man. No board member had a background in the consumer movement.

Figure 14. Professional backgrounds of DTe, NMa, NMa-DTe, and NMa Energy Chamber board membership, 1998-2013



Total number of backgrounds: 13
Total number of board members: 11

As will be shown, this relatively large presence of a combination of public administrators and jurists on this board is notable among the selected cases.

The Financial Markets Authority (AFM) governing board: public administrators and financial sector backgrounds

Since 2002, the AFM governing board has had eleven members. Table 8.1 (in Appendix B to this thesis) and Figure 15.1 (below) display the breakdown of their gender, political party, and professional background characteristics. In terms of *gender diversity*, ten of eleven AFM governing board members were or are male, one is female. Three chairpersons were male, the current chairperson is female. Four of eleven governing board members – including three chairmen – were and are known members of *political parties*: the first chairman, A.W.H. Docters van Leeuwen, first of the social-liberal party D66 and later in

his tenure of the conservative-liberal VVD party; the second chairman, H.F. Hoogervorst, also of the VVD party; the third chairman, R. Gerritse, of the Social Democratic party PvdA. Board member G.J. Everts is also member of the D66 party.

In terms of *professional backgrounds*, nine of eleven AFM governing board members had a previous career in *public administration*. Of these, five had worked at the Ministry of Finance, and six (also) at the IRA itself. Three of them are recent appointees. Mr. Gerritse, the third AFM chairman and appointed in 2011, had been head of both the ministries of Social Affairs and lastly of Finance. Mr. Everts and H.W.O.L.M. Korte, two recent appointees, both had had careers at the Ministry of Finance, before becoming directors – then board members – at the financial markets IRA. Others were (also) previously either employed or involved at the IRA: two as board members of its predecessor organization, Mr. Kist as chairman of its supervisory board, and three as directors. Yet other board members had had a top career elsewhere in public administration: the first AFM chairman Mr. Docters van Leeuwen had been deputy head of police at the Ministry of Internal Affairs, director of the *Binnenlandse Veiligheidsdienst* ('Domestic Security Service') (BVD) and head of the Public Prosecution Service.[115] Mr. Kist had been the first director-general of the competition authority NMa.[116]

Seven of eleven AFM governing board members (also) had *private sector* experience, five of whom in the *regulated domain* itself. Mr. Kaptein had been securities director at an Amsterdam private bank before becoming board member of the AFM predecessor organization and of the IRA. R.H. Maatman had been chief counsel of the investments department of the ABP public sector pension fund (one of the largest institutional investors in the world). He had also been a member of the 'Tabaksblat' Dutch corporate governance code committee. Mr. Everts had been manager at the asset manager APG, and committee chair at the Dutch interest group of institutional investors before becoming director at AFM. The current chairwoman, Mrs. M. van Vroonhoven, had a career at the financial conglomerate ING before she – outside of the financial sector – became director at the national railways NS. P.M. Koster, had been executive vice president and chief auditor at the electronics multinational Philips, while Th.F. Kockelkoren had been consultant at the global McKinsey firm before becoming director – then board member – of the IRA.

Three of eleven AFM governing board members (also) had a background in *legal practice*: Mr. Docters van Leeuwen as former head of the Public Prosecution Service, Mr. Kist as lawyer and land's advocate before becoming NMa chairman – then AFM board member – and Mr. Maatman as chief counsel at the ABP pension fund.
Two of eleven AFM governing board members (also) (had) held *academic positions*: Mr. Kist

115 Before, he had also worked for ten years at the Ministry of Finance. He announced his resignation as AFM chairman in 2006 to campaign for membership of the parliament for the VVD political party, to which he had switched; yet later suspended his campaign and stayed on at AFM one more year. Mr. Docters van Leeuwen afterwards became chairman of Holland Financial Centre (HFC), a public-private initiative to promote Amsterdam as a global financial center, in which AFM took part. HFC was disbanded in 2014 after the government withdrew from the initiative in the wake of the financial crisis.

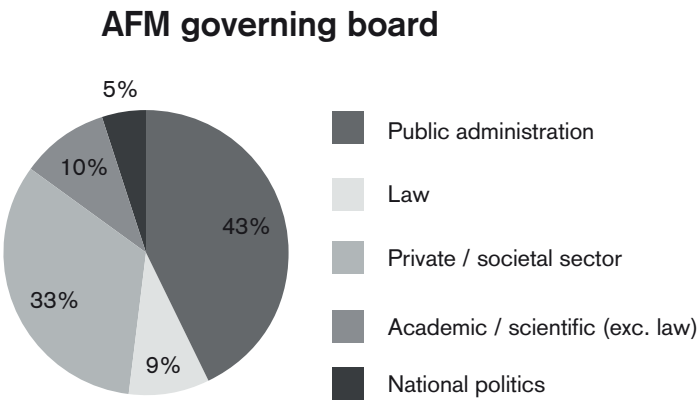
116 Mr. Kist had to resign from the AFM board after two years, however, because of mistakes in handling his stock portfolio *(Het Financieele Dagblad 2007)*.

as chairman of Leiden University and Mr. Maatman as professor of asset management.

One member had a *national political* career. Mr. Hoogervorst, the second AFM chairman, had been minister of Finance (2002-2003) for the conservative-liberal VVD party himself. He had also been minister of Health, Well-being and Sport (2003-2007), where he had presided over the marketization of the healthcare sector and the setup of the healthcare IRA NZa. He was subsequently appointed AFM chairman.[117]

The lists of previous additional functions of some AFM governing board members (not displayed in Table 8.1) is long. Mr. Docters van Leeuwen and Mr. Kist, for instance, before and during their AFM board membership held numerous advisory and supervisory board memberships at various civil society, academic and cultural associations. Mr. Everts had been committee chair at the Dutch interest group of institutional investors Eumedion, and was active in various other international financial organizations.

Figure 15.1. Professional backgrounds of AFM governing board membership, 2002-present



Total number of backgrounds: 21
Total number of board members: 11

All AFM governing boards have in various configurations consisted of a combination of former top civil servants (often from the home ministry, and often from the own organization), and former high-level financial or private sector employees. This has been supplemented with legal expertise, academic backgrounds, and national political experience (as minister of Finance). No board member had a background in the consumer movement.

117 Before, he had worked at the Ministry of Finance, been a member of the parliament for the conservative-liberal VVD party and deputy Minister of Social Affairs.

The recent presence of many public administrators on the governing board is, as will be shown, interesting in comparison to the AFM supervisory board.

The Financial Markets Authority (AFM) supervisory board: financial sector and academic backgrounds

Since 2002, the AFM supervisory board has had eighteen members. Table 8.2 (in Appendix B to this thesis) and Figure 15.2 (below) display the breakdown of their gender, political party, and professional background characteristics. In terms of *gender diversity*, fifteen of eighteen AFM supervisory board members were or are male, three were or are female. The four chairpersons were all male. Notably, no supervisory board members are known members of *political parties*.

In terms of professional backgrounds, thirteen of eighteen AFM supervisory board members had or has a (previous) career in the *private sector*. Of these, nine had or have a career in the *regulated domain* itself: the financial sector All of these previously occupied high-ranking executive positions: seven of nine had board-level positions at multinational financial institutions such as Fortis or ING, or private banks such as MeesPierson. Two of nine had been partner at large accountancy firms such as KPMG. Four of thirteen had been top-level controllers or board members at multinational corporations such as Philips and Shell. H.J. Hielkema, for instance, had been vice chairman of the Fortis financial concern. J. Vroegop had been director at the ABN Amro bank. G. Möller had been chairman of the asset manager Robeco and director of the Amsterdam stock exchange. A.J. Bindenga had been partner at Ernst & Young. A. Baan had been a board member of the electronics multinational Philips.

Seven of eighteen AFM supervisory board members (also) held or hold *academic positions*. J.H. Blokdijk – partner at KPMG – and Mr. Bindenga had been or were professors of accountancy. J.W. Winter – practicing lawyer and law firm partner – and Mrs. A.G.Z. Kemna were and are professors of corporate governance – the latter had also been director of asset management at ING. Mrs. H.M. Prast is professor of personal financial planning.

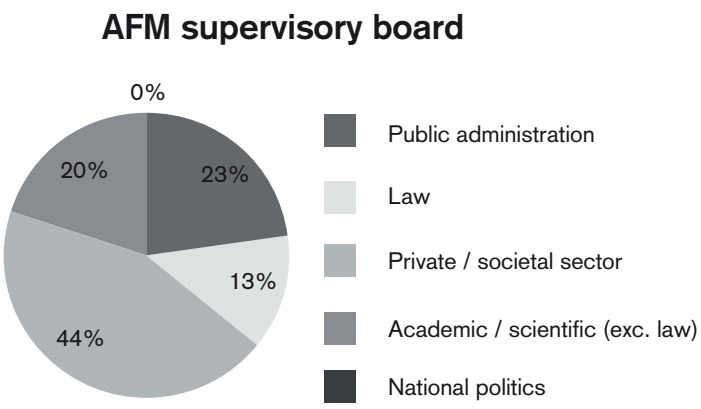
Four of eighteen AFM supervisory board members (also) had or have a career in *legal practice*. In addition to the abovementioned Mr. Winter, for instance, Mrs. D.C.C. van Everdingen is partner at a law firm. The five board members of the AFM predecessor organization (Mr. Loudon, Mr. Van Praag Sigaar, Mr. Blokdijk, Mr. Heeneman and Mr. Vroegop) all took place in the AFM supervisory board, but four of them not for very long. In reality, only Mr. Kist – former land's advocate and director-general of the competition authority NMa – had part of his career in *public administration*, at another IRA. Mrs. Prast had been researcher at the central bank. No AFM supervisory board members have had a *political* career.

The list of additional functions of AFM supervisory board members (not displayed in Table 8.2), moreover, is very long. Many members (had) held supervisory or advisory board positions at a multitude of corporations, civil society associations, universities and foundations. Mr. Vroegop, for instance, during his AFM supervisory board membership

was chairman of the stock investment committees of two pension funds (AFM 2003: 76). Mr. Baan simultaneously held supervisory board positions at a publishing company and a number of other corporations. Mr. Hielkema did likewise (idem 2004: 78). Mr. Tiemstra at the time of his AFM supervisory board membership also was board member of the interest association of corporations listed at the Amsterdam stock exchange (VEUO) and supervisory board member at a large number of corporations and associations, including the national employers' association VNO-NCW (idem 2010: 151). The pile-up of additional functions by AFM supervisory board members in 2004 led to public critique by the *Algemene Rekenkamer* ('Netherlands Court of Audit') on the danger of conflicts of interests. This critique was rejected by the AFM as well as the ministry of Finance, who referred to the internal regulations of the supervisory board (*Het Financieele Dagblad* 2004).

In various configurations, then, all AFM supervisory boards have consisted of (former) top-level executives of financial conglomerates and multinational corporations, partners of accountancy firms, professors of accountancy and corporate governance, and lawyers. This was supplemented with Mr. Kist (the former director-general of NMa), who after two years went on to become AFM governing board member.[118] No board member had a background in the consumer movement.

Figure 15.2. Professional backgrounds of AFM supervisory board membership, 2002-present



Total number of backgrounds: 30
Total number of board members: 18

118 The additional members with a background in public administration represented in the Figure are former governing board members of the IRA's predecessor organization, most of who only served for a year in the AFM supervisory board. They, too, mostly had financial or private sector backgrounds.

The presence of a high level of financial sector backgrounds and academics in the supervisory board is notable.

The NZa governing board: public administrators

Since 2006, the NZa board has had six different members. Table 9.1 (in Appendix B to this thesis) and Figure 16.1 (below) display the breakdown of their gender, political party, and professional background characteristics. In terms of *gender diversity*, four of six NZa governing board members were or are male; two were female. The two chairpersons were both male. Two governing board members were known member of a *political party*: the first chairman F.H.G. de Grave of the conservative-liberal party VVD, and Mrs. Mulock Houwer of the Social Democratic party PvdA.[119]

In terms of professional backgrounds, four of six NZa governing board members had a previous career in *public administration*, mostly in the area of healthcare. Two of these were the general directors of two predecessor organizations of the healthcare IRA. A.L.M. Barendregt had been general director of the *College Tarieven Gezondheidszorg* ('Healthcare Tariffs Board') (CTG). M.E. Homan had been general director of the *College Toezicht Zorgverzekeringen* ('Healthcare Insurance Supervision Board') (CTZ). Both were appointed in 2006 to the NZa board. The second NZa chairman, T.W. Langejan, had had high-ranking functions at various ministries, including the Ministry of Health, Well-being and Sport and that of Finance. Mrs. Mulock Houwer had had high-ranking functions at the Ministry of Justice and that of Social Affairs (she later went on to become board member at NMa).

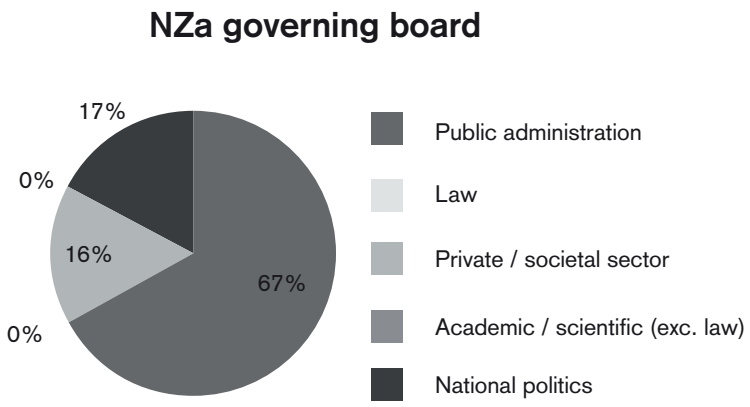
One NZa governing board member had a previous *political career* in government and the parliament. Mr. De Grave had been a long-time member of the parliament for the conservative-liberal VVD party, and minister of Defense (1998-2002). Afterwards, he was appointed by Mr. Hoogervorst, then-minister of Health, Well-being and Sport of the same political party (and later AFM chairman), to set up the new healthcare IRA. Mr. De Grave became NZa's first chairman afterwards.

One NZa governing board member had a background in the *regulated domain* itself: the healthcare sector. Mrs. C.C. van Beek had had various managerial positions in healthcare, and until her appointment was a hospital board member.

The list of additional functions (not displayed in Table 9.1) of Mr. De Grave is long: he held numerous advisory, supervisory and board memberships in civil society, public and private organizations. Mrs. Van Beek had held advisory and supervisory board positions in healthcare.

119 Mrs. Mulock Houwer served between October and December 2009 as interim board member.

Figure 16.1. Professional backgrounds of NZa governing board membership, 2006-present



Total number of backgrounds: 6
Total number of board members: 6

The NZa governing board thus consisted of a combination of former civil servants with backgrounds in IRA predecessor organizations or the ministry of Health, and/or a former national politician, and one person with experience in the regulated domain. No board member had a background in the consumer or patient movement.

The appointment of Mr. De Grave as chairman of the NZa governing board was subject to public criticism. The Socialist Party SP, opposed to healthcare marketization, asked parliamentary questions about the semblance of a 'political' appointment by the minister of Health (Mr. Hoogervorst of the conservative-liberal VVD party). To this, the minister responded he had wanted a 'top administrator' with 'specific expertise' for the job of NZa chairman, and referred to the public job vacancy that had appeared in newspapers (SC 2005-2006b: 25). A few months later, nevertheless, the Dutch national ombudsman released a report stating that the minister of Health should have avoided the 'semblance of partiality' in his choice for appointment (Nationale Ombudsman 2006: 8). To this, Mr. Hoogervorst responded in the parliament that the ombudsman had 'acted somewhat carelessly' and did not know 'the way in which the world turns'. The minister claimed to have pointed his fellow political party member Mr. De Grave, who he at time met weekly, at the vacancy, and to have stated that the latter would stand much chance. According to the minster, 'people who think such conversations are unavoidable, come from another world.' (SC 2005-2006c: 3488-3489). The ensuing parliamentary debate did not come to a conclusion.

The NZa advisory board: healthcare sector and academic backgrounds

Since 2006, the NZa advisory board has had 27 different members. Table 9.2 (in Appendix B to this thesis) and Figure 16.2 (below) display the breakdown of their gender, political party, and professional background characteristics. In terms of *gender diversity*, 23 of 27 NZa advisory board members were or are male, four were female. The two chairpersons were both male. Ten of 27 advisory board members were and are known members of *political parties*: five of the Social Democratic party PvdA, two of the conservative-liberal party VVD, two of the Christian Democratic party CDA, and one of the social-liberal party D66.

In terms of professional backgrounds, fourteen of 27 NZa advisory board members had or has a (previous) career in the *private or societal sector*. Of these, ten had or have a career in the *regulated domain* itself: the healthcare sector. All of them previously occupied high-ranking positions: as board members or chairpersons of hospitals and care institutions, or as directors of large healthcare insurers and/or their interest associations. Some of them have also been healthcare practitioners themselves. F.J.M. Werner, for instance, was chair of the Radboud University Nijmegen Medical Center. G. Blijham was chair of the University Medical Center Utrecht. P.A.M. Vierhout was chairman of the national interest group of medical specialists. B.F. Dessing was chair of the St. Antonius hospital Nieuwegein, as well as chair of the healthcare insurance cooperative UVIT (the second largest in the Netherlands). M.A.M. Leers was vice chairman of the national interest group of healthcare insurers. M.J. van Rijn was chair of PGGM – the second-largest pension fund of the Netherlands – and through that connected to many national healthcare associations (Skipr 2010).

Twelve of 27 NZa advisory board members (also) held or hold *academic or scientific positions*. Many of these were or are in the field of healthcare economics. F.T. Schut, F.F.H. Rutten and E. Schokkaert are professors of healthcare economics. S.J.G. van Wijnbergen and C. van Ewijk are professors of economics. Mr. Blijham and G. van der Wal were or are professors of medicine. Mrs. D. Delnoij was director at various institutes for measuring quality indicators and patient experiences in healthcare.

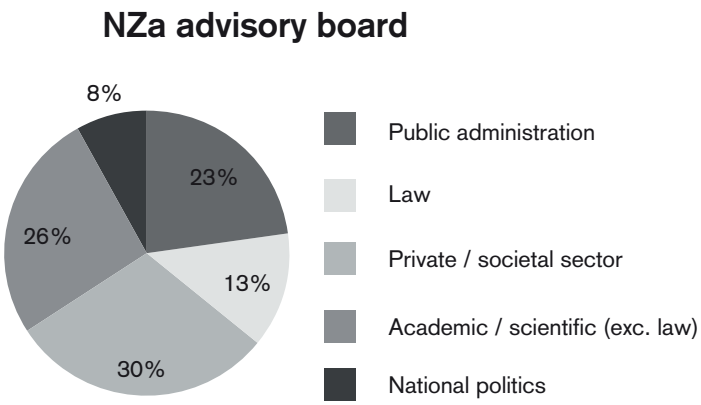
Eleven of 27 NZa advisory board members (also) had previous experience in *public administration*. Mr. Van Rijn was a top-level civil servant at the Ministry of Health, Well-being and Sport, where he was closely involved with Minister Hoogervorst (see above) in preparing the draft healthcare marketization act and setting up the healthcare IRA. Three NZa advisory board members, moreover, occupied board-level positions at other IRAs: Mr. Fonteijn as chairman of the telecommunications authority OPTA, Mr. Kist as director-general of the competition authority NMa and board member of the financial authority AFM, and Mr. De Keijzer as board member of NMa. Mr. Barendregt was board member of the NZa itself.

Six of 27 NZa advisory board members (also) had a career in *legal practice*. Mrs. T.H. de Gaay Fortman was partner at a law firm, and specialized in healthcare law. Mr. P.J.M. van Wersch – specialized in healthcare law – and W.F.C. Stevens were or are both lawyers as well.

Four of 27 NZa board members (also) had a *political career* in government or the parliament. Mrs. E. Borst was a two-time minister of Health, Well-being and Sport in the Social-Democrat-liberal governments (1994-2002) for D66. Mrs. A.M. Vliegenthart was deputy minister of Health in the second of these governments (1998-2002) for PvdA. Mr. Werner and Mr. Stevens were both members of the Eerste Kamer (Senate) of the Netherlands for the Christian Democratic party CDA.

The list of additional functions of many NZa advisory board members (not displayed in Table 9.2), lastly, both before and during their membership, is very long. Mrs. Borst, Mrs. Vliegenthart, Mr. Van Rijn, Mr. Vierhout, Mr. Barendregt, Mr. Blijham, Mr. Boekholdt, Mr. Leers and Mr. De Weijer all were or are supervisory or advisory board member at many Dutch healthcare institutions, hospitals, care institutions, insurance corporations, interest groups and healthcare associations of practitioners, insurers and patients. Mrs. De Gaay Fortman, Mr. Dessing, Mr. Werner and Mr. Stevens were or are supervisory board member at many civil society associations, corporations, foundations and healthcare institutions. Mr. Schut was member of various editorial boards and policy advisory committees, as was Mr. Wijnbergen.

Figure 16.2. Professional backgrounds of NZa advisory board membership, 2006-present



Total number of backgrounds: 47
Total number of board members: 27

The NZa advisory board, then, has in various configurations consisted of combinations of (former) top-level healthcare domain officials (hospital, care institution and insurance corporation board members, interest group leaders), academic professors in healthcare economics, healthcare or economics, top-level civil servants of the Ministry of Health or other IRAs, lawyers and former national politicians. No board member had a primary background in the consumer or patient movement.

The almost evenly divided representation of public administration, healthcare domain and academic backgrounds stands out in this board.

The four IRA boards combined

Now that all four cases have been separately discussed, the gender, political party and professional background composition of all IRAs' boards combined can be presented.

In terms of *gender diversity*, of 73 persons appointed to the six IRA boards – in 80 acts of appointment – 13 were or are female.[120] From a representative bureaucracy perspective, which puts central the descriptive representativeness of administrative agencies regarding (among other variables) a population's gender diversity, women can therefore be said to be *underrepresented* at the IRA boards in the Netherlands. The first chairwoman of a Dutch IRA was only appointed recently (2014): Mrs. Van Vroonhoven of the financial markets authority AFM. This is not a remarkable conclusion, as top-level positions in the Netherlands' civil service, private and societal sectors as well as academia are mostly occupied by men (Rijksoverheid 2014).

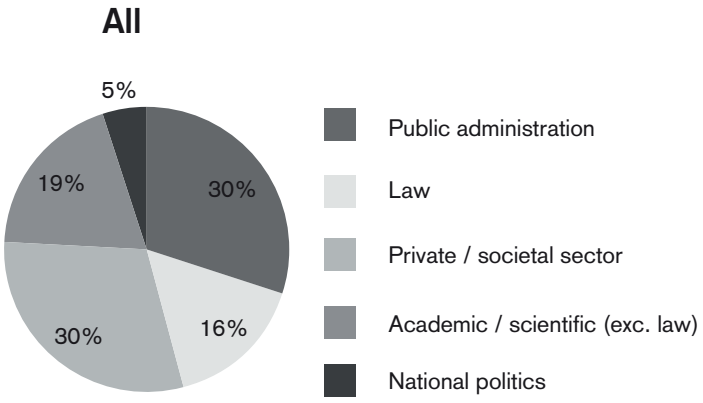
Regarding *political party membership*, of the 73 persons appointed to the six IRA boards, 17 were or are known members of political parties. Of these, nine were or are member of the Social Democratic party PvdA, six of the conservative-liberal party VVD, three of the social-liberal party D66 and two of the Christian Democrat party CDA. This means slightly less than 25 percent of IRA board members is member of a political party. For comparison: less than two percent of the Dutch population is member of a party. While this is more than ten times as much, these results are not very remarkable. Given the widespread membership of political parties in the higher ranks of the Netherlands' civil service, in fact, these numbers may be remarkable for the relatively *low* number of political party members among IRA board members.

Regarding *professional backgrounds*, the results are interesting for their consistency (see Figure 17). A third of *all* IRA board members has a professional background in public administration. A third of *all* board members, likewise, has a professional background in the private or societal sector. For a majority of them, this is in the regulated domain itself. The remaining third is about evenly divided between legal and academic-scientific backgrounds. One-twentieth of all IRA board members has a professional background in national politics. This includes, it must be added, two former IRA chairmen.

The omission of consumer movement backgrounds in all six boards is poignant. No board members of any of the four selected IRAs have a clear-cut background in the consumer or patient movement. These results therefore invite reflection on board composition, in light of the representative claims about IRAs.

120 One female board member was appointed twice: Mrs. Hulock Houwer to the governing board of NZa, and the governing board of NMa.

Figure 17. Professional backgrounds of all IRA boards combined, 1997-present



Total number of backgrounds: 127
Total number of board members: 73

7.5 Conclusion: actual board membership in light of representative claims

How can we reflect on these results in light of the representative claims made about IRA boards and their members, and in light of the various theories offered to explain public appointments? If one explanatory theory for public appointments is adopted, this shows that this composition apparently was the best, right or optimal choice for the boards at the four IRAs. From the perspective of the representative claim framework (RCF), the government could claim that these appointees were the ones best capable of making independent decisions that would represent economic and non-economic public interests, including the consumer interest, in regulated and supervised domains. Given negative selection criteria, by appointing former judges and state lawyers the government may for instance have attempted to enhance the (image of) independence and impartiality of the competition authority NMa (cf. *ANP* 2003). Given positive selection criteria, the choices at all other IRAs apparently were the best or right ones in terms of expertise, being recognized as authority in the regulated domain, possessing societal knowledge and experience, and having charismatic or leadership competences.

If the second explanatory theory for public appointments is adopted, however, these results demonstrate an active recruitment of connections in various external fields relevant to the four IRAs. These notably include public administration and the private sector or society (especially the regulated domain), and to a lesser extent science and

academia, legal practice and national politics. The appointment of board members with ties in these external fields was thought to bring valuable resources to the four IRAs. Certain appointments hint at this explanatory theory. At OPTA and DTe, after public clashes between the regulators and the sector, top-level sectoral executives were appointed in the IRA boards (cf. *Het Financieele Dagblad* 2003; idem 2006). At AFM, the financial sector in terms of backgrounds traditionally is well-represented in the governing board, and even more so in the supervisory board. In accordance with the conglomerization of the Dutch financial sector as a regulated domain, many AFM supervisory board members had top-level positions in the financial sector, mostly at a small number of financial conglomerates and accountancy firms. Various academics in the supervisory board combine their work with financial sector or accountancy functions. Likewise, in the NZa advisory board the healthcare sector is very well-represented. Apparently, despite the claims to independence of the new regulatory bodies, a representation of the regulated domain at the top level of these agencies is still considered important in the Netherlands.

On the other hand, many recent AFM governing board appointees have a background at the Ministry of Finance. This could be due to the financial crisis and the ensuing public rescuing of a large part of the Dutch banking sector, perhaps creating an urge for the government to strengthen the ties between the IRA and the home department – and through that with the sector. The third AFM chairman was publicly presented by the authority as having played a large role in the governmental rescue operations of the banking sector (AFM 2012a). Yet he was also presented by the responsible minister as a top civil servant with a 'critical and constructive relation with the sector' (*ANP* 2011).

If a third explanatory theory for public appointments is adopted, these results demonstrate that the government wanted to make the boards of the four IRAs descriptively representative of important stakeholder groups. The government considered an informal representation of various backgrounds on the IRA boards important to bestow legitimacy to the independent regulatory bodies in the eyes of certain important stakeholders, such as ministerial departments and the regulated domains. The abovementioned examples could also point in this direction. If this was the government's real motivation, however, the omission of clear-cut consumer movement backgrounds at every board of every IRA is notable. Although consumers in liberalized domains are a purportedly represented constituency of the independent bodies, both in legislative frameworks (see Chapter 5) and even more so in the public self-presentation of IRAs (see Chapter 6), no board member with clear-cut affinity with the organized consumer or patient movement has been detected. Instead, many IRA board members have professional backgrounds at regulated corporations, producers, institutions or providers.

The leadership class of the four IRAs through selection criteria has been claimed by the lawmaking body and the agencies themselves to be both independent and expertise-based, to be both impartial and experienced in the regulated domains. This underpins the institutional-representative claims of the independent bodies: to represent economic and non-economic public interests, including the consumer interest,

through regulation and supervision. Yet although the negative selection criteria ensure that board members have no incompatible functions and interests during the length of their tenure (some exceptions aside), the positive selection criteria of having expertise, knowledge or experience on relevant fields may lead to an overt informal representation of particular backgrounds on the boards. Although IRAs and their boards are considered formally independent from both the political-administrative sphere and the regulated sectors, more than 50 percent of board members nevertheless have professional backgrounds in these two domains. While true independence or impartiality cannot be measured by professional background, the demands of sectoral expertise in regulation nevertheless put some representative claims of the independent agencies – to also represent consumers and their interests – in a peculiar light. Where are the consumer representatives on the boards?

In the following chapter, the extent of the representation of consumers on the work-floor or administrative level of IRAs will – among other issues – be explored.

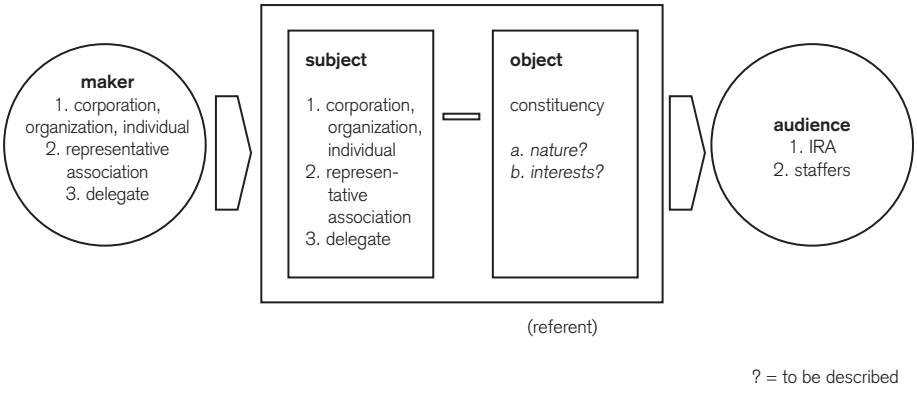
Chapter 8

A theatre of representation(s). The administrative level of independent regulatory authorities

Independent regulatory authorities (IRAs) have administrative organisations. While the formal independence of these agencies is expressed in the decisions taken by their boards, these decisions are prepared and implemented by lower-level managers and staffers. These stand in daily interaction with many external actors in regulatory space: political government, ministerial departments, administrative bodies, European and transnational networks, and affected interests. The latter group consists of corporations, practitioners, consumers and their interest groups in regulated and supervised domains. The four IRAs have consultation procedures to involve these in independent regulatory decision-making (Lavrijssen 2006). In this chapter, the interaction between IRA staffers and these affected interests is therefore central. The question it seeks to answer is: '*To what extent can representative claims be identified at the administrative level of independent regulatory authorities?*'

In this chapter, the four IRAs and their staffers now feature as *audience* ('A') (see Figure 8).

Figure 8. The administrative-level representative claim (reprint)



While being representative claimants at the institutional level (see Chapters 5 and 6), at the administrative level, they receive, evaluate and judge the representative claims of affected interests and their delegates. IRAs and their staffers (audience) must first pass judgment on the initial claims of external entities to represent affected interests, and decide on their inclusion in consultations. Subsequently, they must evaluate the representative claims that affected interests and their delegates make *during* consultations. In pressing their case on regulatory and supervisory policies, the latter portray their interests.[121]

The primary *makers* ('M') of representative claims in this chapter therefore are affected interest organisations – corporations, organisations, consumers or their representative associations – and their delegates.

121 Affected interests and their delegates may obviously also make representative claims directed at *other* audiences. The general public may be one such audience, as may be the purported constituencies of affected interest organizations themselves. IRAs and their staffers, however, are the audience that is selected for scrutiny here.

As representing *subject* ('S') these claimants either posit themselves, or others. An organisation (maker) may, for example, claim it represents (subject) a constituency of affected interests. A delegate (maker) may likewise claim he represents (subject) both the organisation and its constituency. Representative claims so exhibit a 'nested' structure (see Chapter 3): the representative claim of a person can be embedded in the representative claim of an organisation.

The represented *objects* ('O') are the affected constituencies and their interests, but more precisely put: the selective and often strategic portrayal of these as *referents* ('R'). As discussed in Chapter 3, constituencies, their nature and their interests are often selectively portrayed. Representative claim-makers have opportunities to strategize, to depict claims for specific groups as concerning very general interests, or even to deny the constructedness of their portrayals. This is true in regulatory governance as much as it is anywhere else.

To analyse this process of representative claim-making at the administrative level of the four IRAs, interviews with 45 participants in consultative processes were conducted. 20 respondents were staffers of the IRAs (IRA respondents: IRs), 25 respondents were delegates of affected interests and their interest groups in the four domains (stakeholder respondents: SRs). A grounded, multi-person view on the process of representative claim-making as perceived by participants on both sides of the aisle could thus be obtained. This provided insight in the topic of how, in interaction between IRA staffers and sectoral delegates at the administrative level, constituencies are constructed, representing subject roles enacted, and representative claim-making strategies employed and received.

This chapter is divided into five different parts. The first part concerns the arrangements or stages the four IRAs have set up for consultation with organisations claiming representation in regulated domains. Which interaction arrangements exist, are they mandatory or voluntary, and what is their place in the process of preparing and implementing regulatory or supervisory decisions? Such an account has until now not been available in the Netherlands.

Second, the criteria for inclusion on the basis of which the four IRAs decide on the involvement of affected interests in these stages for interaction are discussed. Decisions on inclusion entail an initial audience judgment by IRAs of the representative claims of affected interests (makers). Are they, or their organisations (subject) considered valid enough representatives of relevant interests (objects) to allow for further representative claim-making *inside* stages for interaction? Such criteria for inclusion may have a legal as well as a voluntary basis.

In the third and fourth parts, the process of regulatory representative claim-making and receiving as it subsequently occurs *inside* certain stages for interaction is analysed. How, according to 45 participants on both sides of the aisle, do affected interests and their delegates represent their interests or those of others inside these stages? How do they claim to speak or act for others, and which constituency or object constructions do they invoke? Which representative claim-making strategies do they employ? And how do IRAs and their staffers receive and evaluate these affected-interest representative claims?

What is the background role of the institutional-level representative claims of IRAs?

In the fifth and last part, the perceived added value of administrative-level interaction in the regulatory process is discussed. IRAs are formally independent of affected interests, yet consult them in the preparation and implementation of regulatory and supervisory decisions. What is this representation of interests thought to achieve?

8.1 Stages for interaction in the administrative-level regulatory process

The four independent regulatory authorities (IRAs) discussed in this thesis – the telecommunications regulator OPTA, the energy regulator NMa Energy Chamber, the financial markets supervisor AFM, and the healthcare regulator NZa – all maintain elaborate structures for daily interaction and consultation with external parties at their administrative level. These parties consist of political government, ministerial departments, administrative bodies, expert or advisory bureaus, European and transnational networks, as well as affected interests: regulated or supervised corporations, professional or practitioner groups, interest associations, and consumer, customer, client or patient groups in all four regulated domains. It is not the goal of this chapter to provide a comprehensive overview of *all* forms of interaction the IRAs maintain with external parties; nor to determine on which exact basis the IRAs make decisions; nor to establish possible 'capture' of the IRAs by affected interests; but rather, to focus on structured forms of interaction between IRAs and affected interest parties, and analyse these in terms of representative claim-making.

Across the four IRAs discussed here, broad divisions in *types* of stages for interaction with external parties at the administrative level can be discerned (see Table 2 below). First, there are those set up to explicitly facilitate affected-interest representation. Second, there are those set up to extract technical information and expertise from external parties, of which affected interests are a subset. Third, a variety of arrangements, not explicitly set up to extract expertise, exists for interaction with external parties and affected interests both.

Stages for affected-interest representation

The four IRAs discussed here all maintain stages for interaction and consultation meant expressly to facilitate affected-interest representation. They exist solely for, and are exclusive to them. These stages for interaction have in common that, at the three market regulators among the four cases, they concern the *ex ante* market regulatory part of their mission.

At the telecommunications regulator OPTA, it was the 'market analysis procedure' that was exclusively open to the representation of affected interests (IR1; IR3; SR1; SR2; SR3; SR4; SR5; SR6). At the energy regulator NMa Energy Chamber, the process

of decision-making on the methods to calculate maximum tariffs for energy network operators (*netbeheerders*) was exclusively open to the representation of affected interests (IR5; IR8; IR9; SR9). At the healthcare regulator NZa, three 'advisory committees' on 'Care', 'Cure primary care' and 'Cure secondary care' are concerned with regulatory 'policy rules' (*beleidsregels*) that determine tariffs and performances in these areas. These are exclusively open to affected interests (IR16; IR17; IR17; IR19; SR17; SR18). At the financial market supervisor AFM, however, the primary stage for the exclusive facilitation of affected-interest representation, its 'advisory panel for representative organisations', concerns the costs, performance and policy priorities of the IRA's *ex post* market supervisory work (Financial Supervision Funding Act 2012 art 9.1; IR12; SR14).[122] As interaction inside these stages will be analysed in terms of representative claim-making later, I will describe them in somewhat more detail here.

At the telecommunications regulator OPTA, first, the market analysis procedure was the triennial process by which this IRA demarcated relevant electronic communications markets, identified dominant market parties and decided on *ex ante* regulations with the goal to create a competitive marketplace (see Chapter 5).[123] This procedure is formally structured by the Telecommunications Act, which prescribes formal consultation with 'interested parties' (see below). Since 2004, the IRA involved affected interests in advance of this formal procedure by means of informal multilateral 'Industry Groups' (IR1; IR3; SR1; SR2; SR3; SR4; SR5; SR6). NMa Energy Chamber, second, every three to five years made new *ex ante* regulatory decisions about the methods by which it calculated the maximum tariffs allowed for public utility energy network operators.[124] The Electricity and Gas Acts formally prescribe consultation with network operators and 'representative organisations' on the energy marketplace regarding these decisions (see below), and the IRA did this in part through organizing informal 'feedback groups' (*klankbordgroepen*) (IR5; IR8; IR9; SR9). The healthcare regulator NZa, third, calls its three advisory committees the 'only exception' to the principle that no institutionalized consultation takes place at the IRA (NZa 2014f). The committees meet six times a year to discuss NZa policy rules regarding tariffs and performances in the healthcare sector (IR16; IR17; IR19; IR20). At the financial markets supervisor AFM, lastly, the advisory panel for representative organisations from the financial sector convenes biannually to discuss the costs, policy choices and performance of the IRA's supervisory work (Financial Supervision Funding Act art. 9.1; IR10; IR12; SR10; SR12; SR14).

These stages for interaction, their differences notwithstanding, have in common that in the last five to ten years, the degree and intensity of involvement of affected interests in them has increased. At the telecommunications regulator OPTA, the informal Industry Groups of its market analysis procedure were an innovation of the last three

122 At both the NZa advisory committees and AFM advisory panel, observer parties are allowed.

123 This concerned four or five separate decisions on various telecommunications submarkets (IR7; IR9).

124 This concerned four separate decisions: on electricity and gas, and for national and regional network operators (IR5; IR8; IR9).

rounds of market regulation, with an emphasis on the very last round (IR1; IR3; SR1; SR2; SR3; SR4). At NMa Energy Chamber, the feedback groups for the tariff method decisions were set up after a period of heavy confrontation with the energy sector that ended in the early 2000s. Since then, they have been increasingly streamlined and professionalized (IR5; IR7; IR8; IR9; SR9). At the healthcare regulator NZa, the advisory committees since about 2010 are involved in earlier stages of the regulatory process (IR15; IR16; IR17; IR18; IR19; SR17; SR22).[125] At the financial supervisor AFM, lastly, the advisory panel for representative organisations has evolved from a strictly financial accountability forum for supervisees to a stage where the IRA's general *ex post* supervisory policy is discussed as well (AFM 2013e; IR12; SR10; SR14).

Stages for technical expertise, information and knowledge

Three of the four IRAs discussed here also all maintain stages for interaction and consultation primarily meant to extract technical expertise, information and knowledge from outside parties – including, but not limited to, affected interests. These meet *ad hoc* and as often as considered necessary. These stages have in common that, at two market regulators among the IRAs, they are an extension of the arrangements discussed above: they are concerned with the more detailed, technical implementation of the decisions discussed and decided upon in the latter arrangements.

At the telecommunications regulator OPTA, the 'implementation Industry Groups' concerned the implementation of *ex ante* regulatory decisions decided on in the market analysis procedure (IR1; SR1; SR3; SR4).[126] At the healthcare regulator NZa, the 'technical consultations' concern the implementation or technical execution of *ex ante* regulatory policy rules discussed in the advisory committees (IR15; IR17; IR18; SR17; SR19; SR24). At the financial supervisor AFM, on the other hand, two 'expert committees' on 'Capital Markets' and 'Accountancy' present a different case.[127] They have no relation to the advisory panel for representative organisations, but instead advise the AFM board and organisation directly on individual *ex post* supervisory cases, strategic supervisory matters and the interpretation of new legislation (AFM 2014e). Committee members are at least partly selected on the basis of their expertise (IR10; IR11; IR12; IR14; SR13; SR14).

125 The advisory committees are successors to similar forums at a predecessor organization of the NZa: the CTG. While representative organizations in this organization had a binding say in regulations, since the establishment of the IRA in 2006 this say has been reduced to non-binding advice.

126 At the NMa Energy Chamber, the feedback groups for tariff method decisions, in which affected interests were represented, themselves were simultaneously considered a stage for extraction of information and expertise (IR5; IR8; IR9; SR9).

127 A third expert committee existed since 2006: the Financial Consumer Committee. This committee was to provide advice on the *ex post* supervisory and information providing role of AFM regarding financial consumers. It ceased to exist in 2008 (AFM 2014e).

Other stages for interaction and consultation

The four IRAs discussed here all host a variety of additional consultative arrangements in which affected interests, among other parties, are involved as well. These may run from the top of the regulatory organisation (the IRA board) to the levels below (from director to manager to work-floor level), and concern the entire spectrum of their regulatory and supervisory activities. They can have a permanent character, or be convened incidentally when the need arises.

At the Energy Chamber, for example, such interaction between IRA staffers and affected interests happened on a regular and issue-driven basis (IR5; IR8; SR7; SR8; SR9).[128] The healthcare regulator NZa, too, six times a year engages healthcare insurers and consumer and patient organisations in 'administrative consultations', while occasionally engaging healthcare practitioners in project-based feedback groups (IR15; IR20; SR15; SR17; SR18; SR25).

Ex post market supervision policy is a common topic for interaction with affected interests. OPTA consulted them regarding its informal guidelines and interpretations on such consumer protection issues as spam, telemarketing and privacy (IR2; SR3; SR4). NMa Energy Chamber consulted affected interests on such supervisory and consumer protection issues as a model energy contract for household consumers and the introduction of 'smart meters' (IR6; IR7; SR7; SR8). AFM does likewise regarding its interpretation of financial regulatory law and its informal guidelines (IR10; IR11; IR12; IR13; IR14; SR10; SR11; SR12; SR13; SR14).

Public consultation documents were and are a common method for all four IRAs to garner affected-interest and third-party responses on regulatory and supervisory issues. Published online and sent directly to interested parties, the IRAs collect(ed) the responses and subsequently address(ed) them in other public documents. At the NZa, this sometimes concerns its proposed advice to the Minister of Health on healthcare subdomain marketization. As an extension of the documents, the NZa on this subject also organizes large-scale consultation meetings in convention centres (IR16; IR18; IR19; SR19).

Above the administrative level, lastly, all four IRAs interact and consult with affected-interest and third parties on their board level (IR1; IR2; IR3; IR10; IR11; IR12; IR13; IR14; IR15; IR16; IR17; IR18; IR19; IR20; SR10; SR11; SR12; SR14; SR17; SR18; SR19; SR24). As interviews with boards of IRAs and affected-interest parties were not conducted, however, this is not discussed in this thesis.

128 Interviewed NMa Energy Chamber staffers and representatives from the energy sector describe these bilateral and multilateral consultations as taking place on a regular basis at least between 4 and 6 times a year, and – depending on project or dossiers – much more if necessary. Sometimes, contacts can occur a few times a week, while on other issues contacts are less frequent (IR5; IR8; SR7; SR8).

Table 2. Types of stages for interaction with external parties

Stage type	**OPTA**	**NMa Energy Chamber**	**NZa**	**AFM**
Affected interest representation	Market analysis procedure (incl. Industry Groups)	Tariff method decisions (incl. feedback groups)	Advisory committees (Care, Cure primary, Cure secondary)	Advisory panel for representative organizations
Technical expertise, information and knowledge	Implementation Industry Groups		Technical consultations	Expert committees (Capital Markets, Accountancy)
Other	- Regular or issue-driven *ad hoc* consultations - *Ex post* supervision policy - Public consultation documents	- Regular or issue-driven *ad hoc* consultations - *Ex post* supervision policy - Public consultation documents	- Regular or issue-driven ad hoc consultations - *Ex post* supervision policy - Public consultation documents	- Regular or issue-driven *ad hoc* consultations - *Ex post* supervision policy - Public consultation documents

8.2 **Criteria for inclusion and represented parties**

The criteria for inclusion into the various stages for interaction described above have different sources (see Table 3 below). While some are legally determined, others are drawn up by the four IRAs themselves. Frequently, however, decisions on inclusion are made in an ongoing fashion by IRA staffers. Either way, except for the technical arrangements, a decision on the inclusion of an affected-interest organisation entails an explicit or implicit audience judgment of their representative claim.[129] An IRA or its staffers (audience) evaluates on the basis of certain criteria whether the claim of an organisation (maker) to represent (subject) its own interest or those of others (object) is valid enough to allow for inclusion. For some stages for interaction analysed in terms of representative claim-making later, this has led to a specific list of represented parties, which will be discussed here.

129 In practice, however, some technical stages are an extension of affected-interest arrangements.

Legally prescribed criteria for inclusion: distinctive, objective and relevant interests

For some IRA stages of interaction, the Dutch lawmaking body has established criteria to judge representative claims and determine inclusion of affected interests.[130] This was and is the case for:

- the OPTA market analysis procedure
- the Energy Chamber tariff method decisions
- the AFM advisory panel

For OPTA, first, the Telecommunications Act since 2004 stipulated it was to apply the *uniforme openbare voorbereidingsprocedure* ('uniform public preparation') (UPP) procedure of Dutch administrative law for certain *ex ante* market regulatory decisions (Telecommunications Act Revision Act 2004 Art. IY art. 6b.1). The UPP procedure – described below – prescribes formal consultation with 'affected interests' (General Administrative Law Act art. 3.13). NMa Energy Chamber, second, on the basis of the Electricity and Gas Acts was for its tariff method decisions obliged to consult with the 'joint' energy network operators and the 'representative organisations' of parties on the energy market (Electricity Act 1998 art. 41; Gas Act 2000 art. 61). The IRA in practice applied the UPP procedure as well (IR5; IR8; IR9). For AFM, the Financial Supervision Act stipulates the IRA in its advisory panel must consult an 'eligible representation of supervised persons' as well as 'eligible client organisations' (Financial Supervision Funding Act 2012 art. 9.1).[131]

The Dutch lawmaking body has also stipulated consultation with affected interests for certain types of NZa and AFM decisions. The Healthcare Market Structuring Act stipulates the NZa must apply the UPP procedure for *ex ante* regulatory decisions in which it determines significant market power in the healthcare domain (Healthcare Market Structuring Act 2006 art. 48). The AFM must consult an 'eligible representation of supervised corporations' in the extraordinary case it issues generally binding legal rules (Financial Supervision Act 2006 art. 1.28).

The UPP procedure of Dutch administrative law, then, where it applies, prescribes a concept decision is to be made public by an administrative body for a period of six weeks and sent to 'interested parties' (General Administrative Law Act 1992 art 3.13 and art 3.16). The body takes responses into account and may organize a hearing. It subsequently makes an independent decision. Administrative law defines an interested

130 For all four IRAs, being administrative bodies, a general obligation of Dutch administrative law exists to gather information on 'relevant' facts and interests and carefully weigh them in decision-making (General Administrative Law Act art. 3.2). This general obligation prompts them to engage in interaction with external parties even where this is not formally mandated. OPTA, in addition, is legally obliged to motivate, in a quantitative and qualitative sense, decisions that have a 'considerable impact on the marketplace' (Telecommunications Act Revision Act 2004 Art. IB art. 1.3; Lavrijssen 2006: 122).

131 Until 2013, for the advisory panel this was formulated as 'supervised corporations' (Financial Supervision Act 2006 art. 1.39).

party as 'he whose interest is directly involved in a decision'. This notably may also include organisations that given their goals and activities represent the 'general and collective interests' of others (idem art. 1.2). Case law has further determined a party (maker) claiming to represent (subject) an interest (object) must meet certain criteria in order to be positively received by an administrative body (De Poorter 2003: 131-132; Lavrijssen 2006: 30-31). Its interest must be:

- personal
- distinctive[132]
- objectively determinable
- directly involved in a decision
- relevant at the time

Administrative law thus conceives of having such an interest, or representing it, as constituting a sufficient criterion for positive reception and hence, inclusion into IRA stages for interaction, but only where it has been determined the UPP procedure applies.[133] Importantly, while individual corporations can be marked as interested parties, individual consumers cannot (Lavrijssen 2006: 31). For NMa Energy Chamber, in addition to these general criteria, it is legally stipulated that, at least, network operators and representative organisations of parties on the energy markets are to be seen as interested in its tariff method decisions (Electricity Act 1998 art. 82; Gas Act 2000 art. 61).[134] For NZa, certain parties are legally designated as representative ones: 'nationally operating consumer and patient organisations' are to be seen as interested parties in decisions involving patient or consumer interests (Healthcare Market Structuring Act 2006 art. 105).

OPTA and the Energy Chamber, then, maintained permanent stages for interaction on the basis of these legal criteria for inclusion. These criteria determined the list of represented parties. AFM for its advisory panel drew up additional criteria itself, and is therefore discussed below.[135] Both OPTA and Energy Chamber, before the formal six-week consultation period of the UPP procedure commenced, maintained a much longer informal consultation period, to which the same criteria for inclusion *de facto* also applied. At OPTA, this informal period, in which it organized multilateral Industry Groups for affected interests, took about five quarters of a year (IR1; IR3). At the Energy

132 For organizations that given their goals and activities represent the 'general and collective interests' of others, these interests are legally considered personal and distinctive (General Administrative Law Act 1992 art. 1.2).

133 More in general, aside from the UPP procedure, such interested parties may appeal to any decision taken by the IRAs at the agency itself, or at the administrative judge (De Poorter 2003: 131).

134 According to Lavrijssen, it is somewhat unclear how this stipulation relates to the general definition of an interested party as given in the Dutch General Administrative Law Act (Lavrijssen 2006: 138).

135 For NZa *ex ante* regulatory decisions on significant market power and AFM generally binding legal rules, no permanent stages for interaction have been constructed, as these decisions or rules are made more incidentally than the ones taken regularly by OPTA and Energy Chamber.

Chamber, this period, in which it organized feedback groups for affected interests, took about two years (IR5; IR8; IR9).

At OPTA, the parties that until 2013 were usually involved in the market analysis procedure – both formally and in the informal Industry Groups – were the following (IR1; IR3; SR1; SR2; SR3; SR4; SR5; SR6):

- KPN (the former telecommunications incumbent)
- Tele2 (a telecommunications corporation making use of the incumbent's network and therefore dependent on regulations)
- UPC and Ziggo (the two remaining cable operators in the Netherlands)
- Vodafone, T-Mobile, KPN, Telfort (mobile telephony operators; others were represented as well)
- Verizon, BT (business telecommunications providers; others were represented as well)
- business alliances of various corporations, represented by a lawyer
- Reggefiber, Eurofiber (fiberglass corporations)

According to OPTA staffers, parties unknown to the IRA but wishing to enter a marketplace and to represent their future interests were welcome to the market analysis procedure as well, yet this did not happen very often (IR1; IR3).

At NMa Energy Chamber, the parties that until 2013 were usually involved in the tariff method decisions – both formally and in the informal feedback groups – were the following (IR5; IR8; IR9; SR9):

- Alliander, Enexis, Stedin, TenneT, Gasunie (individual regional and national energy network operators; others were represented as well)[136]
- Netbeheer Nederland (a representative association of network operators)
- EnergieNed (a representative association of various energy production, trade and supply companies, excluding network operators)
- VEMW (a representative association of industrial energy consumers)
- PAWEX (a representative association of wind turbine operators)
- Duurzame Energie Koepel (a representative association of corporations and organisations wishing to promote the use of sustainable energy)
- certain representative associations from industrial and agricultural sectors
- VNG (the representative associations of Dutch municipalities)

According to Energy Chamber staffers, unknown parties with a concrete and identifiable interest were welcome to the informal feedback groups, yet such parties did not present themselves very often (IR5; IR8; IR9).[137]

136 Only network operators were legally allowed to *individually* represent their interest.

137 Some written formal consultation responses by individual parties are known to have been declared inadmissible by the NMa Energy Chamber, as these parties did not conform to the legal criteria for inclusion (IR8; IR9).

Invitations to both the formal six-week UPP procedure and the preceding informal stages were published on the websites of the two IRAs, and sent to these 'known parties' (IR1; IR3; IR5; IR8).

As can be glanced from the lists of represented parties, consumer organisations were almost completely absent from these stages for interaction. According to OPTA staffers, consumer organisations such as the *Consumentenbond* ('Consumer's League') were welcome in the market analysis procedure, but almost never attended. They were perceived by staffers as having no direct interest in *ex ante* market regulatory decisions, which in recent years mostly concerned wholesale or business telecommunications markets (IR1; IR3; SR1; SR2). Likewise, at the Energy Chamber, household consumer organisations such as the *Consumentenbond*, the Homeowner's Association and the Dutch Association of Housewives were, according to staffers, always invited but rarely participated (IR5; IR6; IR7; IR8; IR9). Only large-scale industrial energy consumers were represented (SR9). According to IRA staffers and delegates from the two sectors, consumer groups structurally lack the resources, manpower, expertise and direct interest to participate in these *ex ante* regulatory stages. Consumer groups carefully choose on which telecommunications or energy issues they wish to represent their constituency, and usually pick issues with a high public profile such as broadband network neutrality or smart energy meters (IR6; IR8; IR9; SR1; SR2; SR9).

Criteria for inclusion drawn up by IRAs themselves: organisational criteria

Two IRAs discussed here have themselves drawn up criteria for inclusion and judgment of representative claims: the financial supervisor AFM for its advisory panel and expert committees, and the healthcare regulator NZa for its advisory committees. These criteria, however, differ markedly in extensiveness.

For the AFM advisory panel for representative organisations, as described above, the Dutch lawmaking body has determined the IRA must consult 'eligible' supervised persons and client organisations (Financial Supervision Act 2006 art. 1.39; Financial Supervision Funding Act 2012 art. 9.1). Eligibility, however, is not further defined. The AFM board therefore solely decides which financial sector organisations are allowed to delegate representatives to the advisory panel. The only hint of an evaluative criterion is that the board claims to strive for 'as faithful a representation of interested parties as possible', but this is not further defined. The board considers 'parties having an interest in AFM supervision' to be interested parties (AFM 2007b art. 2.3).

At AFM, the 17 parties that in 2014 were represented in the advisory panel were (AFM 2014m):

- Adfiz (a representative association of financial intermediaries)
- APT (a representative association of proprietary traders)
- *Consumentenbond* (the Consumer's League)
- DUFAS (a representative association of asset management funds)

- Eumedion (a representative association of institutional investors wishing to further good corporate governance and sustainability performance)
- FOV (a representative association of mutual insurance companies)
- NBA (a representative association of accountants)
- NVB (a representative associations of banks)
- NYSE Euronext (the Amsterdam stock exchange)
- Pensioenfederatie (a representative association of pension funds)
- SRA (a representative association of chartered accountants)
- VV&C (a representative association of asset management funds)
- VvV (a representative association of insurance companies)
- VEUO (a representative association of corporations listed at the Amsterdam stock exchange)
- VEH (the Homeowner's Association)
- VEB (the Stockowner's Assocation)
- VFN (a representative association of credit lenders)

Observer parties are present as well: delegates from the Ministry of Finance and the Ministry of Social Affairs and Employment.

For the two AFM expert committees on 'Capital Markets' and 'Accountancy', on the other hand, a mixture of inclusion on the basis of expertise and informal representation can be observed. The committees – consisting of 8 to 12 members each – according to the AFM website and staffers are put together by the board strictly on the basis of knowledge and expertise (IR10; IR11; IR12; IR14). One AFM staffer describes them as 'sages and experts, and people from the market, who advise us on certain market developments' (IR14). According to the committees' regulations, however, some members must possess juridical and economic knowledge, while others represent listed corporations and accountancy firms (AFM 2011b; idem 2012b). Although members according to AFM staffers take a seat on an individual basis, *no* formal stipulations prescribe this.[138] In 2014, members of the two committees had (had) high-ranking functions at large financial corporations, accountancy firms and law firms, as well as being professors. Each committee also had one president or director of a financial consumers organisation. According to one financial consumers representative, the expert committees – described as an 'elite club' – function as an internal 'counterweight' to the policy proposals of the AFM organisation (SR14).

The healthcare regulator NZa, on the other hand, has published extensive evaluative criteria to judge the representative claims of healthcare organisations, and determine inclusion in its advisory committees (NZa 2010b). They must apply at the IRA board, which retains full control on admissions. To gain admission, a healthcare organisation must:

138 If a conflict of interest occurs, however, a committee member is not allowed to take part in that part of the meeting in which the interest is discussed.

- be in full capacity of rights
- its members, whether natural persons or institutions, must provide healthcare as defined by the Healthcare Market Structuring Act
- must as its official goal have the representation of its membership's interests
- if it claims to represent healthcare practitioners: must have a 'not insignificant' number of members in this constituency
- if it claims to represent healthcare insurers: it must make 'sufficiently clear' its members occupy, or will be able to occupy, a 'substantial position' on the healthcare insurance market
- its various organs must be (in)directly elected by its members, and be accountable to their general meeting
- must inform its members about matters concerning their interests, and the actions of the association to represent them
- must be financially capable of continuous activities
- must present a 'certain guarantee' it is independent in its policy positions from any other organisations

The NZa – as audience – thus applies evaluative criteria of proportionality in numbers or market share; of authorization and accountability; and of authenticity and independence to judge the representative claims of healthcare organisations – as makers and subjects – and determine inclusion in its advisory committees.

At NZa, the about 30 parties that in 2014 were represented in the three advisory committees were (ibid.):

- ActiZ (a representative association of residential and homecare organisations)
- LHV (a representative association of general practitioners)
- GGZ-Nederland (a representative association of mental healthcare institutions)
- KNMP (a representative association of pharmacists)
- NFU (a representative association of academic hospitals)
- NMT (a representative association of dentists)
- NVZ (a representative association of hospitals)
- OMS (a representative association of medical specialists)
- VGN (a representative association of healthcare providers for people with disabilities)
- VNG (the representative associations of Dutch municipalities)
- ZKN (a representative association of independent clinics)
- ZN (a representative association of healthcare insurers)
- various representative associations of medical professions and specialized healthcare institutions

These lists and descriptions of represented parties demonstrate that consumer organisations are present in the AFM advisory panel, and informally represented in its two expert committees. Indeed, according to a representative of one financial consumers

organisation, AFM in recent years on their request has also organized preliminary meetings with consumer organisations in advance of the advisory panel (SR14). Still, AFM staffers state that financial consumer constituencies are not as well organized as financial corporations, which results in a challenge on the part of the IRA to involve them, and a sometimes lower quality of responses (IR10; IR11; IR12).

At NZa, on the other hand, consumer, policyholder and patient organisations such as Consumentenbond, the Netherlands Patient Consumer Federation (*Nederlandse Patiënten Consumenten Federatie*) (NPFC) and the Council for the Chronically Ill and Handicapped (*Chronisch Zieken en Gehandicapten Raad Nederland*) (CG-Council), are not present at all in the advisory committees. Although the NZa board has invited them to take part, and has officially added them, according to staffers they have refused to take part because of limited capacity and a lack of direct interest (IR15; IR16; IR18; IR19; IR20).

Inclusion decided in an ongoing fashion

For all other stages of interaction and consultation at the four IRAs, decisions which initial representative claims merit inclusion into stages for interaction are made in an ongoing fashion. Rather than on the basis of legal or written criteria, they are judged on the basis of established practice or *ad hoc* by the managers or staffers of the four IRAs. Often, however, at least the same parties as mentioned above attend, in addition to other ones and consumer organisations.

For some technical stages, in practice the criteria for inclusion are an extension of the legal or written criteria for affected-interest stages. The OPTA implementation Industry Groups for the technical execution of decisions taken in the market analysis procedure, for instance, were attended by the same telecommunications corporations as displayed above, depending on topic (IR1; IR3; SR1; SR3; SR4). Likewise, the NZa technical consultations are open to all healthcare organisations represented in the advisory committees (NZa 2010b). Yet these may also be attended by other parties. NZa staffers indicate they gather all those having expertise on or 'an interest' in a specific policy rule for technical consultation. In this way, for example, Nefarma, an interest association for pharmaceutical corporations, may be invited too (IR18; IR19).[139]

For all other regular or incidental bilateral or multilateral consultations about regulatory or supervisory policy at all four IRAs, decisions about judgment of representative claims and inclusion are made in an ongoing fashion by IRA staffers (IR2; IR5; IR6; IR7; IR8; IR9; IR10; IR11; IR12; IR13; IR14; IR18; IR19). Many interviewed IRA staffers and interest representatives across the four domains say the regulatory field in which they operate is a 'small world' (IR3; IR10; IR11; IR12; IR18; IR19; SR11; SR19). In the Netherlands, in all domains discussed here, it is usually considered clear which parties are directly affected by regulation and supervision, who are the largest among them, and

139 Obviously, consumer and patient organizations, who are invited to but do not attend advisory committees, rarely attend technical consultations as they lack direct interest and expertise (SR22; SR23; SR24).

which are therefore the most self-evident to consult if required. In the words of one AFM staffer, it is 'quite clear in the Netherlands who the big parties [in the financial sector] are': the four large banks and the representative associations present in the advisory panel (IR11). The same goes for the telecommunications, energy and healthcare domains: many of the parties displayed in the lists above also attend other bilateral and multilateral consultations (IR2; IR3; IR6; IR7; IR10; IR11; IR13; IR18; IR19). At some point, furthermore, IRA staffers know whom to call if expertise on a subject is required or an interest is involved, while sectoral representatives know which staffers handle their dossiers (IR10; IR12; IR14; IR18; IR19). One NZa staffer says: 'At some point, you know whom to call.' (IR19) An AFM staffer says: 'An [interest association] knows exactly whom to call at AFM for a certain dossier.' (IR12) IRA staffers also indicate certain parties 'invite themselves' (IR19) to consultations or 'cannot be refused' (IR3). Consumer and patient organisations in these other stages for interaction, lastly, participate somewhat more frequently than in the stages for *ex ante* market regulation, especially when topics discussed concern *ex post* supervisory or consumer protection issues (IR1; IR2; IR6; IR7; IR20; SR25).

Table 3. Sources of criteria for inclusion into stages for interaction

Sources of criteria for inclusion	**OPTA**	**NMa Energy Chamber**	**NZa**	**AFM**
Law (acts of foundation and/ or administrative law)	Market analysis procedure	Tariff method decisions	Decisions on significant market power	- Advisory panel for representative organizations - Decisions on significant market power
Drawn up by IRA itself			Advisory committees (Care, Cure primary, Cure secondary)	- Advisory panel for representative organizations - Expert committees (Capital Markets, Accountancy)
Decided in ongoing fashion	All other (see Table 2)	All other (see Table 2)	All other (see Table 2)	All other (see Table 2)

8.3 The process of representative claim-making

For the stages for interaction discussed here, the above-discussed criteria for judgment of representative claims determine the inclusion of affected interests. Representation, however, does not stop there. Like parliamentary representation does not stop at elections, extra-parliamentary representation does not stop at inclusion into consultative stages. Instead, representation is continuously formed and shaped in parliamentary debate, a process of claim-making and claim-receiving, as it is in stages for consultation in the regulatory process.

When affected interests are allowed in, they send their delegates – regulatory affairs employees, directors, managers, policy staffers of corporations and associations – to the IRA to press their case on proposed regulatory and supervisory policies. At the administrative level, they meet IRA staffers preparing decisions for the board and implementing them. In stages for interaction, in documents, in person or both, the process of representation continues. Affected parties (claim-makers) have interested opinions on regulatory and supervisory policies, and their arguments are very often representative claims: they contain an image of themselves, their organisations (subjects), their interests and constituencies (objects), deliberately construed to appeal to the IRA (audience). And even when they do not, their initial claims to represent interests, on the basis of which they were included, will necessarily feature on the background. The question for the remainder of this chapter is: how, by participants on both sides of the aisle, is the process of representation inside these stages for interaction in the regulatory process perceived to work?

To answer this question, I have selected a number of stages for further scrutiny: the market analysis procedure and Industry Groups at the telecommunications regulator OPTA; the feedback groups and *ad hoc* consultations at the NMa Energy Chamber; the advisory panel and *ad hoc* consultations at the financial supervisor AFM; and the advisory committees and technical consultations at the healthcare regulator NZa (see Table 2). These affected interest arrangements, and some attached technical stages and other stages, provided the richest material to base an account on.

The application of the representative claim framework (RCF) has been described in the introduction of the chapter (see Figure 8). In the following, on the basis of interviews with 20 IRA staffers and 25 affected interest representatives in all four sectors, the process of representative claim-making as it unfolds in certain stages for interaction in the regulatory process is the point of focus. After discussion on the nature of the represented object in these stages, and the nature of the process itself, several representative claim-making strategies are discussed. The chapter concludes with audience reception and the perceived added value of affected-interest representation.

The centrality of interests

According to IRA staffers and affected interest representatives in all four sectors, in the stages for interaction and consultation selected here, corporations and associations as claim-makers (and subjects) nearly always act from a conception of their 'interest' or those of the constituencies (object) they represent. Regulatory affairs employees and policy staffers, on their turn, are considered by all involved to be speaking for (subject) the corporations or representative associations (object) that delegated them to the IRA (audience), and to be representing their interests, or those of the constituencies represented by their associations (object). This logically stems from the evaluative criteria for inclusion applied by the IRAs to filter out proper interest representatives to make subsequent claims before the IRA in the stages selected here. Regulatory affairs employees and policy staffers are considered representatives of constituency interests.

In the telecommunications regulator OPTA market analysis procedure, for instance, according to both IRA staffers and affected interest representatives, the corporate, financial or material interest of telecommunications corporations featured heavily in object representations in claims, both explicitly and more implicitly. One OPTA staffer says about the Industry Groups: 'They [market parties and their delegates, AV] are there to represent their interest. And we know that's the reason they're there.' (IR3) Says another: 'You're always with interests at the table which you weigh in a set of interests.' (IR1) Admits one telecommunications corporations representative: 'It's just a kind of lobby.' (SR1).

At the NMa Energy Chamber tariff method and other consultations, affected interest representatives were perceived as acting in the interests of their constituencies as well. One Energy Chamber staffer says: 'Usually discussions are about the substance, but arguments are sought which are clearly in the interest of the speaking party.' (IR5) Confirms one representative from a branch association of energy corporations: 'We are of course an interest group, so we represent the interests of our members.' (SR9)

The financial supervisor AFM advisory panel is considered by both IRA staffers and affected interest representatives to be a forum for constituency interest representation (IR12; IR13; SR10; SR14). One AFM staffer says: 'Parties [in the Advisory Panel, AV] have the interests of their constituency on their mind.' (IR13) Says another: 'It is emphatically about interest representation' (IR12). According to one financial consumers representative, too, 'the advisory panel is about interested positions' (SR14).

In the healthcare regulator NZa advisory committees, according to both IRA staffers and affected interest representatives, the latter also claim to represent their constituencies. Their interests feature as objects in representative claims, both explicitly and more implicitly. NZa staffers comment that '[advisory committee members, AV] represent their constituency.' (IR17). Comments one hospital's representative and advisory committee member: 'You are there to represent the interests of hospitals.' (SR19) A healthcare insurer's representative and advisory committee member says: 'I here represent all insurers.' (SR24) In the attached technical consultations, moreover, where policy rules are to be implemented, despite the seemingly neutral or technical

topics discussed, interests are again at the heart of the discussion (SR15; SR16; SR17; SR18; SR19; SR22; SR23; SR24). Comments one hospital's representative: 'This is called informal, but you are still expected to speak on behalf of the branch. Everybody knows interests are represented there.' (SR19) Says a healthcare insurer's representative: 'We have a lobby there. If we can find opportunities, we take them there.' (SR22)

The theatrical nature of representative claim-making

In this context, IRA staffers and affected interest representatives in all four sectors comment on the explicit acknowledgement on both sides of the aisle that interests are at stake, and regulatory affairs employees and policy staffers are there to represent them, even when they purport to do something else, or may privately think something else.[140] Representative claim-making in regulatory governance therefore has a theatrical nature.

OPTA staffers, for example, were aware that telecommunications parties aimed to represent their interests even when, for example, divulging more objective or empirical information in the market analysis procedure:

> *They act in their interest. Commercial parties have commercial interests. They will say something, and we know who says it. So nobody is fooling anyone. That is what it is like. And that happens in all reasonableness and honesty.* (IR1)

Likewise, one AFM staffer says about *ad hoc* consultations:

> *If you read the consultation responses of this club, you see a very decent analysis, in which you can of course see the interests shine through if you read carefully. But at least they do it on the basis of a good analysis. They're not merely preaching to the choir. I think that is quite strong.* (IR11)

This appreciation of the theatrical in regulatory claim-making – the mutual acknowledgement by IRA staffers (audience) and affected interest representatives (makers) alike that the latter always represent interests, even when playing a different role (for instance that of expert) – is confirmed in another observation. Both NZa staffers and affected interest representatives describe how the three advisory committees are sometimes used as a stage by the latter to showcase their representative role on:

> *They [affected interest representatives, AV] want to show what they're there for. One notices they sometimes say things for the* bühne.[141] *A healthcare association must, after all, render account to its constituency about their representation.* (IR16)

140 This is, quite naturally, the job they are paid to do.

141 In Dutch, the phrase 'for the *bühne*' – borrowing the German noun for a theatrical stage – is employed to describe instances of a public showcasing of a representative role, with the intention to appeal to one's constituency, but with a suspicion of insincerity in the eyes of others.

An advisory committee member confirms: 'Sometimes people say things they well know is going to lead nowhere, but is important for their representative association, their group, to have said, to have been heard.' (SR24) Likewise, an AFM staffer says: 'We are well aware that interest organisations have to render account to their constituency about why they did or did not say certain things when they had the chance in the advisory panel.' (IR12)

The theatrical thus plays out in two ways: either affected interest representatives portray themselves as something else (for instance as expert), or delegates (whatever they may privately feel) act as interest representatives. Either way, they are acknowledged on both sides of the aisle (by stage-actors and audience alike) as interest representatives. The questions for the remainder of this chapter are: how do affected interest representatives perform? How do they play their part, which scripts do they read? This comes down to strategic representative claim-making: the rhetorical portrayal of *objects* (the corporations or associations the affected interest representatives claim to stand for, or perhaps something else), their nature and interests; and, conversely, the *subject* portrayal of themselves and their role in the process (as well as the subject portrayal of corporations or associations as standing for certain other interests). Perceptions of how the IRA and its staffers (audience) will respond, and do respond, play a role in strategizing and will be discussed as well.

Strategies in representative claim-making 1: to partly not play a part

According to affected interest representatives and IRA staffers in all four sectors, one possible claim-making strategy for the former is to simply reveal the constituency interest at stake in a proposed regulatory or supervisory policy. The affected interest representative (maker) acts as lobbyist (subject): he voices (dis)agreement with a certain policy on the mere basis of its benefit or detriment to clear-cut constituency interests (object). The theatrical is, in one respect at least, dropped, and the affected interest representative simply reveals himself for what he or she is: a lobbyist. As one affected interest representative (maker) explains about the case of OPTA business fiberglass regulation: 'In this game, our (subject) song is: "We (object) always get too little", if I should summarize it very concisely.' (SR2) A representative from the banking sector remarks about AFM consultations on informal guidelines: 'For us, this is an important instrument. When it still conceptual and a subject of discussion at AFM, we pay much attention to it, to make sure the interpretation of AFM meets our wishes and interests.' (SR10)

Yet according to affected interest representatives and IRA staffers in all four sectors, a strategy of naked interest representation does not always incur a favourable reception at the IRAs or their staffers discussed here. Direct invocations of material, financial or corporate interests as objects in representative claims – as arguments to appeal to these IRAs – IRAs and their staffers frequently consider insufficient grounds on which to solely base decisions. One telecommunications corporations representative says:

> *You can hand in all kinds of wish lists, like a classical lobbyist, but if that is insufficiently concrete and OPTA at the end of the day still has a problem that isn't solved, they are not going to listen. They will say: "Sorry, we have to deal with various interests and this is useless to us."* (SR2)

One AFM staffer confirms: 'If you are too obviously agitating on the basis of your own self-interest, you are automatically not going to be very effective.' (IR11). Likewise, an Energy Chamber staffer says: 'Just calling out: "This is not in our interest" is not sufficient.' (IR8)

As witnessed by the criteria for inclusion of some stages, and the remarks by staffers on the theatrical nature of their interaction with affected interest representatives, the four IRAs recognize that affected interests are at stake. Yet the independent bodies will not decide in favor of these interests, simply by them being interests. IRAs and their staffers, according to many respondents, seek a more multifaceted message (IR8; IR9; SR2; SR10; SR14; SR15; SR16; SR18). One OPTA staffer says: 'You want to have good evidence for your positions. That means you have to get away from the wish lists on regulations.' (IR3) An AFM staffer says: 'The obvious lobby points are discarded more easily.' (IR11) Says a medical specialist's representative: 'If you only represent naked interests, you are not going to make it.' (SR15)

For this reason, affected interest representatives in stages for interaction with IRAs and their staffers often resort to other representative claim-making strategies.

Strategies in representative claim-making 2: united they stand, divided they fall

According to affected interest representatives and IRA staffers in all four sectors, a second claim-making strategy is to (re)present multiple interests as one, or common, before the IRA. *Multiple* interest representatives (makers) may band together and represent (subject) the interests (object) of their various constituencies (referent) as one or common. A *single* representative (maker) may likewise claim to represent (subject) the interests (object) of a constituency (referent) as one, or common, before the IRA (audience).

In the telecommunications regulator OPTA market analysis procedure, for example, depending on the topic, in certain market analyses varying alliances between telecommunications parties opposed on other market analyses occurred (IR1; IR3; SR1; SR2). In other regulatory dossiers of this IRA, like network neutrality, when interests were perceived as common, this could occur as well. One telecommunications corporation representative says: 'It is not like we [market parties and their representatives, AV] are fighting all the time. Where interests run parallel, we act together.' (SR3) Says another telecommunications corporation representative: 'In every corner of the marketplace cooperation exists. Even though parties vehemently oppose each other on other dossiers.' (SR2) An OPTA staffer reflects on one such case in an Industry Group: 'We encountered so much resistance to a hypothesis by all market parties that we reconsidered. Despite us knowing they of course have a certain interest. All parties were united there.' (IR3)

In the energy sector, despite the fact that the interests of public utility network operators and energy companies are often opposed, sectoral associations may likewise come together for or against NMa Energy Chamber proposals. Two regulatee representatives from energy companies describe how this happened regarding a new method for calculating the distribution of national gas transport costs (SR7; SR8). Likewise, a representative from industrial energy consumers states how his organisation sometimes seeks cooperation with representative associations of small household consumers, as 'the interests we represent often coincide with the consumer interest' (SR9). Energy Chamber staffers claim to be somewhat receptive to such coalitions: 'If the entirety of the sector agrees with us, it is easier to make a decision than when everyone is annoyed.' (IR8) Says another: 'It helps when there is a collectively shared opinion.' (IR9)

At the financial supervisor AFM, one staffer says about advisory panel sessions: 'Often enough, various interest organisations have shared interests. In such meetings, they try to close the ranks as good as they can.' (IR12) Representatives from the banking sector and from listed corporations indicate that when required, they contact representatives from – among others – the associations of insurance companies and asset management funds to mutually adjust their responses to AFM consultations (SR10; SR11). Likewise, representatives from institutional investors and small-time financial consumers state they cooperate regarding AFM proposals when required (SR13; SR14).

At the healthcare regulator NZa, healthcare practitioner representatives fragmented in many associations prior to advisory committee meetings commonly meet in the lobby of the IRA building to exchange information and adjust arguments to present a common front when interests run parallel (IR16; IR17; IR18; SR19; SR23). When the healthcare insurers join the fray, and regulatory policy proposals on tariffs or performances are filed together at the NZa, the IRA seldom refuses (SR19; SR22; SR23; SR24). One healthcare insurer's representative says: 'The NZa is sensitive to joint solutions. When all parties together say an alternative is better, the NZa is sensitive to that.' (SR24) Comments another on practitioner-insurer cooperation: 'I can't think of any example in which that didn't work out, as long as it fits in the general policy framework of course.' (SR22)

The four IRAs discussed here seem more receptive to common interest representation than to single-interest representation, particularly when otherwise opposing interests unite. In such cases, independent regulation almost seems to turn into self-regulation approved by an IRA. In various sectors, such as telecommunications, energy and healthcare, indeed, agreements on tariffs, contracts and their technical execution are also sometimes reached in self-regulatory arrangements external to the IRAs.[142] Only when parties fail to reach an agreement here, they turn to the IRAs. Because of the centrality of material or financial interests in regulated domains, however, agreements and cooperation between opposing interests are not the norm (SR1; SR17).

142 Examples of these are the Forum for Interconnection and Special Access (FIST) in the telecommunications sector, and the Platform of Electricity and Gas Network Users in the energy sector. In these external arrangements, telecommunications and energy network operators and the users of networks aim to resolve issues regarding tariffs and technical arrangements for network access and use (SR1; SR9).

The opposition of interests in the telecommunications sector, for example, is described as 'huge' (SR4). The nature of IRA regulatory decision-making reinforces this: an OPTA decision on access and tariffs is described as a zero-sum game, in which the benefits to one market party are to the detriment of another (often in terms of millions of euros). The network structure of the sector is described as adding to this:

> *The complexity of the telecom sector is that we are all connected one way or the other. (...) We are all tied together in the telecom sector. A decision [by OPTA, AV] always involves an interest on two sides of the market, or three, or four, or five. It really is about the heart of competition. So the importance of an OPTA decision is very big for all parties.* (SR4)

In the energy sector, too, the interests of network operators and energy companies in energy network tariffs set by the Energy Chamber are opposed: while energy companies want low tariffs, network operators want higher tariffs (IR5; IR8). A similar observation can be made about the healthcare sector, where the interests of healthcare insurers are perceived as diametrically opposed to those of healthcare practitioners (SR22; SR23).

Not on every regulatory or supervisory issue, therefore, cooperation between multiple interest representatives of different constituencies is perceived to be possible. Yet single delegates of representative associations such as interest groups (makers-subjects), too, may experience difficulty in (re)presenting the interests (object) of their constituency (referent) as one, or common, before the IRA (audience).

The mediating representative role of interest groups in regulatory governance

Across the four sectors discussed here, marked differences exist in the aggregate level of interest organisation among regulated constituencies. Interest groups must unite and claim to represent a multitude of parties: dozens, hundreds or thousands of corporations, organisations or individual practitioners or consumers. The challenge for them and their delegates (makers-subjects) is to make a convincing representation of their constituency and their interests (object) as one, or common, before the IRA (audience).

In the telecommunications sector, the intensity of interest opposition and the nature of regulatory decisions has prevented the rise of a stable interest association (SR1; SR2; SR3; SR4). Associations or alliances that represent interests as common in this sector are loose, short-lived and subject to change.[143] A number of competitors of the telecommunications incumbent KPN for nine years organized themselves in an alliance claiming to represent their common interests in the OPTA market analysis procedure. Yet as membership declined because of corporate take-overs and market consolidation,

143 Some informal associations, round tables and platforms do exist. The Digging Rights Group *(Groep Graafrechten)* claims to represent the interests of various telecom operators regarding the construction and maintenance of telecommunications infrastructure and the regulation thereof. A round table of consumer telecom providers also exists.

those remaining no longer perceived their interests as similar enough to be represented as one (IR1; SR1; SR2). Some members split off to found their own association claiming to represent common interests in OPTA business market regulation: 'That interest (…) is shared by these parties in exactly the same manner.' (SR2)

In the energy, financial and healthcare sectors in the Netherlands, however, interest groups are more common. These may claim to represent constituencies of corporations, organisations or professions – energy corporations, financial institutions and professions, or healthcare insurers or practitioners – or consumers, customers, policyholders or patients. In all three sectors, associations with relatively homogenous memberships exist. Netbeheer Nederland, for instance, claims to represent all national and regional public utility energy network operators in the Netherlands. On IRA tariff method decisions, their interests usually do not diverge much, and if they do, it is perceived as common for them to hand in partially diverging consultation responses (IR8; IR9). Likewise, at VEUO, the association for corporations listed at the Amsterdam stock exchange, as well as the general healthcare practitioner's association LHV, internal disagreements on the interest to be represented in regulatory policy vis-à-vis the IRAs are described by their representatives as not common (SR11; SR17).

Yet the association of energy companies EnergieNed, the banking association NVB, and the medical specialist's association OMS – to give one example from each sector – all claim to represent rather heterogeneous constituencies. These consist, respectively, of three different types of energy companies (producers, traders, suppliers), of large and of small banks, and of about 30 types of medical specializations.[144] EnergieNed, NVB and OMS – like many other interest groups – all run policy bureaus where staffers concern themselves daily with energy, financial or healthcare regulatory policy. At these bureaus, arguments for representatives to put forward in the IRA stages for interaction are prepared (SR7; SR8; SR9; SR10; SR13; SR14; SR15; SR16; SR17; SR18; SR19; SR20; SR21; SR22; SR23; SR24; SR25).

In preparing these arguments – and the depictions of constituency interests in them – staffers must navigate between the organisations' various institutions and constituencies. While a direction is set at the policy bureaus, and accounted rendered to a board, confirmation is sought in constituency contacts (SR7; SR8; SR9; SR10; SR12; SR15; SR16; SR17; SR19; SR24).[145] As one representative of industrial energy consumers reflects on the constructed nature of interest representation, and the importance of maker-constituency interaction in the RCF model:

144 These medical specializations represented by OMS can, furthermore, be either self-employed or on the payroll of hospitals, created additional marked differences in their perceived interests.

145 The boards of these interest groups, in turn, are often composed of descriptive representatives of various (sub) constituencies. The board of the energy companies association EnergieNed, for instance, consists of the CEOs of various energy companies. The board of the banking association NVB consists of the presidents of various banks. The board of the medical specialists organization OMS consists of – among others – a neurologist, cardiologist, and a gynecologist.

> *I* (maker) *am responsible for interest representation* (subject) *on the area of energy of water. That naturally means I must express those interests* (object), *but also that I must be sure that the formulation of those interests corresponds with the perceptions of them among our members* (audience/constituency). (SR9)

IRA regulatory policy may sow division among the constituencies of an interest group, however. It is then up to the policy bureau and the association's board to find internal consensus, meaning, in the words of one medical specialist's representative, 'the sharpest edges are sometimes taken off' in responses to IRA proposals (SR15). Some constituency elements may subsequently be displeased. Says this medical specialist's representative on his association OMS:

> *The Order does not just represent 'the' medical specialist. Sometimes you represent multiple scientific associations who may have different interests. (...) One part will understand [a position], another not. Just like a political party has a constituency of which a part will say they don't agree.* (SR15)

Likewise, a banking representative says:

> *There are many different types of banks, and that results in different interests. On some issues more than other issues. As NVB you try to find a common interest and represent that. Representing common interests, that is what we do. Individual banks have their own interests, of which they take care in their own ways.* (SR10)

To have a say in regulatory policy, an interest group may try and come to terms with the IRA, rather than vocally represent constituency interests. In the energy sector, this is described as occurring occasionally (IR6; IR7; SR7; SR8). In the financial sector, AFM staffers and interest representatives on both sides of the aisle generally describe relations as more distant (IR11; IR13; IR14; SR10; SR11; SR12). In the healthcare sector, however, some interest groups have embarked on a strategy of keeping their constituencies in check and try to have them accept regulatory policy, in exchange for a place at the NZa table (SR15; SR16; SR17; SR19).

At a certain point, however, the representative claim of an interest group may no longer find a positive reception at (parts of) its purported constituency. A rival organisation may then be formed, seeking reception among the constituency with a competing representative claim.[146] IRAs, on their part, may start to consult (groups of) individual regulatees, if they regard the representative claim of interest groups as no longer reflecting the opinion of its entire constituency (IR15; IR18; IR19).

146 This happened to the representative organization OMS, which after signing an agreement with NZa found itself confronted with a rival organization for self-employed medical specialists making competing representative claims (VVMS). This party criticized the 'monopoly position' and the 'single vision' of the OMS in making representative claims for the medical specialists constituency.

The representative claim-making strategy of affected interest representatives (makers) to represent interests as one, or common before the IRA (audience), therefore, while potentially well-received, because of the opposition of interests in regulated domains and the nature of regulatory decision-making often runs into problems of constituency heterogeneity. An alternative strategy for sectoral delegates, then, is to appeal to some larger interest before the IRA.

Strategies in representative claim-making 3: the selfless representative

A third claim-making strategy, according to affected interest representatives and IRA staffers in all four sectors, is for the former to invoke an interest *other* than the naked singular or multiple market party or constituency interest. Rather than unabashedly representing partial interests, affected interest representatives (makers-subjects) may in claims before the IRA (audience) appeal to *broader* or *larger* interests (object) purportedly at stake in regulatory or supervisory policies. Sectoral delegates so position themselves – and their corporations and associations – as explicit or implicit representatives (subjects) of these broader or larger interests, in hope of appealing to the IRA.

Affected interest representatives (makers-subjects) may, for instance, invoke their *client or customer base* and its interests (object) when pressing their case on regulatory or supervisory policies before the IRA (audience). What is good or bad for their corporation or association is depicted as being likewise good or bad for their clients or customers and their interests, who are thus purportedly represented. One telecommunications corporations representative (maker) says: 'We (subject) also represent the users (object), in the end. Not just ourselves, but also the goal to provide better services to our users.' (SR2). Likewise, a representative from financial institutional investors claims: 'Institutional investors say things out of their own self-interest, but also in the interests of their clients, such as pensioners and people who pay premiums.' (SR13)

Yet affected interest representatives (makers-subjects) may also invoke the *sectoral marketplace* at large, and such claimed interests of market parties (objects) as free competition, low regulatory burdens or a stable investment climate. The future of the marketplace at large is then portrayed as hinging on the regulatory or supervisory decisions of the IRA (audience) – and delegates position themselves as purported representatives of this marketplace. A representative from energy corporations says about the main message of his association: 'Our bottom line is that we want a good and stable investment climate.' (SR7) One AFM staffer indicates that affected interest representatives are more likely to find a good reception at the financial supervisor if they argue for or against certain measures not in terms of costs to themselves, but in terms of consequences to the financial marketplace at large (IR11).

By the same token, affected interest representatives (makers-subjects) may advocate their positions as serving a *public interest* (object). As demonstrated in Chapters 5 and 6, the notion of the public interest has increasingly taken centre stage in all four regulated domains. While this public is alternately defined as being economic or non-

economic in nature, in each sector a list of its interests has been articulated. These public interests comprise, among others, energy supply security, a careful treatment of financial customers and healthcare affordability and accessibility. In IRA stages for interaction, then, affected interest representatives sometimes invoke these public interests:

> *Some sectoral parties or interest groups* (makers-subjects) *put forward arguments from a particular perspective. For example the interest of sustainability, supply security, or the reliability of energy supply* (objects). *In the end, that also comes down to money, but now the zest of the arguments is not the euro per se.* (IR8)

A representative from energy companies confirms: 'You always have to keep an eye on supply security, which is in the interest of the energy customer. (…) A stable investment climate is in our interest, but supply security is in the general interest of the Netherlands.' (SR8) For IRA staffers, indeed, public interests seem to form a framework in which regulatory and supervisory decisions are made, and by which to evaluate the representative claims of sectoral delegates. One NZa staffer says:

> *[In specific policy proposals] sometimes the emphasis is more on affordability, sometimes on accessibility. But in the end, you want to represent all those interests.* (…) *Healthcare insurers, then, you'll engage on affordability, and healthcare practitioners on accessibility.* (IR18)

In the rhetorical endeavour to purportedly champion public interests, however, one of these stands out: the *consumer interest*. Sectoral delegates regularly invoke the consumer interest when pressing their case on regulatory or supervisory policies. As one medical specialist's representative says: 'You always have to appeal to a societal interest, a patient interest. That is a strong card to play.' (SR15) A representative from energy corporations thus for example claims: 'It is in the interest of the consumer there is enough freedom for companies to offer different products.' (SR7)

The consumer interest, however, is approached by all parties from a different perspective, leading, in a process of representative claim-making *par excellence*, to a kaleidoscopic exchange of conceptions of the consumer. Healthcare insurer delegates, for example, may claim to represent all policyholders: 'We say we represent all policyholders in the Netherlands, who want the best healthcare for their insurance premiums.' (SR24) This claim may be contested by healthcare practitioners: 'The insurers claim to represent the financial interests of patients. But these are derived from their own interests. We look at the substantive interest of the patient. Does [this proposal] lead to an improvement in oral care?' (SR18) Either way, all sectoral delegates hope to appeal to the IRA: 'They [the NZa, AV] approach everything from the consumer interest. So when you file a proposal, you always have to emphasize the patient perspective.' (SR18)

Added to the mix, indeed, are the institutional-level representative claims of the IRAs themselves, purporting to represent the consumer interest in terms of information

symmetry and protection on the marketplace. One AFM staffer says: 'We consider ourselves very much the guardian of the consumer and the investor. In economic theory, we are the agent of the investing consumer who cannot obtain redress himself.' (IR10) Likewise, an Energy Chamber staffer says: 'We consider ourselves a representative of the consumer in the sense that we check sharply if in all our decisions the interests of the consumer weigh heavily.' (IR7) These institutional-level claims play a role in the reception by IRA staffers (audience) of the arguments put forward by sectoral delegates on the administrative level. One AFM staffer claims to value the arguments of affected interest representatives in terms of 'the interest of the investor, the interest of the consumers' (IR10), and so do others (IR6; IR7; IR11; IR14). Says one NZa staffer: 'We have translated the general interest into consumer interests, such as quality, transparency, and accessibility of healthcare. We check our policies for these.' (IR17)

Yet despite the clashing claims between all parties to represent (different aspects of) the consumer interest, in the words of one dentist's representative, 'the patient himself plays no part in the entire story' (SR18). Consumer or patient organisation representatives, although invited, are often not present in these stages for interaction because they seem to lack direct interest, staff, resources or expertise (IR1; IR3; IR6; IR7; IR8; IR9; IR20; SR1; SR2; SR9). IRA staffers claim to regret this: 'A Consumer's League has to consider which themes to pick. So they are not always represented, which we regret.' (IR8) An Energy Chamber staffer says: 'We miss their counterforce in the consultations we arrange.' (IR6)

Representative claim-making therefore remains of a theatrical nature. Sectoral delegates in interviews admit to never neglect their partial interest when invoking broader or larger interests, and perceive IRA staffers as being aware of it as well (SR13; SR15; SR16; SR18; SR24). Both sides of the aisle are aware that affected interests remain at stake, and delegates must represent them. As one medical specialist's representative comments:

> *The NZa knows when they talk with us, and with other parties as well, these people are obviously there from a certain interest. But you are also there with co-responsibility for the system.* And this system we want to make as fitting as possible for our constituency. (SR15) (emphasis added)

A dentist's representative, too, speaks of the mutual awareness of representative role portrayals: 'This of course our role. We naturally represent the interests of dentists, but we are not going to make it by that alone. So we always have to translate [policy proposals] to the patient's perspective and demonstrate it is also in the interest of the patient.' (SR18)

A fourth and final strategy for affected interest representatives, then, is to give the impression of avoiding the theatrical altogether, and purport not to speak from a representative role, but act as supplier of information or policy expert.

Strategies of representative claim-making 4: acting not to act as a representative

A fourth claim-making strategy, according to affected interest representatives and IRA staffers in all four sectors, is for the former to put forward empirical knowledge or information in *support* or as apparent *substitute* of representative claims. Empirical knowledge or information may be brought forward by sectoral delegates as constituting unavoidable or 'hard' evidence in favour of a desired regulatory policy, rather than arguing for this policy on the basis of their interest. Participants on both side of the aisle remain aware, however, that on the background, affected interests remain at stake, and delegates must represent them.

In the OPTA market analysis procedure and Energy Chamber tariff method decisions, for example, representatives from telecommunications and energy corporations sometimes put forward their own research. One such representative of the former says:

> *Putting forward knowledge can influence the decision-making process. (…) The more compelling you make it, the harder it is to refute. (…) If you can say: the numbers are correct, you're there immediately. They [the IRA, AV] have to respond.* (SR2)

Another telecommunications representative confirms: 'Your story has to be legally correct. It should be factually correct. And it should be a clear story economically.' (SR1) Representatives from both sectors therefore often hired external consultants or academic experts to convince the IRAs of their arguments (IR5; SR3; SR4).

OPTA and Energy Chamber staffers confirm they valued empirical information, and preferred sectoral delegates to come up with clear-cut descriptions of problems and possible solutions (IR1; IR2; IR5; IR8; IR9). Says one Energy Chamber staffer: 'Just saying "Something is wrong" does not work for us.' (IR8) Likewise, an OPTA staffer says:

> *They [affected interests, AV] have to come up with something. Either an external investigation revealing that what we think is not right. Or an analysis in which they clearly explain why what we think is not right. For example because of their experience on the marketplace. But there has to be something on the table we can use as a foundation.* (IR3)

An Energy Chamber staffer confirms: 'If you can base your arguments on statistics, that is an enormous aid.' (IR9)

At the financial supervisor AFM and healthcare regulator NZa, both staffers and sectoral delegates likewise indicate the former appreciate 'good arguments' (IR10) and 'decent analysis' (IR11) in mutual interaction (SR15; SR16; SR17; SR18; SR19). IRA staffers value efforts of financial and healthcare interest groups to present 'reasonable alternatives' (SR24) more than 'preaching to the choir' (IR11) or 'hobby horses' (IR13). A delegate from financial institutional investors claims:

> *Sometimes you have specific knowledge of the market, such as how certain trade platforms function, or what the important players are. That is pretty objective, there is not much behind that.* (SR13)

Says one general practitioner's representative about NZa technical consultations: 'You try to steer it, by bringing in all kinds of papers that support your position. Third party research, or research we have conducted ourselves.' (SR17) A medical specialist's representative reflects: 'You can only persuade the NZa when you have good, factual information. You cannot win on power, because you have no power. You can only win on pure argumentation.' (SR15)

Despite this appreciation of affected interest representatives delivering factual information, however, IRA staffers in all four domains remain aware that for these delegates, interests are at stake. In the words of one AFM staffer: 'Lobby and expertise sometimes blend into each other.' (IR11) While in some stages, interest representation is accepted practice, in others, such as the NZa technical consultations, the gathering of technical expertise is supposed to be the point of focus. Yet this stage, too, according to sectoral representatives, has evolved into one in which interests are central (SR15; SR17; SR18; SR19). One medical specialist's representative says:

> *Here, you help to think substantively as a system expert, but you naturally also advocate your interest. It is a combination.* (SR15)

This statement is confirmed by a dentist's representative: 'You argue from the methods. But you do that in your role as interest representative.' (SR18) Comments one healthcare insurer's representative on the technical consultations: 'We try to exert our influence especially in implementation. (…) Naturally, we want solutions closest to the desires of our constituency.' (SR23) And one medical specialist's reflects: 'You can only score if you truly prove something. Or sow doubt, that is also important.' (SR15)

Interaction in these stages, too, retains its theatrical nature. While affected interest representatives may put forward empirical information in support of, or as substitute of surface-level representative claims, participants on both side of the aisle remain aware that interests are at stake, and delegates are to represent them. In the words of one representative of industrial energy consumers:

> *There is no such thing as value-free knowledge. Everyone works from his own perception, and those are partly coloured by the interests you represent. By whom you are paid, and by whom you are steered.* (SR9)

This makes relevant the question how IRAs and their staffers as audience handle the stagecraft of regulatee representative claim-makers. How, at least in their perception, are useful facts separated from staged representations?

8.4 **Audience reception: breaking the fourth wall**

The theatrical nature of representative claim-making in regulatory governance – the acknowledgement on all sides that sectoral delegates, at all times, are interest representatives, even when they invoke broader interests or purport to put forward expertise – means IRAs and their staffers (audience) must find a way to separate useful fact from staged representation. They must 'break the fourth wall': go beyond role portrayals, and judge and process the information put forward by interested parties.[147] To do this, IRAs may either rely on the professional skills of their staffers, attempt to install an organisational separation between interest representation and expertise, or rely on their boards to make a decision.

IRA staffers in all four sectors, first, comment on the need to apply professional skills to detect when sectoral delegates argue mostly on the basis of their interest, and when they put forward non-interested information. An OPTA staffer comments on the input of affected interests in the market analysis procedure: 'There's always an interest behind it, yes. But it's kind of your job to see through that.' (IR3) An NZa staffer likewise states: 'You can usually see the difference when they [sectoral delegates, AV] act strategically and when they respond substantively. And on most dossiers you can also estimate it.' (IR19) An AFM staffer reflects: 'You notice it by the type of question, and the time at which they ask it. (…) Of some questions you can tell they ask them on the basis of their interest.' (IR13)

Part of this professional skill is the aptness of IRA staffers to apply checks and balances to the input provided by sectoral delegates. One OPTA staffer says: 'You have to make sure you have enough checks and balances on the veracity of facts and figures, because there are always interests behind them.' (IR1) Information provided by third parties, such as consultancy bureaus, universities or other agencies, may provide such checks. Says one Energy Chamber staffer: 'We often hire third parties to conduct research.' (IR8). An OPTA staffer reflects:

> *It is the core of what we do at OPTA: weighing these kinds of insights and weighing the interests behind them. And match that with the objective information you received from market or third parties.* (IR1)

One Energy Chamber staffer quips this may sometimes result in a 'battle of research projects' (IR5) between the IRA and affected interests.

A second means for IRAs and their staffers to break the metaphorical fourth wall is to channel interest representation and expertise provision into different stages for

147 In theater and film, the 'fourth wall' refers to the invisible boundary between stage-actors and audience. When stage-actors directly address the audience or otherwise acknowledge it, this is referred to as 'breaking the fourth wall'. Breaking the fourth wall is considered a technique to openly acknowledge and comment on the fictional nature of the play. I here employ the metaphor to bring into consideration the possibility that the audience, too, may break the fourth wall. They may acknowledge the staged nature of the play, yet manipulate it to distill out of the fiction what is valuable or useful to them in the 'real' world.

interaction. In the OPTA market analysis procedure and the Energy Chamber tariff method decisions, affected interests were legally obliged to provide information on facts and figures. At the former, the gathering of empirical data and of subjective opinions were split up, because otherwise the former was seen as tinged with interests: 'They [sectoral delegates, AV] tell a coloured story.' (IR3) At the healthcare regulator NZa, too, the advisory committees were separated from the technical consultations. While sectoral delegates in the former advised on policy rules on the basis of their interest, in the latter they were to help technically implement them. Yet, as remarked above, the distinction between the two stages became blurred. This has recently led the NZa to implement a tiered structure in which policy rules becoming contested in technical consultations are sent back to the advisory committees for renewed discussion between sectoral delegates (IR15; IR18; IR19; SR17; SR19; SR22; SR23).

Thirdly and ultimately, however, information on interests and expertise is aggregated on the administrative level and sent upwards to the IRA boards. Says one Energy Chamber staffer: 'In the end, the board takes the final decision.' (IR5) At the NZa, committee advice is summarized by the responsible directorate and sent upwards, accompanied by the directorate's own advice and the opinions of all represented parties (IR17). The NZa board – of which one member chairs at least one advisory committee – ultimately takes a decision, weighing represented and other interests, and processing information. According to some affected interest representatives, it is not always clear how IRA boards come to a decision (SR10; SR11; SR15; SR16; SR17; SR22; SR23). While some delegates perceive independent regulatory decision-making as fair game, moreover, others may disagree and take the representation of their interests to another forum: the judiciary. The threat of the latter, then, forms one motivation to involve affected interests in the regulatory process.

8.5 The value of representation

The four IRAs discussed here have, next to those stages for which interaction with affected interests is legally obliged, all set up additional arrangements to consult a wide variety of external parties, including affected interests. This presents a paradox, since IRAs are specifically established to be independent from affected interests. Why do they consult them so extensively, and allow for representative claim-making inside the regulatory process?

Representation is perceived as legitimate

Many interviewed IRA staffers consider the efforts of affected parties to claim and represent their interests, or those of their constituencies, inherently legitimate – even when expertise is required. This pertains to stages for which interaction is legally obliged, but to others as well. One AFM staffer says: 'It is not like parties are not allowed to reveal

their interests, because they certainly are. A consultation is partly meant to do just that.' (IR11) The decisions of IRAs primarily affect these constituencies and their interests, after all. In the words of one OPTA staffer: 'Parties like to have the opportunity to provide us with their opinions and positions, their problems. It is often about interests, but also about things they face in practice.' (IR1) Even though IRAs have been granted the discretion to make independent decisions, many staffers consider it good regulatory practice to consult affected interests. Says another OPTA staffer: 'We adhere to the philosophy that market parties are the interested parties, and the most important source of information. That is why we explicitly say we want to actively involve them.' (IR3)

Since the four IRAs for some decisions must make visible how they have weighed various interests, they must allow for the very representation of these interests inside the regulatory process. One Energy Chamber staffer says: 'We have to do this, because in order to weigh interests properly, we need their input. We cannot do it otherwise.' (IR9) One banking representative confirms: 'AFM wants to probe where the interests lie.' (SR10) A representative from a telecommunications corporation adds: 'OPTA must take a decision and substantiate it. And then it must also explain why it has rejected the arguments of other parties. It must make visible how it has weighed the different interests.' (SR3)

Representation produces valuable information and expertise

Almost every interviewed IRA staffer and sectoral delegate claims one of the most salient functions of facilitating representation in the regulatory process is that it provides information and expertise. This is considered to increase the quality of IRA decision-making (IR16; IR10; SR1; SR13; SR14; SR19). In the words of one OPTA staffer: 'You are there by the grace of the insights you receive from the marketplace. You have to be a sponge.' (IR1) Affected interests inhabit – even constitute – the domains to which the regulatory and supervisory work of the IRAs applies. They are therefore a unique repository of relevant information about these domains. One AFM staffer says: 'If we present a new standard for clearing and settlement, which happens in a complex environment, and is a complex issue, we talk with people from the marketplace to find out what happens there.' (IR11) The practices of affected interest, indeed, *are* what is regulated and supervised by IRAs.

The expertise that affected interests have to offer often concerns daily practice: working methods, technicalities and implementation issues. In order to gather information and expertise about this daily practice, and gauge the potential effects of proposed regulations, interaction with affected interests seems required. Says one NZa staffer: 'We get much information from daily practice. It is valuable for us to hear what is possible and what not.' (IR16). A banking representative confirms: 'They [AFM, AV] want to test whether something is feasible.' (SR10) Yet the very interests of these parties often lie in their daily practices. In the words of one NZa staffer: 'You involve parties to make sure your policy lands in the right way, and take account of their interests. To make sure you don't decide things behind your desk that don't work in practice.' (IR15) For sectoral delegates, then, interaction with IRAs and their staffers always is a mixture of interest

representation and providing expertise. In the words of a representative from financial institutional investors:

> *Our contacts with AFM are part information transfer, part information gathering, and part putting forward our position regarding certain decisions or policy proposals, especially where it concerns the consequences for daily practice. The latter you could call 'lobby'.* (SR13)

An AFM staffer confirms: 'Our motivation is that we want to hear expertise. (…) Yet interests always play a role.' (IR11) But: 'We always weigh matters ourselves. Yet it would be a shame to not employ the expertise they [affected interests, AV] bring along.' (IR11)

This IRA reliance on the information of affected interests harbours a danger: that of informational dependency and capture. Affected parties with a great capacity to divulge information may have an advantage towards other parties, and towards to the IRA, in pressing their interested case. A representative from telecommunications corporations remarks about one such party: 'If [this party] alleges something about the marketplace, they are always being listened to. (…) Because often it is true. What they say should not always be accepted, but at least be reckoned with. If you shove it aside too quickly, [this party] will repeat it all the way to the court.' (SR2) For this reason, IRAs and their staffers aim to apply checks and balances to aim and filter facts from interests, but also aim – so they claim – to consult a wide array of affected interests. In the words of a representative from financial consumers: expertise is always coloured by 'views, a vision. You know, it always coloured. But that is why they [AFM, AV] invite everyone.' (SR14)

Representation facilitates understanding and support

A third and final motivation for IRAs to facilitate affected-interest representation in the regulatory process is that it may garner support for, or a form of perceived legitimacy of, regulatory and supervisory decisions. Although IRAs are formally independent from affected interests, and do not require their approval to make decisions, a measure of support can nevertheless render benefits to the agencies.[148] In the words of one NZa staffer: 'If you communicate at an early stage, you involve people and possibly create support, by arousing sympathy that can aid you later in the decision-making process.' (IR19)

Affected interest support is intimately related to the two motivations for involving them identified above: the perception of interest representation as a legitimate activity, and the need to acquire information and expertise about regulated domains. These are themselves intertwined. The facilitation of both may contribute to some form of affected

148 In this respect, the Dutch noun *draagvlak* is often coined by interviewees on both sides of the aisle. Literally translated as 'bearing surface', in Dutch this word is frequently employed to refer to formal or informal support or legitimacy among constituencies of all kinds.

interest support for IRA decisions. Indeed, as one Energy Chamber says: 'Checking the level of support is an inherent aspect of the feedback groups.' (IR8) Yet interviewed staffers are keen to stress that they are not *dependent* on support, nor always seek it out. Making decisions without affected interest support may even enhance the reputation of an IRA as independent regulator in the public or consumer interest (IR10; IR11; SR14).

Affected interest support, moreover, is not always attainable. In domains in which interests are highly opposed and *ex ante* regulatory decision-making is perceived as a zero-sum game, affected interest support for any IRA decisions is hard to come by. Says one OPTA staffer: 'You will never get consensus on this marketplace. The interests are so different, it will never be resolved.' (IR3) The best IRAs can hope for is for decisions to be empirically 'recognizable' by affected parties. In the words of another OPTA staffer: 'You are looking for choices that are recognizable for market parties, whether they agree or disagree. (…) You strive for basic recognition.' (IR1) Yet all the same, many IRA decisions will be contested in courts. Affected interests 'may understand it objectively, but they will never say so because the end result is not in their interest.' (IR1)

Involvement in IRA stages for interaction may nevertheless lead to a measure of mutual understanding, and a feeling of 'being heard' among affected interests. In the words of a medical specialist's representative: 'If you're having these conversations, they [the NZa, AV] will understand our position. They do not have to adopt it, but they can at least understand it. (…) Like we understand the situation of the NZa.' (SR15) Two representatives from energy companies likewise claim that periodical consultations with Energy Chamber staffers are aimed at 'mutual understanding' (SR7), as the feedback groups may result in sectoral parties 'feeling heard' (SR8).

Although true support for IRA decisions may be hard to come by, empirical recognition or mutual understanding of affected interests may create benefits to the independent agencies. The first of these is the possibility of enhanced sectoral compliance to regulations. One OPTA staffer says: 'For us it is important to know what the expected level of compliance will be. If there is no support at all, we know it will take much effort to enforce compliance.' (IR2) Stages for interaction may reveal affected interest support, but also enhance it through the processes described above. In the words of one AFM staffer: 'A rule that is not supported in the marketplace is ineffective. (…) If you have no support, you have to be so effective in enforcement it becomes almost impossible to achieve.' (IR11)

A second and last benefit of affected interest support obtained through involvement is the promise of a decreased judicialization of the regulatory process. For IRAs, the judicial process is time-consuming and possibly detrimental to their reputation, as their decisions may be annulled.[149] IRA staffers and delegates in all four sectors allude to initial periods of hostility and judicial activity between their mutual organisations. After this followed, in their perception, an outreach by each of the IRAs

149 Going to court is not always possible. While many IRA decisions, such as *ex ante* regulatory decisions on tariffs and *ex post* supervisory decisions in individual cases are, contested in courts, for informal guidelines and non-binding regulations no direct path to the judiciary is open.

to involve affected interests in earlier stages of the regulatory process (SR1; SR3; SR4; SR7; SR8; SR14; SR15; SR16). Respondents are, however, divided on the actual results of this policy in terms of decreasing judicialization. In the words of one Energy Chamber staffer: 'You won't prevent judicialization. For network operators or client parties it is always worth the effort to have a decision checked by a judge.' (IR5) Likewise, an OPTA staffer says: 'I do not have the illusion we will prevent appeals by doing this.' (IR3) Others, however, are more positively inclined (SR7; SR8; SR14).

The early involvement of affected interests in stages for interaction in the regulatory process to prevent later judicialization once again creates a danger, however: that of over-exposure of IRAs and their staffers to a select group of corporations and associations. Those with the biggest interests and the most expertise are usually well-represented. The absence of consumer, customer and patient organisations in many of the stages for interaction discussed here is therefore to be lamented. Although the IRAs sometimes perform surveys among consumers or install consumer panels to gauge their experiences on the marketplace (IR1; IR10), their most direct claimed representatives are often not present in stages for interaction to give object portrayals of the interests of this constituency. Although their expertise on daily practices in regulated domains may be limited, their involvement may create much-needed support for IRA decisions that are, purportedly, ultimately in the claimed interest of consumers.

8.6 Conclusion: representative claim-making in regulatory governance

Representative claim-making in independent regulatory governance exhibits distinctive characteristics. On the one hand, representative claim-making in the regulatory context exhibits universal features of the process of representative claim-making as described in Chapter 3. These are encountered in the parliamentary arena as much as they are encountered outside of it. In regulatory governance, business and professional organisations, associations or their delegates (claim-makers) either posit themselves or other entities as representing (subject) the interests of constituencies (object) before an audience (here: the IRAs and their staffers). In doing so, they apply representative claim-making strategies to put forward their own self-interest, present various interests as one or common, or cloak interests as concerning much broader ones, notably public or consumer interests. In doing so, they hope to appeal to the IRAs, who have their own institutional-level claims to represent public and consumer interests in their independent decisions (see Chapters 5 and 6).

On the other hand, as a function of the regulatory context in which the process of representative claim-making described in this chapter takes place, sectoral delegates also have an enlarged interest in presenting their case as factually or empirically 'true'. Because of the formal independence of the decision-making agencies, the highly technical nature of interaction in regulatory domains, and the scope of regulation and supervision

(concerning the daily practices of affected interests), in regulatory governance, affected-interest representation and the delivery of expertise are to a high degree intertwined. This creates a dilemma for the IRAs, who on the one hand do not require the formal approval of sectoral interests, but on the other hand to a certain extent stand in need of their expertise and informal support. They have in this chapter been shown to cope with the dilemma of the persistence of representative claim-making in extra-parliamentary domains in various ways.

Notable in all cases, however, is the absence of consumer and patient organizations in many stages for interaction. Although the IRAs conduct consumer surveys and install consumer panels (in addition to setting up consumer websites such as *ConsuWijzer* – see Chapter 6), and invite consumer and patient organizations to their stages of interaction, these representative organizations themselves often seem to lack the resources, manpower, expertise and direct interest to participate.

Chapter 9

Independent regulatory authorities, representative claim-making, and democracy

The global landscape of politics and administration in the twenty-first century is teeming with a dazzling variety of organisations, institutions, networks, movements and individuals claiming to speak for, or work on behalf of interests, constituencies or ideas. The historical era when parliaments – periodically elected by geographical constituencies within the boundaries of the nation state – were the sole, or even the central locus of political debate seems to have passed into a yet uncertain epoch in which acts of political expression are increasingly performed beyond the closed-off electoral domain. Similarly, the time when political authority had its sole locus in territorially elected parliaments and the nation-state governments they controlled seems to have passed into an era in which public decision-making power is dispersed between a variety of multilevel public and non-public actors. A number of developments have caused the, in hindsight, well-ordered 'standard model' of representative democracy – of a single centre of political debate and authority, parliament, geographically elected by a national constituency and considered the sole locus of political representation – to dissipate into a more fragmented constellation for which an appropriate overall label still has to be found ('monitory democracy' ranking high as a label gaining traction) (Keane 2009; cf. Rosanvallon 2011). The transnationalisation and increasing international interdependence of public decision-making arenas, the pluralisation of constituencies within, across and beyond geographical demarcations, and the domestic fragmentation of political and administrative authority – combined with, or perhaps resulting in a pervasive sense of a 'crisis' of representative democracy due to declining levels of trust in its traditional institutions – have made political expression and political authority to yet uncharted extents an extra-parliamentary or 'post-parliamentary' affair. Independent regulatory authorities (IRAs), discussed in this thesis, are at the centre of these developments and an expression of them.

The forms of political expression and political authority that flourish in between the rupturing stages and venues of the standard model of representative democracy are frequently labelled as – for political expression – 'participatory' democracy, 'grass-roots' politics, 'deliberative' democracy or 'public' accountability, or – for political authority – 'post-representative' or 'non-majoritarian' government. Yet these labels seem to gloss over the fact that *claims* to speak or act for others, and *invocations* of constituencies from narrowly defined ones to such broad ones as 'the public' or 'the people', are today as much a feature of political life as they were in the past – in its participatory, deliberative or grass-roots, as well as its supposedly post-representative incarnations. Representation, or claims to representation, as well as the consideration and appropriation of these claims by audiences and constituencies, is a property of politics as long as language is a vehicle for political expression, and a division of labour central to political organisation. Rather than an activity confined to the parliamentary-electoral realm or a feature of institutional mechanisms, representation is a phenomenon occurring across politics and society. Conceived as the making and receiving of representative claims – of claims to speak for or act on behalf of others – it is a staple of political life; and so it is, this thesis argues, of, by, within and around IRAs.

In this thesis, Michael Saward's (2010) representative claim framework (RCF) has been employed to demonstrate how four extra-parliamentary IRAs in the Netherlands still draw on invocations of the public, or other constituencies, in their political legitimation; how the selection of their board leadership stands in service of these invocations, yet results in a circumscribed pool of appointments; and how interaction with affected interests in their internal decision-making processes is a game of representations as much as it is in parliaments. As such, the RCF served as a tool to answer the main question of this thesis: '*What is the representative character of independent regulatory authorities?*'

In the next pages, the answer to this question will be summarized. In concluding my argument, I will then delineate the positive and normative benefits of viewing IRAs from a representative claim perspective, argue how this adds to existing technocratic, delegation and relational approaches to the position of these bodies in the polity, and end on a consideration of the democratic legitimation of these agencies and their practices from a representative claim-making perspective.

9.1 Independent regulatory authorities: public and consumer interest representative claimants

The establishment of IRAs in the Netherlands as well as in other Western European polities followed a widespread and deeply impacting historical movement of marketization and liberalization policies in formerly state-owned or controlled utility sectors and the economy at large since the 1980s, accompanied by an equally thorough process of autonomisation or hiving-off of government agencies into more or less independent public bodies. In the Netherlands, these policies intensified in the mid-1990s with the implementation by the legislature of European Community (EC) directives in such areas as telecommunications, postal services, energy and public transport, as well as the adoption of EC competition law.

The first two IRAs in the Netherlands – the Independent Mail and Telecommunications Authority (OPTA) and what was initially known as the Energy Supervisory Service (DTe) – were, along with the general competition authority NMa, set up in the late 1990s as temporary co-facilitators of liberalization processes in the networked utility sectors of telecommunications and energy. They were considered exceptions. The independence of OPTA and DTe from the elected political sphere was framed by the Dutch lawmaking body as restricted, and argued for in terms of their temporary impartial or umpire role in the introduction of market forces in networked domains. This, along with their protection of certain 'societal' interests such as universal service provision, was claimed to be of national economic interest.

The wave of criticism of marketization policies in Dutch policy-making circles at the turn of the twenty-first century, however, propelled the lawmaking body to much more explicitly imprint in the establishment laws of the existing and new IRAs the 'public' interests they were to represent. The notion of the public and its interests

gained traction at the time, and was considered in policy-making circles to refer to any societal interest of which the democratic polity had decided it would require public intervention. This could happen *through* marketization, and the accompanied setup of independent regulators to ensure both 'economic' and 'non-economic' public interests in liberalized domains. Marketplace competition now was increasingly considered one public interest among others (such as universal service provision or security of energy supply), and independent authorities in concomitant acts and proclamations of the legislature awarded a more permanent and substantial place in a polity transformed in the previous decades by marketization and the autonomisation of government bodies.

A representative claim for these newfound institutions emerged: IRAs, a whole string of which was set up in the early 2000s, were through delegation of regulatory and supervisory tasks now claimed by the lawmaking body to independently secure or advance economic and non-economic public interests through the goals they would pursue. While the motivations for the independence of the authorities from the elected political sphere varied from the professed need to detach from short-termist politicians and the possible lobbying interests behind them to a desire for purportedly objective expertise, seen through the lens of the representative claim framework (RCF) the Dutch lawmaking body (maker) with each subsequent foundation made the following claim: that authorities marked by independence and expertise (subject) would be better capable than itself to secure or advance certain interests of the public (object) in marketized and liberalized domains. The erection of IRAs marked a departure of the standard model of representative democracy, in which a general interest was continually represented by the elected people's representation (parliament), towards a more fragmented model of political authority in which more concrete public interests are represented by a string of independent authorities.

This departure is reflected in the establishment laws of the four independent and expertise-based authorities analysed in this thesis. The OPTA from 2004 onwards was through independent and expertise-based regulation and supervision to further the economic and non-economic interests of a 'public' – of market actors, consumers and citizens in the electronic communications sector – in marketplace competition and the prevention of market power abuse, as well as investments in the quality and capacity of networks, universal service provision, consumer market transparency, and the ability to switch providers at low costs. The NMa Energy Chamber from the same year onwards was through independent and expertise-based regulation and supervision to further the economic and non-economic interests of a public – of market actors, consumers and citizens in the energy sector – in marketplace competition and the prevention of market power abuse, as well as investments in the quality and safety of networks, energy supply security, the continuous availability of energy, improved service quality and consumer market transparency. The Financial Markets Authority (AFM) from 2002 onwards was through independent and expertise-based supervision to further the economic interests of a 'public' – of market actors and consumers in the financial sector – in orderly and transparent financial market processes, proper relations between market parties and

a careful treatment of customers. The Netherlands Healthcare Authority (NZa), lastly, from 2006 onwards was through independent and expertise-based regulation and supervision to further the non-economic interests of a 'public' – the Dutch citizenry – in the accessibility, quality and affordability of healthcare. The lawmaking body claimed these would best be secured through the marketization of the healthcare domain, which the NZa would help facilitate. Yet as a first IRA legally so, the NZa was also obliged to 'put the general consumer interest first'. Now the consumer appeared as a distinct entity whose interests were legally to be secured and advanced by an IRA. This development seems to be confirmed in the Netherlands by the establishment, in 2013, of a Consumer and Markets Authority (ACM) as the product of a merger of OPTA, the competition authority NMa and a consumer rights authority. According to the law's preamble, this is to 'protect the interest of the consumer'.

In the Netherlands, two questions have as of yet not been solved. The first of these pertains to the mutual weight and relations of the various public interests to be secured and advanced by these independent and expertise-based authorities. The economic public interest of marketplace competition can be opposed to non-economic public interests, such as the quality and affordability of healthcare. Likewise, the place of these various interests vis-à-vis the consumer interest – and the very definition of the consumer interest – is a subject of debate. A second question that has not yet been solved is which representative body should weigh these various interests, and in which way: the elected political sphere and government in advance by law, or the IRAs through their independent decision-making in regulation and supervision. The ongoing political, juridical and political-economic debate on these questions reflects a continuing struggle in the Dutch polity between market and public logics in the question of state-market arrangements and responsibilities. Yet the place of IRAs here in the foreseeable future as *new types of representative claimants* cannot be denied. Independent and expertise-based regulation performed beyond the elected parliament in the name of the 'public' and its interests seem at present (2014) to be a permanent feature of the Dutch political-administrative landscape.

The public these authorities represent, however, should be seen as an abstraction and a rhetorical construct. This has repercussions in two ways. First, in abstract, in the time of state-owned or controlled utility sectors, *citizens* were represented via their elected parliament in regard to the distribution of goods and services to them. Yet today, in the establishment laws and parliamentary texts of the newfound extra-parliamentary IRAs, the public that is depicted is largely one of *market constituents*. This reflects an important change in the nature of citizenship (and its portrayal) that accompanies the new historical division of state-market responsibilities caused by marketization and liberalization, and that too often goes unnoticed. The community that is acted for is henceforth largely one of market actors and consumers; its interests purportedly co-secured and advanced (and to uncertain extents weighed) by independent regulatory and supervisory authorities, rather than an elected parliament and a government and bureaucracy it controls. Some movement in the opposite direction can be discerned:

with the installation of independent supervision on the financial sector (in the Netherlands: by AFM), the *economic* interests of a community of market parties and their customers are awarded by the lawmaking body a 'public' nature. Yet this does not change the basic structure. It is therefore an open question, secondly, what the consequences are of this double shift from citizens to consumers on the one hand, and from elected to independent representative bodies on the other hand. The notion of citizenship *qua* citizenship – being a member of a political community with certain rights and responsibilities – carried with it a set of expectations: for one, that of being actively engaged in the community, and of the community being engaged in its member – even at a bare minimum, for instance through the vote (Arendt 1958). Yet the language of consumerism is different: it emphases personal choice, private goods and in some respects, an abstinence from matters public (cf. Haque 2001). The independence of regulatory authorities from one group of people they allegedly represent (consumers) could be reinforced by the very definition of this group as consumers.

To be sure, the four IRAs explored in this thesis – the OPTA, NMa Energy Chamber, AFM and NZa – in their public presentation all actively promote an image of being public or consumer interest representatives. They convey their independence from both the political sphere and sectoral interests, and supposed expertise, as part of their representative claim to act as 'agents of the consumer' (acting in his stead, was he not prevented from doing so in an ideal marketplace situation by market failure or information asymmetry) or, in the phrase of NZa, as symbolic 'guardian angels'. Contributing to this, in various formulations, are their self-proclaimed flexibility, openness and communicativeness towards both market actors and consumers, and role as 'landmark' – as guardians or restorers of public trust in free marketplaces. The publics these IRAs claim to work on behalf of – the constituencies they represent – are depicted as market parties and consumers ultimately benefiting from their activities. Often, 'society' takes up a rhetorical place as a direct or indirect beneficiary of their regulation and supervision through an enhancement of its economic welfare.

Parallel to its recent enshrinement in law, indeed, 'the consumer' in the public self-presentation of these IRAs has taken up his own, increasingly prominent place. While in the immediate years after the establishment of IRAs, consumers, or customers, were rhetorically portrayed as benefiting foremostly from the efforts of these independent authorities to 'make markets work' via an increased freedom of choice, they have since been depicted by the four IRAs as a more clearly protected – and to be emancipated – constituency in marketized and liberalized domains. Consumer protection and market functioning have throughout the years been awarded more equal emphasis in the corporate self-presentation of the four examined cases; with consumers in the present day (2014) having become the near-central proclaimed focus of all the independent authorities' activities. Through consumer information websites such as *ConsuWijzer* (ConsuGuide), the four IRAs target consumers with information in order for them to take up their desired role as autonomous and actively participating market constituents in liberalized domains. By claiming to undertake action when enough consumer

signals are received, for instance through ConsuGuide and consumer panels, the agencies do attempt to establish a more direct connection between representative and represented. This development once more seems to be confirmed in the Netherlands by the establishment in 2013 of the Consumer and Markets Authority (ACM), which at its opening press conference and on its website publicly claimed it would 'put the consumer interest central' – to the point of announcing interventions in the political debate as a way of securing his interests (*De Volkskrant* 2013).

At present, these four IRAs in the Netherlands thus strive to become viewed as guardians and market-makers as well as consumer emancipators. The public, but especially the consumer is so represented in the double sense of acted for and portrayed: portrayed as market constituent, and acted for in that stead as well, by the activities of IRAs as well as the direct provision of information to them. On the one hand, the IRAs are so involved in a lengthy process of moulding citizens in the image of well-informed and critical customers as a purportedly essential component of the liberalized marketplace, including in such contested domains as public healthcare. Yet a more direct representation of consumers on the board and administrative levels of the IRAs seems to be lacking.

9.2 The boards of independent regulatory authorities: selection and appointment

The legislature of the Netherlands, as it installed IRAs as new types of representative claimants of the public, also made provisions for the leadership of these bodies. Stipulations for appointments, term limits, and mechanisms for control and accountability (the latter not examined in this thesis) must guarantee a measure of political control over the agencies. Legal provisions that secure operational autonomy, and protections against easy dismissals, warrant a measure of agency independence. Selection criteria for IRA boards and their members, meanwhile, serve to underpin their representative claims to independence and expertise in regulatory and supervisory decision-making in the purported public interest, while circumscribing the pool of potential appointees. They create a leadership class for IRAs to which various personal qualities are ascribed.

In the cases of all four IRAs examined in this thesis, negative selection criteria imprinted in acts of foundation prescribe, by banning additional functions and financial or material interests, what boards and their members are to be *not*. These are to ascertain their formal personal independence from the elected political sphere, the regular bureaucracy and sectoral interests, and thence their impartiality, during the length of their tenure. Positive selection criteria, on the other hand, prescribe what IRA boards and their members *should* be: experts. In two cases – NMa and NZa – this selection criterion is imprinted in the law. In the other two cases – OPTA and AFM – this selection criterion is found in parliamentary documents accompanying their acts of foundation.

In all cases, a variation criterion is found in these texts as well: IRAs are to unite various expert disciplines in their boards. In two cases, additional positive selection criteria are imprinted in the law as well. AFM board members are to be 'trustworthy' and 'suited' for their function (reflecting similar demands made of executive functions in the financial sector), while NZa board members must possess 'societal knowledge and experience'. In both parliamentary documents and the informal criteria these four IRAs themselves have drawn up, moreover, as a desired trait for board members a 'personal' or 'natural' charismatic authority is frequently emphasized. Potential board members are to have a personal 'reputation' in the regulated field, or be an example of knowledge or integrity to it. In marked contrast to the traditional bureaucracy, the public profile of IRAs as new types of representative claimants thus seems to be buttressed by an older, more direct style of leadership authority, based on personal reputation or charisma.

Deviations from this general picture can be found as well. Through the legal figure of OPTA associated board membership, those with limited interests in the telecommunications sector were potentially allowed on the board. The government claimed this would yield valuable marketplace insights. AFM governing board members must informally at present (2014) be diverse in terms of an unspecified 'affinity', while those of its supervisory board must informally possess a 'network' in the financial sector. These deviations serve to expose the potential tensions that exist between the negative and positive selection criteria for IRA boards: between being independent and having expertise, being impartial and possessing sectoral experience. This is a paradox at the heart of the representative claim about independent regulation, and made a description of the professional backgrounds of boards members relevant.

The aggregate leadership class of the four IRAs – overwhelmingly male, yet relatively a-political in terms of party membership – has elite-level professional backgrounds in Dutch public administration (30%), the private sector and society (in majority in the four regulated domains) (30%), science and academia (19%), law (16%) and to a lesser extent national politics (5%). In addition to the demands for expertise, various explanatory theories for public appointments shed light on possible motivations for the government to appoint board members with these particular backgrounds. The composition of IRA boards may demonstrate an active recruitment of connections in various fields relevant to the work of the independent bodies. It may also demonstrate a desire to make IRA boards descriptive-representative of these various external fields, in an attempt to create a measure of legitimacy in the eyes of important stakeholders. Whatever motivation is employed – and none excludes the others – the high level of IRA board members with professional backgrounds in public administration (sometimes at the home department) and the four regulated domains, while perhaps unavoidable, is notable in light of the representative claims to the twofold independence of the agencies from these very spheres. And in light of the public self-presentation of IRAs, it is interesting that no board members with clear-cut consumer or patient movement backgrounds could be detected either.

9.3 The administrative level of independent regulatory authorities: representation of affected interests

The four IRAs analysed in this thesis all allow for the representation of affected interests in the decision-making processes at their administrative or work-floor levels – one level below the board. Here, board decisions are prepared and implemented. Prompted by law but also of their own volition, the four IRAs as public interest representative claimants have set up stages for interaction and consultation with their external environment, of which affected interests – regulated corporations, practitioners, consumers and their interest groups – constitute a subset. In these stages for interaction, the IRAs allow these parties to represent their interests, or the agencies intend to extract technical expertise and information from them. Many stages, however, exhibit a blended form.

These stages are not universally accessible. The four IRAs, prescribed by Dutch administrative law but also of their own volition, determine the inclusion of affected interests on the basis of evaluative criteria to judge – as audience in the representative claim framework (RCF) – the claims of external entities to represent affected interests or constituencies in regulated domains. Where prescribed by law, these criteria determine inclusion on the basis of the personal, distinctive, objective and relevant materiality of the interest at stake. On this basis, OPTA and NMa Energy Chamber included telecommunications corporations, energy network operators, energy production, trade and supply companies, interest groups, and organisations of large-scale industrial consumers into regulatory stages for consultation. AFM en NZa have drawn up additional criteria to evaluate representative claims, on the basis of which they include interest groups of many types of financial sector businesses and healthcare institutions and practitioners into regulatory and supervisory stages for interaction. Yet the four IRAs for many stages determine inclusion in an ongoing fashion: based on precedent, a list of 'known' parties, or judged *ad hoc* by staffers. Regulatory governance in the Netherlands is by some participants described as a 'small world'. Nonetheless: at all four IRAs, end users, small-time investors, patients, consumers and their interest groups are considered to be structurally underrepresented. Some IRAs, however, perform surveys among consumers or install consumer panels to gauge their experiences on the marketplace.

In the stages for consultation, the process of representation continues. In the interaction between affected interest delegates – regulatory affairs employees, directors, managers, policy staffers – and administrative-level IRA staffers, a process of representative claim-making and receiving unfolds. In pressing their case on regulatory policies, affected interest delegates must paint a picture of the sectoral interests and constituencies at stake. IRA staffers, meanwhile, must seek to separate useful fact from staged representation in order to prepare independent decisions. Thus a theatre of representative role-portrayals comes into being, in which all participants are aware that delegates must represent sectoral interests, yet – as stage-actors – employ representative claim-making strategies to invoke and construct constituencies, and convince IRAs and their staffers – the audience – of their depictions.

On the basis of interviews, four representative claim-making strategies can be discerned. In reality, these are often mixed or combined. In one, affected interest delegates (makers) act as lobbyists (subject): they voice (dis)agreement with a proposed regulatory policy on the 'naked' basis of its clear-cut benefit or detriment to sectoral interests (object). This strategy, according to interviewed participants, is not always well-received by the IRAs and their staffers, since they seek evidence for positions rather than obvious lobbying points. In a second strategy, therefore, affected interest delegates (makers) band together and represent (subject) the interests of various constituencies (object) as one, or common, before the IRA. This is perceived as a potentially more successful strategy by interviewed participants. Due to the opposition of interests in many regulated domains, however, and the sometimes zero-sum nature of IRA decision-making, this claim-making strategy can be difficult to perform, even for interest groups.

A third representative claim-making strategy therefore is to appeal to a larger interest purportedly at stake in a regulatory policy. Here, the economic and non-economic public interests, including the consumer interest, to be represented by IRAs in their independent decisions take rhetorical centre stage. Affected interest delegates (makers) may argue for or against a policy in the ostensible interests of their customer base (object), the liberalized marketplace at large (object), public interests such as energy supply security or network quality (object), or consumers and patients (object). They so implicitly or explicitly set themselves up as representatives (subject) of these very constituencies, rather than their own particular interest. For IRA staffers, indeed, public interests seem to form a framework in which regulatory and supervisory decisions are made, and by which to evaluate sectoral proposals. Yet the awareness on all sides that, in mutual interaction, sectoral interests remain at stake, and delegates must represent them, makes that the latter sometimes turn to a fourth strategy to appeal to IRAs: to not make surface-level representative claims at all, but to act as experts or information providers. Empirical evidence is then brought forward in support of, or as substitute of representative claims. While this according to interviewed participants is a strategy that is appreciated most by IRA staffers, it is admitted by many that, here, too, affected interests often inform the empirics that are brought forward. Interest representation and expertise provision, as attested by many respondents, are often intertwined.

This leaves IRAs and their staffers with the challenge to separate 'fact' from representation. They attempt to do this by relying on the professional skills and attitude of staffers, by bringing about an organisational separation between interest representation and expertise, or by relying on their boards to make a decision. Staffers comment on the much-needed professional skills to be able to distinguish when sectoral delegates speak on the basis of their interest, and when they put forward – in the eyes of staffers – useful information. Staffers also claim to attempt to apply checks and balances to information. On an organisational level, most IRAs attempt to channel interest representation and expertise into different stages for consultation. This, however, can be thwarted by the abovementioned intertwined nature of both. Ultimately, however, decision-making is the preserve of the board.

The value of affected interest representation in regulatory decision-making processes to the work of the independent bodies is, in the perceptions of participants on both sides of the aisle, twofold. While perceived by some as an inherently legitimate activity – the regulatory activities of IRAs concern the interests of the affected, after all – according to many it produces valuable information and expertise on the regulated domain. While this information may be biased or interested, it is nevertheless of use in sectors marked by complex technicalities. The process of mutual interaction may, moreover, create reciprocal understanding or perhaps support of affected interests for regulatory policy, leading to increased compliance. Yet the absence of consumer and patient representatives in many stages for interaction, and the danger of overexposure to a select group of business interests, makes that the four IRAs must walk a thin line between opening up to affected-interest representation, and reinforcing their claim to independence in the public or consumer interest. Representation, either way, is in no means absent in regulatory governance.

9.4 The positive and normative benefits of a representative claim approach to independent regulatory authorities

In this thesis, an account of four IRAs, their leadership, and their consultative procedures for interaction with affected interests in the Netherlands has now been provided. Having zoomed in from the macro level of a string of public institutions to the micro level of work-floor interaction in regulatory processes, it was demonstrated how the establishment, board membership selection, and affected-interest interaction procedures of these unelected agencies can be understood in terms of a reciprocal process of representative claim-making and receiving. This is an instance of an ubiquitous phenomenon of representative claim-making and receiving that occurs in electoral and non-electoral, formal and informal, democratic and non-democratic ways, and permeates the democratic, political and societal domains. The traditional institutions of electoral-representative democracy are encompassed by a broader field of representational practices, of which IRAs, in their specific manner, too, are currently a part.

These agencies are politically and legally claimed, and publicly claim themselves, to represent economic and non-economic public interests, including the consumer interest, in marketized and liberalized domains. The personal characteristics of their leaders are said to stand in service of these claims, although the actual composition of their board membership contrasts with one part of the authorities' institutional claim: to represent consumers. And the agencies allow for a representation of affected interests in consultative procedures – albeit often with a notable absence of consumer organizations – that constitute an important part of their decision-making process. The statement that independent regulatory authorities 'do not rely on any claim of representativeness' (Maggetti 2010: 2) can therefore be considered to be refuted. In answer to the main question:

their representative character lies in a production and facilitation of representative claims revolving around public and consumer interests, with which their independent exercise of public authority on market and societal domains is rhetorically legitimized.

But what good does this claim-based account about the representative character of IRAs do? How does anyone – scholars, regulatory practitioners, consumers, citizens – benefit from viewing IRAs from this representative claim-making perspective? As a way of concluding this thesis, I will in the following stress the inherent positive and normative benefits to political scientists, historians, regulatory practitioners and citizens of adopting a representative claim-making approach to the study, mission and evaluation of IRAs and other public institutions. I will consider how this adds to the various existing approaches to the position of IRAs in the polity identified in Chapter 1: the technocratic, delegation, and relational approaches. Lastly, I will consider the normative question of the democratic legitimation of IRAs from a representative claim perspective.

Benefits of a representative claim approach to IRAs to scholars, practitioners, and citizens

A view on representation as an activity that is not exclusively produced through elections, but that is instead constituted by claims to act or work for a constituency – and portrayals of this very constituency – is able to capture how representation is an inherent feature of many, if not all, constellations of public and political governance. This is of interest to political scientists, historians and contemporary observers alike. It demonstrates how elections are, and for a long time have been, an important facet of representation, namely that produced around parliaments, but not the *only* part anymore. Assertions to speak or stand for people, causes or goods, and the simultaneous construction of these, are an innate feature of public and political life. This remains the case today, even though public decision-making increasingly occurs above and beyond elected parliaments, as witnessed by the proliferation of IRAs. In the face of this proliferation, it remains of importance to demonstrate *how* non-electoral representative claims are produced, and what such messages intend to convey.

To consider institutions like IRAs as representative claimants, for example, has brought into clear focus *who* or *what* it is these agencies are claimed or claim to represent. It has shown within one conceptual framework what these public bodies were set out to do, how they themselves perpetuate this image, how their supposed beneficiaries are portrayed, and the nature of the purported representative relationship between the bodies and their constituencies. It thus has laid a focus on the substance of the activities of these institutions and their proposed place in the polity: what it is they do, but most importantly: *who* they are claimed to do it for. Among public institutions, IRAs are among the most interesting ones because they are partially detached from the electoral political sphere, thus creating an alternative set of institutions with their own claims to representation *and* decision-making power that did not exist before. Yet the RCF could likewise be applied to other public bodies: supranational organisations, ombudsmen, international courts, charities, advisory bodies and more. To do this would lay bare

an economy of representative claim-making that is important in any evaluation of the activities of these public institutions.

Either way, these analytical gains create space to normatively emphasize *or* criticize proposed roles and representations. In addition to political scientists, this is of interest to regulatory practitioners and citizens. First, IRAs, their boards and their staffers may be seen as 'latent' representatives. Although they themselves would likely not literally describe themselves as representatives (because of the dominant electoral-normative conception of representation), it can be argued, as has been done in these pages, they are, in the sense of being public or consumer interest representative claimants. For IRAs, their boards and their staffers to literally think of themselves as 'representatives' may create enlarged self-awareness of their public role in the world. The word representation itself to many incorporates a purported relation between benefactor and beneficiary that may aid in a sense of mission for these and other public institutions, and their employees. As testified in interviews, many IRA staffers in fact already think of themselves this way, when reflecting on their role as agents of the consumer or public interest representatives. IRAs sometimes run into public misunderstanding, moreover, such as when they address sensitive political issues from their particular perspective. If they would present themselves even more as institutions with the representative mission to through their actions further the interests of various publics or consumers, this could create enlarged public awareness or perhaps understanding of their role.

Yet importantly, the representative claim framework also shows how their beneficiaries, the supposed 'public' they represent, are in the end a rhetorical construct. In the case of IRAs, the public that is acted and spoken for largely consists of market actors and consumers. This is a conception to a large extent informed by an economic or market logic that has impacted the historical division of responsibilities between state and market in taking care of the needs and demands of citizens, and is continuing to do so. The RCF's focus on constituency construction shows the inherently political and historically determined nature of independent market regulation and its goals, which is important in analyses of the place of this phenomenon in the polity.

Bringing this into focus then allows for citizens to *contest* these representations: do they actually want to be represented as consumers? Do they agree with their depiction, by both the lawmaking body and IRAs, as market constituents and consumers in the first place? Or would they rather be seen as citizens in the more traditional sense? This is a question of representative claim reception (not explored in this thesis), but also of the changing nature of citizenship in polities transformed by marketization and autonomisation processes, especially in such contested domains as public healthcare. If citizens agree with their depiction, however, and realize they are claimed to be represented by IRAs, they may demand a form of representation at the independent bodies that is supported by more thorough responsiveness-inducing institutional mechanisms than currently present (more on this below).

These positive and normative benefits pertain mostly to the *institutional* level of IRAs. Regarding the work-floor or *administrative* level, however, for political

scientists and regulatory practitioners the representative claim-making perspective has demonstrated how interaction between affected party interests and staffers can be viewed as a theatrical role-playing game. Viewing affected party consultation in regulatory procedures through the representative claim framework shows how this interaction, like representational interaction in elected parliaments or the societal and political sphere at large, can involve attempts to de-emphasize the self-interest at stake, invocations of broader or public interests, or claims to neutral expertise. The RCF, by viewing pronouncements from a subject-object perspective, shows how regulatory actors employ various rhetorical strategies in attempts to press their interested cases. They position themselves in relation to constructed constituencies, and this phenomenon must be described in order for it to be understood.

This view has repercussions for the understanding of the nature of affected interest involvement in regulatory and supervisory decision-making. The involvement of affected interests in IRA consultative and interactive procedures is valued largely because of their sectoral expertise and knowledge of daily practice. Their interests, however, also *concern* this daily practice, leading to a quandary for IRAs how to distinguish between interest representation and expertise (cf. Braun-Poppelaars, Berkhout and Hanegraaff 2011). Far from a technocratic activity, independent regulation and supervision are about interests; and the representation of these interests is a political game that deserves to be viewed as such, by observers, participants and the public at large. While this not a new or original observation, further study of the representative claims made in interaction between public and non-public actors, in regulatory governance and elsewhere, may more clearly elucidate – for scholars, practitioners, and the general public alike – how arguments and constituencies are constructed in processes and domains that ostensibly are about exchanges of expertise and the pursuit of the best technical policies. This view, moreover, makes the question of the representation of business and professional interests in comparison to consumer interests in regulatory decision-making processes all the more urgent.

Contribution to existing approaches to the study of IRAs

In those senses, viewing IRAs, their leaderships and affected-party consultative processes from a representative claim perspective adds to existing approaches to the place of these unelected bodies within the polity that were discussed in Chapter 1.

To the 'technocratic' approach, that emphasizes the inherent or output legitimacy of IRAs as a result of their independence and expertise, it adds a notion of a constituency represented to be considered in the evaluation of these agencies and their activities. Output legitimacy may rest on implicit or explicit claims to represent constituencies (cf. Bellamy and Castiglione 2011: 102). Dutch IRAs are not only claimed to be independent and expertise-based: they are claimed to represent public or consumer interests as well. Nature abhors a vacuum, and so does politics: technocracy is, still, always (claimed to be) in the service of something or someone. While emphasizing this aspect of IRAs already

makes them less of a technocratic and 'unrepresentative' anomaly, it is simultaneously to be realized these public interests are not value-free. Rather, there are political choices behind their formulation, as well as behind the establishment of IRAs to represent them, and these may be informed by transient opinions on the desirability of state-market intervention. It is, moreover, unlikely the representation of public interests has mere efficiency-raising or market competition improving effects. Independent regulatory and supervisory decision-making is likely to involve trade-offs between various public interests, making this a political rather than a technocratic affair. Viewing IRAs as representative claimants so emphasizes the inherently political nature of independent regulation and supervision as opposed to a purely technocratic approach.

In regard to the 'delegation' approach, that constructs the legitimation of IRAs largely in terms of their position vis-à-vis traditional political institutions, the representative claim perspective emphasizes that these independent bodies were bestowed with their own particular mission and legitimation. In the delegation approach, the encapsulation of IRAs in political control and accountability mechanisms would leave the 'standard model' of representative democracy intact if the dilemma of agency drift could be resolved. Yet the problem of independence was created by lawmaking bodies in the first place, who established autonomous bodies in marketized domains in pursuit of goals that were apparently considered so important as to negate the traditional legitimation for the exercise of public power: full electoral control. The independent bodies were – at first hesitatingly, then more deliberately – vested with their *own* particular claims to representation, alternative and adjacent to the electoral-parliamentary claim to representation. Although the representative claim approach does not solve the dilemma of agency independence (and does not pretend to), more than the delegation approach it stresses what polities today through historical choices of lawmaking bodies themselves are faced with: a string of public institutions with new claims to representation that are not based on a complete integration into the traditional electoral sphere.

Lastly, in regard to the 'relational' approach to the place of IRAs in the polity, that emphasizes the embeddedness of the bodies in a regulatory space consisting of the political sphere, the judiciary, other regulators, administrative bodies, affected interests and the general public, a representative claim-making and reception approach stresses the representational process involved in many aspects of mutual interaction with external actors. The relations of IRAs to these external actors are often conceived as an outwardly spiralling multitude of participatory, deliberative, responsiveness-inducing or accountability relationships. Yet, participation of affected interests or other parties in regulatory and supervisory decision-making is often done by representatives participating *on behalf of* interests and constituencies. Deliberation is often performed by representatives as well, and the employment of rhetorical strategies involving a kaleidoscopic exchange of claim-portrayals of interests and constituencies is a part of that. Accountability is often rendered to representatives of interests and constituencies – and to render account is often an aspect of representing interests and constituencies. When considering the procedural legitimation of IRAs, it is worthwhile to consider – and

subsequently explore – who participates on behalf of whom; to which extent criteria for participation involve notions of representativeness; how the representation of interests and constituencies is performed; and subsequently, how the representation of interests and constituencies is received by IRAs as audiences.

The benefits of a representative claim approach to the study of IRAs and other public institutions and processes are therefore present, and a possible contribution to existing approaches. But how can we address the elephant in the room: the question of the democratic legitimacy of IRAs?

9.5 Democratic representation and independent regulatory authorities

Until now, in this thesis, IRAs have been analytically considered from a non-traditional, non-electoral and non-normative representative claim-making perspective (with a bearing, nevertheless, on positive and normative questions). The entire premise of this thesis, and the broader understanding of representation as developed by Saward (2010) it has sought to advance in the domain of IRAs, is that claims to act or speak for others, and the invocation of constituencies, must be viewed as a process of representation(s). This has led to a view in which IRAs are considered public and consumer interest representative claimants in marketized economic domains. As argued above, this view has various positive and normative benefits. Yet this study opened with the question of the *democratic* legitimacy of independent regulatory authorities. Because of their independent decision-making power, they are still anomalies in the standard model of electoral-representative democracy. IRAs, their representative claims notwithstanding, make formally independent decisions without full control of the electorate. In these final paragraphs, I want to address this lack of democratic legitimacy of IRAs from a representative claim-making perspective.

From a representative claim-making perspective, two things are required to enable a provisional judgment of democratic legitimation. First, we need to identify the 'appropriate constituency' of IRAs. According to Saward, this appropriate constituency itself should be the first-order normative judge of the democratic legitimacy of representative claims. It consists of those whom a claim-maker *intends* to represent (the intended constituency), plus those audience members who *recognize themselves* and their interests as implicated in representative claims (the actual constituency) (ibid.: 146) (see Box 2 in Chapter 3). In Saward's view, 'provisionally acceptable claims to democratic legitimacy across society are those for which there is evidence of sufficient acceptance of claims by appropriate constituencies under reasonable conditions of judgment' (ibid. 145). In other words: we should find out whether the appropriate constituency considers itself represented, and if not, what can be done about it.

As established above, the four IRAs studied in this thesis intend to represent a public of both market actors and consumers in marketized economic domains (see

Chapters 5 and 6). Consumers, moreover, constitute *everyone*: in public utility domains such as telecommunications, energy, the financial sector and healthcare, all citizen-consumers are interested parties in decisions affecting the supply of goods and services to them. Does this audience recognize itself as a constituency purportedly represented by IRAs? Do they consider themselves actually represented by IRAs? Since survey or polling work was not conducted, definite answers cannot be given here. We do know, however, that IRA board members with clear-cut consumer or patient backgrounds are non-existent (see Chapter 7), while consumer and patient representatives are largely not present in administrative-level consultation procedures at the four IRAs (although they do sometimes conduct consumer surveys and run consumer panels) (see Chapter 8). Consumer and patient groups in the Netherlands structurally lack the resources, manpower, expertise and direct interest to participate in many of these consultative procedures. Although this is not a widely known fact, if it was, it would at the very least likely not contribute to a feeling of being represented in these procedures among the consumer part of the intended constituency of IRAs.

This calls for a re-institution of the notion of responsiveness as developed by Pitkin (1967) into Saward's representative claim-making framework, and a practical application of this notion at IRAs. According to Pitkin, responsiveness entailed a representative's 'potential readiness to respond' to the represented (1967: 232-233). Both parties stand in communication with each other, while remaining independently capable of action and judgment. This allows both to communicate their desires and considerations, leading, in Pitkin's view, to substantive representation. Yet responsive communication has value in Saward's representative claim framework too. First, responsive communication may lead to an increased chance of acceptance of a representative claimant's assertions among the intended constituency. Secondly, responsive communication may lead to more accurate depictions *of* the intended constituency in a representative claimant's activities. If this mutual communication is to be (more) democratic in nature, it should be directed to the appropriate constituency, a part of which consists of consumers.

The four IRAs should thus responsively communicate with the intended consumer constituency in the Netherlands if they wish their non-electoral representative claims to be more widely understood and possibly accepted, and gain more democratic legitimacy. Saward's notion of reasonable conditions of judgment adds to this argument. First, if the IRAs wish to broaden their base, they should make an effort to make the contents of their often highly technical and complex decisions transparent to the public and the consumer audience at large. This could lead to reasonable conditions of judgment under which the latter can evaluate the claims of the bodies to (also) represent them. Second, if, despite the current efforts of the four IRAs to structurally involve consumer representatives in their consultation procedures, an underrepresentation of this constituency persists, consumer groups should be publicly supported and empowered to participate in these procedures. This can be done through strengthening the funding, resources and expertise of consumer and patient representative associations, in order to enable them to strengthen their connections with their constituencies and voice

their perspectives in IRA decision-making processes. An empowered representation of consumers – a constituency consisting of everyone in the polity – inside IRA committees and processes will add to the democratic legitimacy of the independent bodies. This will compensate to some extent for the lack of legitimacy of IRAs due to their disconnect from electoral democracy. Although the independent bodies would not necessary always have to decide in favour of the consumer interest, they should nevertheless make their decision-making processes (more) transparent and accessible to the public, while the voice of the consumer constituency in these procedures should structurally be heard. Empowered consumer representation has the additional benefit of decreasing the chance of capture of the IRAs by a select group of market constituents, whose regulatory expertise is necessarily intertwined with their interests.

To conclude: IRAs have, in the famous expression by the American Brownlow Committee of 1937, been said to constitute 'miniature independent governments' (Majone 1996: 288). This statement can now be elaborated upon. The government in the standard model of representative democracy has a claim to general interest representation, validated through consultation with an elected parliament in which many interests and constituencies are represented. Independent regulatory authorities today, their unelected character notwithstanding, have a claim to representation of public and consumer interests. They seek to validate this in part through consultation with 'miniature parliaments' in which some affected interests and constituencies are represented. If lawmaking bodies wish to undo the existence of independent bodies, it is in their ability to do so. If they do not, however, they should make sure that *all* affected interests are represented in the miniature parliaments of the agencies. This includes consumers and consumer organizations. The fragmentation and proliferation of acts of political authority and political expression beyond the electoral domain – embodied in this study by IRAs – has not lead to a decreased relevance of the theory and practice of representation. On the contrary: it is today more relevant than ever, and we should be even more attentive to and critical about where it is and how it works, which representations of people are produced and effectuated, and to what extent those purportedly represented are part of the production of these claims.

Appendices

Appendix A

The regulatory state in the Netherlands: timeline

1994: coming into office of first centrist Social Democratic-liberal 'Purple' government

1995: report of the *Algemene Rekenkamer* ('Netherlands Court of Audit') criticising 'uncontrolled growth' of independent agencies

1997: adoption of Competition Act

1997: adoption of OPTA Act and establishment of the *Onafhankelijke Post and Telecommunicatie Autoriteit* ('Independent Mail and Telecommunications Authority') (OPTA)

1998: establishment of the *Nederlandse Mededingingsautoriteit* ('Netherlands Competition Authority') (NMa)

1998: adoption of Electricity Act and establishment of the *Dienst uitvoering en toezicht Elektriciteitswet* ('Electricity Act Implementation and Supervision Service') (DTe)

1998: coming into office of second centrist Social Democratic-liberal 'Purple' government

1998: adoption of Telecommunications Act

1999: hybrid merger between NMa and DTe; DTe henceforth 'chamber'

2000: adoption of Gas Act

2000: adoption of Passenger Traffic Act and establishment of *Vervoerskamer* ('Transport Chamber') at NMa

2001: establishment of *College Bescherming Persoonsgegevens* ('Privacy and Data Protection Authority') (CPB)

2002: establishment of the *Autoriteit Financiële Markten* ('Financial Markets Authority') (AFM) and bestowal of prudential supervisory powers to *De Nederlandsche Bank* ('The Bank of the Netherlands') (DNB)

2002: coming into office of right-wing Christian Democrat-liberal-populist government

2003: coming into office of centre-right Christian Democrat-liberal government

2004: revision of Telecommunications Act

2004: revision of Electricity and Gas Acts

2004: publication of critical report about delegation to independent agencies ('Kohnstamm report')

2005: revision of Competition Act to make NMa *de jure* independent; DTe henceforth subordinate directorate (NMa-DTe)

2006: adoption of general framework act for independent agencies

2006: adoption of Financial Supervision Act

2006: adoption of Healthcare Market Structuring Act and establishment of the *Nederlandse Zorgautoriteit* ('Netherlands Healthcare Authority') (NZa)

2006: adoption of Consumer Protection Enforcement Act

2007: establishment of the *Consumentenautoriteit* ('Consumers Authority') (CA)

2007: coming into office of centre-left Christian Democrat-Social Democratic government

2008: NMa-DTe renamed *NMa Energiekamer* ('NMa Energy Chamber')

2010: NMa Energy Chamber merged with NMa Transport Chamber into *NMa Directie Regulering Energie en Vervoer* ('NMa Energy and Transport Regulation Directorate')

2010: coming into office of right-wing conservative liberal-Christian Democrat government

2012: coming into office of centrist conservative liberal-Social Democratic government

2013: merger of OPTA, NMa (including Energy and Transport Chambers) and CA into *Autoriteit Consument en Markt* ('Consumer and Market Authority') (ACM)

Appendix B

Selection criteria, descriptive variables and professional backgrounds of IRA board members, 1997-present

Table 4. Negative board selection criteria: incompatible functions and interests

IRA board	**Formal**	**Informal**
OPTA regular board	· Employment at any entity reporting to minister or government · Elected to parliament · Member of provincial or municipal government · Interests in institutions/corporations that 'threaten impartiality' · Required to take seat on personal title and not bound by mandate	· 'Representation or recognition of political currents (should) not play a role'
OPTA associate board	· Employment at any entity reporting to minister or government · Elected to parliament · Member of provincial or municipal government · Regular board 'sees to it' that conflicts of interest do not occur	
NMa board	· Functions undesirable to (trust in) independence · Interests in institutions/corporations that 'threaten impartiality'	· Employment at ministry · Elected to parliament · Advisory or commissioner functions at corporations, being entrepreneur, practicing liberal profession
AFM governing board	· Employment at other financial supervisor · Employment at institution licensed by any financial supervisor · Employment at corporation issuing securities · Must ask supervisory board permission for additional functions · Member is excluded from deliberations in case of conflict of interest · Must perform tasks 'without mandate or instruction', and 'exclusively serve the goal of the foundation'	

AFM supervisory board	· Employment at other financial supervisor · Employment at institution licensed by any financial supervisor · Must report potentially incompatible interests to chairman; member is excluded from deliberations in case of conflict of interest · Must perform tasks 'without mandate or instruction', and 'exclusively serve the goal of the foundation'	
NZa governing board	· Functions undesirable to (trust in) independence · Interests in institutions/corporations that 'threaten impartiality'	· Governing or supervisory board membership at healthcare institutions or insurers · Active healthcare practitioner
NZa advisory board		· Being non-independent · Required to take a seat 'without a mandate or instructions'

Table 5. Positive board selection criteria: desirable qualities

IRA board	Formal	Informal
OPTA regular board		· Expertise; in various disciplines · Experience in and knowledge of sector; recognized as personal authority in sector · Receptive to new developments · Leadership competences · Operate with distance
OPTA associate board	· Expertise	
NMa board	· Expertise; in task area(s) of IRA	
AFM governing board	· Trustworthy beyond doubt · Suited for function	· Gender diversity · Knowledge diversity · 'Background' diversity · 'Personality' diversity · 'Affinity' diversity · 'Vision/strategy' · 'Morality/integrity' · Resoluteness · Communication skill · 'Influence/impact'

AFM supervisory board	· Trustworthy beyond doubt · Suited for function	· Gender diversity · Knowledge diversity · 'Background' diversity · 'Personality' diversity · Experience with stakeholders diversity · 'Vision/strategy' · 'Morality/integrity' · Previous experience as supervisor to organizations · Knowledge about consumers and small investors · Network within and outside the AFM
NZa governing board	· Expertise; in task area(s) of IRA · Societal knowledge and experience	
NZa advisory board		· Expertise

Figure 18. Descriptive variables tree for IRA board membership

1. Gender
   a. Male
   b. Female
2. Political party membership
   a. Yes
   b. No
3. Professional background
   a. Public administration
      i. Ministerial department
         1. Home department of IRA
         2. Other department
      ii. National-level advisory body
      iii. IRA
         1. Same IRA
         2. Other IRA
   b. Law
      i. Legal practice
      ii. University
   c. Private sector or society
      i. Regulated domain
      ii. Other domain
   d. Science or academia (excl. law)
   e. National politics
      i. Government
      ii. Parliament

Table 6. Gender, political party and professional backgrounds of the OPTA board membership, 1997-2013

Board member **m/f** *(pol. party)* (tenure) / Professional background	**Public administration**					**Law**		**Private / societal sector**		**Academic / scientific (exc. law)**	**National politics**	
	minist. dept.		*adv. organ*	*IRA*		*leg. pract.*	*acad.*	*regulat. domain*	*other*		*govt.*	*parl.*
	home	*other*		*same*	*other*							
Arnbak (ch.) **m** (1997-2005)												
Van Karnebeek **m** (1997-2006)												
Goncalvez **f** (1997-2007)												
Fonteijn (ch.) **m** (2005-2013)												
De Jong **m** (2006-2013)												
Geelhoed **m** *(PvdA)* (2006-2007)												
Ottow **f** (2006-2013)												
Aris **f** (2008-2011)												
/ total sub variable	*1*	*1*										
/ total sub variable	*1*		*1*			*4*	*2*	*1*	*1*			
8 *(m: 5 f: 3) (1 PvdA)*	**1**					**4**		**2**		**3**	**0**	

* The lowest row displays the number of individuals with this background in the board. Individuals with multiple sub backgrounds in a category are counted as one.

** The home department of OPTA from 1997-2004 was the Ministry of Transport, Public Works, and Water Management. From 2004-2013 it was the Ministry of Economic Affairs.

*** The regulated domain of OPTA was the telecommunications (from 2004 onwards: electronic communications) sector; consisting of corporations which as their primary activity exploit telecommunications (from 2004 onwards: electronic communications) infrastructures and/or sell services.

Table 7. Gender, political party and professional backgrounds of the DTe, NMa, NMa-DTe, and NMa Energy Chamber board membership, 1998-2013

Board member **m/f** *(pol. party)* (tenure) / Professional background	**Public administration**					**Law**		**Private / societal sector**		**Academic / scientific (exc. law)**	**National politics**	
	minist. dept.		*adv. organ*	*IRA*		*leg. pract.*	*acad.*	*regulat. domain*	*other*		*govt.*	*parl.*
	home	*other*		*same*	*other*							
De Jong (dir. DTe) **m** (1998-2002)												
Zijl (dir. DTe) **m** (2002-2005)												
Plug (dir. NMa-DTe / NMa EC) **m** (2005-2012)												
Kist (dir.-gen NMa) **m** (1998-2002)												
Jansen **m** (2002-2009)												
Kalbfleisch **m** (dir.-gen./ch. NMa) (2003-2011)												
Zijl **m** (2005-2009)												
Don **m** *(PvdA)* (2009-2013)												
De Keijzer **m** (2009-2011)												
Fonteijn (ch.) **m** (2011-2013)												
Mulock Houwer **f** *(PvdA)* (2011-2013)												
/ total sub variable	*1*	*1*		*1*	*4*							
/ total sub variable	*2*		*1*	*5*		*4*		*2*	*1*			
10 *(m: 9 f: 1) (2 PvdA)*	**6**					**4**		**2**		**1**	**0**	

* The lowest row displays the number of individuals with this background in the board. Individuals with multiple sub backgrounds in a category are counted as one. Mr. Zijl is displayed twice as individual, because he served in both boards.

** The home department of both DTe and NMa from 1998-2013 was the Ministry of Economic Affairs.

*** The regulated domain of NMa Energy Chamber and its predecessor was the energy sector: consisting of corporations which as their primary activity exploit energy infrastructures and/or sell services. The regulated domain of NMa is the entire economy, yet this is included in the 'other' category.

Table 8.1. Gender, political party and professional backgrounds of the AFM governing board membership, 2002-present

Board member **m/f** *(pol. party)* (tenure) / Professional background	**Public administration**					**Law**		**Private / societal sector**		**Academic / scientific (exc. law)**	**National politics**	
	minist. dept.		*adv. organ*	*IRA*		*leg. pract.*	*acad.*	*regulat. domain*	*other*		*govt.*	*parl.*
	home	*other*		*same*	*other*							
Docters van Leeuwen (ch.) **m** *(D66/ VVD)* (2002-2007)												
Kaptein **m** (2002-2004)												
Koster **m** (2002-2008)												
Kist **m** (2005-2007)												
Hoogervorst (ch.) **m** *(VVD)* (2007-2011)												
Kockelkoren **m** (2008-present)												
Maatman **m** (2008-2012)												
Gerritse (ch.) **m** *(PvdA)* (2011-2013)												
Everts **m** *(D66)* (2012-present)												
Korte **m** (2012-present)												
Van Vroonhoven **f** (2014-present)												
/ total sub variable	*5*	*2*		*6*	*1*							
/ total sub variable	*5*			*6*		*2*		*5*	*3*	*2*	*1*	*1*
11 *(m: 10 f: 1) (2 VVD; 2 D66; 1 PvdA)*	**9**					**2**		**7**		**2**	**1**	

* The lowest row displays the number of individuals with this background in the board. Individuals with multiple sub backgrounds in a category are counted as one.
** The home department of AFM is the Ministry of Finance.
*** The regulated domain of AFM is the financial sector, consisting of banks, insurers, intermediaries, securities exchanges, asset managers, accountancy firms and pension funds. Although corporations listed at the stock exchange are supervised as well, this category is very broad and therefore included in the 'other' category.

Table 8.2. Gender, political party and professional backgrounds of the AFM supervisory board membership, 2002-present

Board member **m/f** *(pol. party)* (tenure) / Professional background	**Public administration**					**Law**		**Private / societal sector**		**Academic / scientific (exc. law)**	**National politics**	
	minist. dept.		*adv. organ*	*IRA*		*leg. pract.*	*acad.*	*regulat. domain*	*other*		*govt.*	*parl.*
	home	*other*		*same*	*other*							
Loudon (ch.) **m** (2002-2003)				■				■				
Van Praag Sigaar **m** (2002-2003)				■		■						
Blokdijk **m** (2002-2003)				■				■		■		
Heeneman **m** (2002-2003)				■								
Vroegop **m** (2002-2008)				■				■				
Kist (ch.) **m** (2003-2005)					■	■				■		
Baan (ch.) **m** (2003-2009)												
Bindenga **m** (2003-2009)								■		■		
Hielkema **m** (2003-2007)								■				
Winter **m** (2005-2009)						■	■			■		
Kemna **f** (2008-2009)								■		■		
Böttcher **m** (2008-2010)								■				
Tiemstra **m** (2009-2012)												
Van Everdingen **f** (2009-present)						■						
Möller (ch.) **m** (2009-present)								■				
Prast **f** (2010-present)					■					■		
Feilzer **m** (2010-present)								■				
Schönfeld **m** (2012-present)									■			
/ total sub variable				*5*	*2*							
/ total sub variable				*7*		*4*	*1*	*9*	*4*			
18 *(m: 15 f: 3)*	**7**					**4**		**13**		**6**	**0**	

* see remarks at table 8.1

Table 9.1. Gender, political party and professional backgrounds of NZa governing board membership, 2006-present

Board member **m/f** *(pol. party)* (tenure) / Professional background	**Public administration**					**Law**		**Private / societal sector**		**Academic / scientific (exc. law)**	**National politics**	
	minist. dept.		*adv. organ*	*IRA*		*leg. pract.*	*acad.*	*regulat. domain*	*other*		*govt.*	*parl.*
	home	*other*		*same*	*other*							
De Grave (ch.) **m** *(VVD)* (2006-2009)												
Barendregt **m** (2006-2007)												
Van Beek **f** (2006-2011)												
Homan **m** (2006-present)												
Mulock Houwer **f** *(PvdA)* (2009)												
Langejan (ch.) **m** (2010-present)												
/ total sub variable	*1*	*2*		*2*								
/ total sub variable	*1*			*2*				*1*				
6 *(m: 4 f: 2) (1 VVD; 1 PvdA)*	**4**					**0**		**1**		**0**	**1**	

* The lowest row displays the number of individuals with this background in the board. Individuals with multiple sub backgrounds in a category are counted as one.
** The home department of NZa is the Ministry of Health, Well-being and Sport
*** The regulated domain of NZa is the healthcare sector, consisting of hospitals, care institutions, healthcare insurers and healthcare practitioners

Table 9.2. Gender, political party and professional backgrounds of NZa advisory board members, 2006-present

Board member **m/f** *(pol. party)* (tenure) / Professional background	**Public administration**					**Law**		**Private / societal sector**		**Academic / scientific (exc. law)**	**National politics**	
	minist. dept.		*adv. organ*	*IRA*		*leg. pract.*	*acad.*	*regulat. domain*	*other*		*govt.*	*parl.*
	home	*other*		*same*	*other*							
Don (ch.) **m** *(PvdA)* (2007-2009)			■							■		
Vliegenthart **f** *(PvdA)* (2007-2008)									■		■	■
Fonteijn **m** (2007-2008)					■	■						
Halbertsma **m** *(PvdA)* (2007-2008)									■			
Schut **m** (2007-2008)										■		
Borst **f** (D66) (2007-2010)								■		■	■	
De Gaay Fortman **f** (2007-2010)						■						
Werner **m** (CDA) (2007-2010)	■							■				■
Van Wijnbergen **m** *(PvdA)* (2007-2010)		■						■		■		
Dessing **m** (2007-2012)								■				
Velthuijsen **m** (2007-2012)									■	■		
Delnoij **f** *(VVD)* (2007-2012)										■		
Van Rijn **m** *(PvdA)* (2008-2012)	■	■							■			
Vierhout *(VVD)* **m** (2008; 2012-present)								■				
Kist (ch.) **m** (2009-present)					■	■						
Barendregt **m** (2009-2012)				■								
Blijham m (2009-present)												

Board member **m/f** *(pol. party)* (tenure) / Professional background	**Public administration**					**Law**		**Private / societal sector**		**Academic / scientific (exc. law)**	**National politics**	
	minist. dept.		*adv. organ*	*IRA*		*leg. pract.*	*acad.*	*regulat. domain*	*other*		*govt.*	*parl.*
	home	*other*		*same*	*other*							
Rutten m (2009-2011)										■		
Van Wersch m (2011-2012)						■						
Van Ewijk m (2011-present)			■							■		
Leers m (2011-present)								■				
Boekholdt m (2012-present)								■		■		
Stevens m (CDA) (2012-present)	■					■						■
De Weijer m (2012-present)								■				
De Keijzer m (2013-present)					■	■						
Schokkaert m (2013-present)										■		
Van der Wal m (2013-present)	■							■		■		
/ total sub variable	*4*	*2*		*1*	*3*							
/ total sub variable	*5*		*2*	*4*		*6*		*10*	*4*		*2*	*3*
27 *(m: 23 f: 4) (5 PvdA; 2 VVD; 2 CDA; 1 D66)*	**11**					**6**		**14**		**12**	**4**	

** see remarks at table 9.1*

Appendix C

Lists of interview topics and respondents

IRA staffer interview topics

1. *General*

- What is your function at [the IRA]?
- What, in your opinion, are currently the most important regulatory and supervisory issues in [your domain]?
- How is [the IRA] involved in these issues?
- Can you describe how, on a given regulatory or supervisory issue, the process of decision-making at [the IRA] generally works?

2. *IRA consultation and interaction procedures*

- Can you describe the various stages and arrangements for interaction and consultation with affected interests maintained by [the IRA]?
  - What is the place of these arrangements in the [IRA] decision-making process?
  - What is the frequency of contact?
- Which groups and organisations are involved in these stages and arrangements?
  - Why are these groups involved, and other ones not?
  - Who do these groups and organisations delegate to these stages and arrangements?
- What are, in your perception, the criteria for inclusion into these stages and arrangements?
  - Who decides on inclusion?
- Do you perceive a historical change in the frequency and intensity of these contacts?

3. *The process of representative claim-making and reception*

- Which interests do affected interests and their delegates emphasize – if at all – in putting forward their opinions regarding regulatory and supervisory issues in consultation procedures at [the IRA]?
- How do affected interests and their delegates present themselves – if at all – while putting forward opinions regarding regulatory and supervisory issues in consultation procedures at [the IRA]?
- Do affected interests cooperate with other groups and organisations in putting forward opinions regarding regulatory and supervisory issues in consultation procedures at [the IRA]?
- How, in your perception, do [the IRA] and [IRA] staffers respond to the arguments and emphases of affected interests?

- Which arguments, in your perception, do [the IRA] and [IRA] staffers find convincing?
- How do you separate – if that is possible at all – interest representation from information delivery?
- What, in your perception, is the interest of affected interests in involvement in these consultation procedures?
- What, in your perception, is the interest of [the IRA] in interacting with affected interests in consultation procedures?
- How, in your perception, does [the IRA] weigh interests in its decisions?

4. *General reflection*
- How do you reflect on the relation between independence and consultation of affected interests at IRAs?
- How do you reflect on the independence of IRAs and their mission to represent (public) interests?
- Are there any topics which have not been mentioned, that you think are important for this interview or the general theme of this conversation?

Stakeholder interview topics

1. *General*
- What is your function at [organisation]?
  - Who does [your organisation] represent?
  - Can you describe your constituency?
    - Are their differences in perceived interests among (sub) constituencies?
  - Can you describe the internal decision making process of [your organisation] regarding regulatory issues?
    - What is the role of constituency contacts?
    - What is the role of the board?
    - What is the role of the policy bureau?
- What, in your opinion, are currently the most important regulatory and supervisory issues in [your domain]?
- What is the current standpoint of [your organisation] on these issues?

2. *Involvement in IRA consultation and interaction procedures*
- In which way are [your organisation] and you yourself involved in interaction and consultation procedures at [the IRA]?
  - Can you describe the various stages and arrangements in which [your organisation] and you yourself are involved?
    - What is the place of these arrangements in the IRA decision-making process?
    - Which issues are discussed?

- What is the frequency of contact?
- Which other groups and organisations are involved in these stages and arrangements?
  - Why are these groups involved, and other ones not?
- What are, in your perception, the criteria for inclusion into these stages and arrangements?

- Do you perceive a historical change in the frequency and intensity of these contacts?

3. *Process of representative claim-making and reception*

- Which interests do you and [your organisation] emphasize – if at all – in putting forward your opinions regarding regulatory and supervisory issues in consultation procedures at [the IRA]?
- How do you and [your organisation] present yourself – if at all – while putting forward opinions regarding regulatory and supervisory issues in consultation procedures at [the IRA]?
- Do you and [your] organisation cooperate with other groups and organisations in putting forward opinions regarding regulatory and supervisory issues in consultation procedures at [the IRA]?
- How, in your perception, do [the IRA] and [IRA] staffers respond to the arguments and emphases of you and [your organisation]?
- Which arguments, in your perception, do [the IRA] and [IRA] staffers find convincing?
- What is the interest of [your organisation] in involvement in these consultation procedures?
- What, in your perception, is the interest of [the IRA] in interacting with you and [your organisation], and other organisations, in consultation procedures?
- How, in your perception, does [the IRA] weigh interests in its decisions?
- Do [the IRA] and [IRA] staffers, in your perception, put your arguments and opinions and those of [your organisation] to good use?

4. *General reflection*

- How do you reflect on the relation between independence and consultation of affected interests at IRAs?
- How do you reflect on the independence of IRAs and their mission to represent (public) interests?
- Are there any topics which have not been mentioned, that you think are important for this interview or the general theme of this conversation?

List of respondents

IRA respondent 1: OPTA staffer
IRA respondent 2: OPTA staffer
IRA respondent 3: OPTA staffer
IRA respondent 4: NMa Energy Chamber staffer
IRA respondent 5: NMa Energy Chamber staffer
IRA respondent 6: NMa Energy Chamber staffer
IRA respondent 7: NMa Energy Chamber staffer
IRA respondent 8: NMa Energy Chamber staffer
IRA respondent 9: NMa Energy Chamber staffer
IRA respondent 10: AFM staffer
IRA respondent 11: AFM staffer
IRA respondent 12: AFM staffer
IRA respondent 13: AFM staffer
IRA respondent 14: AFM staffer
IRA respondent 15: NZa staffer
IRA respondent 16: NZa staffer
IRA respondent 17: NZa staffer
IRA respondent 18: NZa staffer
IRA respondent 19: NZa staffer
IRA respondent 20: NZa staffer
Stakeholder respondent 1: telecommunications corporation representative
Stakeholder respondent 2: telecommunications corporation representative
Stakeholder respondent 3: telecommunications corporation representative
Stakeholder respondent 4: telecommunications corporation representative
Stakeholder respondent 5: telecommunications corporation representative
Stakeholder respondent 6: telecommunications corporation representative
Stakeholder respondent 7: energy corporations representative
Stakeholder respondent 8: energy corporations representative
Stakeholder respondent 9: industrial energy consumers representative
Stakeholder respondent 10: banking representative
Stakeholder respondent 11: corporations listed at the stock exchange representative
Stakeholder respondent 12: pension funds representative
Stakeholder respondent 13: institutional investors representative
Stakeholder respondent 14: stockowners representative
Stakeholder respondent 15: medical specialists representative
Stakeholder respondent 16: medical specialists representative
Stakeholder respondent 17: general practitioners representative
Stakeholder respondent 18: dentists representative
Stakeholder respondent 19: hospitals representative
Stakeholder respondent 20: healthcare providers for people with disabilities representative

Stakeholder respondent 21: residential and home care organisations representative
Stakeholder respondent 22: healthcare insurers representative
Stakeholder respondent 23: healthcare insurers representative
Stakeholder respondent 24: healthcare insurers representative
Stakeholder respondent 25: patients and healthcare consumers representative

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Samenvatting in het Nederlands

Regulering zonder representatie?

Hedendaagse onafhankelijke markttoezichthouders, zoals in Nederland de Autoriteit Consument en Markt (ACM), de Autoriteit Financiële Markten (AFM) en de Nederlandse Zorgautoriteit (NZa), hebben aanzienlijke bevoegdheden. Ze kunnen tot in detail gedragingen en handelingen van markt- en maatschappelijke partijen voorschrijven, en soms prijzen van diensten en producten vaststellen. Ze zien toe op de naleving van voorschriften en handhaven deze waar nodig, met soms hoge boetes en 'naming and shaming'. Ook hebben markttoezichthouders quasi-rechtsprekende functies: ze arbitreren in geschillen tussen marktpartijen onderling, of tussen marktpartijen en henzelf. Tegelijk zijn deze instanties in hun individuele besluiten dubbel onafhankelijk: van zowel sectorale belangen als van regering en het nationale vertegenwoordigende lichaam, het gekozen parlement. Dit roept de vraag op wie, of wat, deze ongekozen instellingen eigenlijk vertegenwoordigen.

In de wetenschappelijke literatuur over onafhankelijk markttoezicht wordt deze vraag vrijwel niet gesteld. In deze literatuur kunnen drie benaderingen worden onderscheiden ten aanzien van de plek van markttoezichthouders in de vertegenwoordigende democratie. Enerzijds is er de 'technocratische' benadering, die stelt dat onafhankelijke markttoezichthouders een eigen legitimiteit bezitten vanwege de kwaliteit van hun deskundige besluiten. Anderzijds is er een 'delegatie'-benadering, die stelt dat markttoezichthouders een indirecte democratische legitimiteit hebben doordat zij door gekozen instellingen worden gecontroleerd. Ten derde is er een 'relationele' benadering, die de legitimiteit van markttoezichthouders zoekt in hun inbedding in een veld van politieke, maatschappelijke en juridische actoren. Maar geen van deze benaderingen – die elk voor zich en in onderling verband onopgeloste spanningen vertonen – stelt de vraag naar het representatieve karakter van onafhankelijke markttoezichthouders. Markttoezichthouders worden vanwege hun onafhankelijke en ongekozen karakter doorgaans als 'onrepresentatief' of 'niet representerend' omschreven.

In dit proefschrift wordt de stelling verdedigd dat onafhankelijke markttoezichthouders wel degelijk ook een vertegenwoordigend karakter bezitten. Markttoezichthouders en hun besturen worden met een bepaald doel ingesteld: om voor een bepaalde groep te spreken en te handelen. Tegelijk staan ze in hun besluitvormingsprocedures derde partijen toe hetzelfde te doen. Deze processen zijn representerend van aard, of preciezer geformuleerd: ze bestaan uit het maken van *claims* op vertegenwoordiging. Deze claims zijn betwistbaar, en kunnen al dan niet geaccepteerd te worden. Maar claims zijn het niettemin. In dit proefschrift wordt betoogd dat het erkennen van het als zodanig vertegenwoordigende karakter van markttoezichthouders voordelen met zich meebrengt voor de positieve en normatieve analyse van deze instituties. Dit vormt een eigen bijdrage aan de drie bestaande benaderingen van de plek van markttoezichthouders in de vertegenwoordigende democratie. De hoofdvraag van dit proefschrift luidt daarom: '*Wat is het vertegenwoordigende karakter van onafhankelijke markttoezichthouders?* In verschillende hoofdstukken wordt het antwoord op deze vraag uiteen gezet.

Representatie als een proces van claims maken

Voor het beantwoorden van de hoofdvraag van dit onderzoek wordt aansluiting gezocht bij recente theoretisering van het begrip representatie door de Britse politiek theoreticus Michael Saward (2010). Volgens Saward moet representatie beschouwd worden als een voortdurend proces van retorische claims maken, en de daaropvolgende receptie van deze claims. Een kandidaat-vertegenwoordiger wordt opgeworpen, of werpt zich op als vertegenwoordiger. Een publiek – met als onderdeel de vertegenwoordigde belangengemeenschap – erkent deze kandidaat vervolgens al of niet als (haar) vertegenwoordiger. Dit proces vindt in de praktijk zowel binnen als buiten gekozen parlementen plaats. Met deze opvatting wordt afscheid genomen van de traditionele opvatting van het concept, waarin vertegenwoordiging gezien werd als uitsluitend democratisch of normatief geïnformeerd, en vrijwel alleen geproduceerd door institutionele mechanismes zoals verkiezingen. In plaats daarvan wordt representatie nu gezien als een dynamisch sociaal proces, waarin naast verkiezingen in de praktijk allerlei culturele noties spelen ter ondersteuning van claims. Identiteit, mechanismes van mandatering en verantwoording, onafhankelijkheid, beweren te spreken voor een niet-vertegenwoordigde groep, deskundigheid: deze culturele noties kunnen allen opgeworpen worden door een kandidaat-vertegenwoordiger ter ondersteuning van zijn of haar claim, en door een publiek met behulp van dezelfde of andere noties geëvalueerd worden.

Representatie wordt daarmee gezien als een veelvormige praktijk, die in de praktijk in allerlei gedaantes en op allerlei manieren voorkomt. Verkiezingen in parlementaire contexten vormen een belangrijke culturele notie ter ondersteuning van representatieve claims, maar zijn zeker niet de enig mogelijke. Ook vakbonden, belangenorganisaties, ombudsmannen, protestbewegingen, invloedrijke individuen en overheidsorganisaties claimen representatie. En de door hen vertegenwoordigde belangengemeenschappen kunnen al dan niet positief reageren op deze claims, en zich vertegenwoordigd menen. Deze opvatting sluit goed aan bij de hedendaagse politiek-bestuurlijke realiteit, waarin naast gekozen politici velerlei actoren representatie claimen, en waarin een veelheid aan besluitvormingsgremia bestaat waarin deze claims gefaciliteerd worden (en een veelheid aan media waarin deze claims gecommuniceerd worden). Representatie moet gezien worden als een inherent aspect van politiek. Het is een systeemfenomeen, dat alomtegenwoordig is. Het bestaat enerzijds uit het maken van claims voor anderen te spreken of te handelen, en de daaraan gekoppelde *constructie* van deze anderen als behoeftig aan vertegenwoordiging. Anderzijds bestaat het uit de receptie van deze claims dóór de betreffende belangengemeenschap, en al dan niet een extern publiek. Vertegenwoordiger en vertegenwoordigde worden beiden geconstrueerd in een claim: representatie is een creatief en esthetisch proces. Het is uiteindelijk aan een belangengemeenschap zelf om te bepalen of zij een claim dermate geloofwaardig vindt dat zij zich gerepresenteerd meent – en daarbij kunnen gekozenheid, maar ook andere culturele noties een rol spelen.

Volgens Saward moeten we de gemeenschap waarvan vertegenwoordiging geclaimd wordt *zelf* dus beschouwen als de ultieme arbiter van de democratische legi-

timiteit van een claim. Hierbij moet wel aan bepaalde voorwaarden voldaan worden: onder andere aan voldoende gelegenheid voor de gemeenschap om de claim te controleren, en aan bewijs van acceptatie door de vertegenwoordigde gemeenschap. Het is aan wetenschappers slechts om te onderzoeken wie vertegenwoordigende claims maakt, wat de inhoud is van deze claims, welke culturele noties gebruikt worden ter ondersteuning van claims, en waarom bepaalde claims geaccepteerd worden.

Met deze opvatting opent Saward de weg voor het bestuderen van vertegenwoordigende claims gemaakt door velerlei actoren. Dit sluit aan bij de hedendaagse politiek-bestuurlijke realiteit, waarin de vertegenwoordiging van belangen, groepen en ideeën en de receptie daarvan in zeer diverse (trans)nationale fora, gremia en netwerken gestalte krijgt. Politiek is niet meer beperkt tot het gekozen parlement, maar het bestuderen van vertegenwoordiging als maatschappelijk fenomeen heeft tot voor kort nog nauwelijks plaatsgehad buiten het nationaal-electorale kader. Dit geldt ook voor het domein van het onafhankelijk markttoezicht.

Onderzoeksopzet

In dit onderzoek is ervoor gekozen het maken van vertegenwoordigende claims over, door en binnen vier *cases* van Nederlandse onafhankelijke markttoezichthouders te bestuderen. Een opvatting van representatie als een retorisch proces noopte allereerst tot het doen van een kwalitatieve studie: talige handelingen die sterk contextbepaald zijn laten zich moeilijk vatten in een kwantitatieve studie. Het gebrek aan empirisch onderzoek naar vertegenwoordigende claims maakte deze studie daarnaast exploratief, en niet hypothese-testend van aard. Om deze redenen is gekozen voor het doen van *case study*-onderzoek.

Vier Nederlandse *cases* van onafhankelijke markttoezichthouders werden geselecteerd. Enerzijds voldeden deze aan drie criteria die typisch zijn voor de bredere populatie: ze zijn onafhankelijk in hun individuele besluiten van zowel gekozen politiek als deelbelangen, ze zijn gericht op markttoezicht, en ze zijn een publieke organisatie. Anderzijds representeerden de gekozen *cases* ook variëteit in de bredere populatie. Dit leidde tot de volgende selectie:

- Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA): een sectoraal-regulerende marktautoriteit op de telecommunicatiemarkt.
- Energiekamer van de Nederlandse Mededingingsautoriteit (NMa): een sectoraal-regulerende marktautoriteit op de energiemarkt ingebed in een algemene mededingingsautoriteit.
- Autoriteit Financiële Markten (AFM): een autoriteit die door middel van markttoezicht bepaalde economisch of maatschappelijk gewenste doelen moet realiseren in de financiële sector.
- Nederlandse Zorgautoriteit (NZa): een sectoraal-regulerende autoriteit in de gezondheidszorg die tevens bepaalde economisch of maatschappelijk gewenste doelen moet realiseren.

Deze vier autoriteiten zijn vervolgens bestudeerd op drie verschillende conceptuele niveaus. Enerzijds is er het niveau van de institutie zelf: de onafhankelijke markttoezichthouder als publieke entiteit (1). Vervolgens is er het bestuursniveau van de markttoezichthouder (2). Tenslotte is er het staf- of werkvloerniveau van de markttoezichthouder (3). Op elk van deze niveaus werd het maken van vertegenwoordigende claims bestudeerd. Onafhankelijke markttoezichthouders zijn door de wetgever ingestelde publieke instituties, met een eigen missie. Hun besturen zijn de boegbeelden van deze instanties, maar worden tegelijk benoemd door traditionele politieke instituties. De vier markttoezichthouders interacteren in hun besluitvorming op werkvloerniveau daarnaast met een veelheid aan door toezicht geraakte partijen. Voor elk van deze niveaus is bestudeerd hoe vertegenwoordigers en hun rollen geconstrueerd worden; welke claims voor anderen te spreken of handelen gemaakt worden; en hoe belangengemeenschappen geconstrueerd worden. De receptie van representatieve claims werd, behalve op werkvloerniveau, niet bestudeerd.

Data voor de bestudering van vertegenwoordigende claims op de verschillende niveaus werd gehaald uit *wetgeving* (oprichtingswetten, amenderingswetten, wetten over zelfstandige bestuursorganen, de Algemene wet bestuursrecht, preambules, Memories van Toelichting), *parlementaire documenten* (kabinetsnota's, adviesrapporten, Kamerverslagen), *documenten van de toezichthouders* (missie-statements, jaarverslagen, bestuursreglementen, profielschetsen, beleidsdocumenten, websites), *krantenverslagen*, *websites*, *secundaire literatuur*, en *interviews* met 45 medewerkers van markttoezichthouders en vertegenwoordigers van belangenorganisaties in de gereguleerde domeinen.

In vier empirische hoofdstukken worden vervolgens de onderzoeksresultaten weergeven. Hoofdstuk 5 behandelt representatieve claims over markttoezichthouders gemaakt door de Nederlandse wetgever. Hoofdstuk 6 behandelt representatieve claims over markttoezichthouders gemaakt door de instituties zelf. Hoofdstuk 7 behandelt representatieve claims over de besturen van markttoezichthouders gemaakt door de wetgever en henzelf, alsmede daadwerkelijke benoemingen in de besturen van hun oprichting tot het heden. Hoofdstuk 8 behandelt het maken en recipiëren van representatieve claims op het werkvloerniveau van de markttoezichthouders, in hun interactie met door toezicht geraakte partijen.

Op zoek naar het publiek belang: representatieve claims op institutieniveau van onafhankelijke markttoezichthouders, gemaakt door de wetgever

De instelling van onafhankelijke markttoezichthouders in Nederland volgde een langjarig, deels door richtlijnen van de EU gedreven proces van privatisering, liberalisering en de invoering van marktwerking in economische en maatschappelijke domeinen enerzijds, en de verzelfstandiging van publieke organisaties anderzijds. Hoe werden in dit proces vertegenwoordigende rollen en belangengemeenschappen geconstrueerd?

De eerste twee onafhankelijke markttoezichthouders in Nederland – OPTA en DTe (later NMa Energiekamer) – werden, samen met de NMa, opgezet in de late jaren negentig van de twintigste eeuw om door middel van regulering en toezicht het proces van liberalisering en privatisering in de telecommunicatie- en energiesector te begeleiden. Vanwege staatsbelangen in deze sectoren werden zij door de wetgever als *de jure* of *de facto* onafhankelijk van de politiek gepositioneerd, maar deze onafhankelijkheid werd omschreven als tijdelijk en beperkt. Ook zouden ze onafhankelijk zijn van sectorale deelbelangen. Door hun dubbele onafhankelijkheid zouden OPTA en DTe volgens de wetgever beter dan het politieke domein in staat zijn een nog relatief vaag omschreven algemeen economisch belang, dat gediend zou zijn met liberalisering, en daarnaast enkele 'maatschappelijke' belangen, te dienen.

Brede kritiek op het in de voorgaande jaren gevoerde marktwerkingsbeleid noopte de Nederlandse wetgever echter vanaf het jaar 2000 de rol van onafhankelijke markttoezichthouders en de door hen vertegenwoordigde belangengemeenschap duidelijker te omschrijven. Waar voorheen veelal over overheidsbeleid gesproken werd in termen van een 'algemeen belang', deed in deze jaren de notie van meer geconcretiseerde 'publieke belangen' haar intrede in het Nederlandse beleidsdebat. Uit dit in adviesraadrapporten en kabinetsnota's gevoerde beleidsdebat ontstond de opvatting dat de overheid – mede in de hoedanigheid van onafhankelijke markttoezichthouders – een belangrijke rol moest houden in het garanderen van publieke belangen in geliberaliseerde economische domeinen. Deze belangen konden – afhankelijk van het analysekader en de rechtvaardiging voor overheidsoptreden die werd toegepast – 'economisch' of 'niet-economisch' van aard zijn. Goed functionerende marktwerking en de opheffing van informatie-asymmetrie onder consumenten waren *economische* publieke belangen. Universele dienstverlening en de kwaliteit en veiligheid van netwerken waren – deels – *niet-economische* publieke belangen. In een economische analyse van de te behartigen belangen in de maatschappij werd de belangengemeenschap geconstrueerd als één van economische actoren: bestaande uit producenten en consumenten. In een niet-economische analyse van de te behartigen belangen in de maatschappij werd de belangengemeenschap anderszins geconstrueerd, bijvoorbeeld als bestaande uit *burgers* met recht op de levering van bepaalde goederen en diensten.

Onafhankelijke markttoezichthouders – waarvan er nu meerdere opgezet werden, onder andere in de financiële sector (AFM) en de gezondheidszorg (NZa) – hadden in deze opvatting een belangrijke eigenstandige rol in het borgen van publieke belangen. Door hun onafhankelijkheid in regulerende en toezichthoudende besluiten zouden zij beter dan zowel gekozen politiek als deelbelangen in staat zijn de economische en niet-economische belangen van het publiek in geliberaliseerde domeinen te behartigen. In beleidsnota's werd de onafhankelijkheid van de toezichthouders in het begin van de eenentwintigste eeuw in toenemende mate omschreven als een positieve kwaliteit: als te vereenzelvigen met deskundigheid, objectiviteit, en besluiten 'los van de politieke waan van de dag'. Hun publieke belangen vertegenwoordigende rol werd daarmee niet door gekozenheid en gebondenheid, maar juist door onafhankelijkheid geschraagd. Dit

betekende de entree van een nieuw type vertegenwoordigend orgaan in Nederland: de onafhankelijke vertegenwoordiger van publieke belangen.

Sindsdien zijn OPTA, NMa Energiekamer, AFM en NZa door de Nederlandse wetgever geclaimd verschillende belangen van een 'publiek' – van marktpartijen, consumenten en burgers – in geliberaliseerde domeinen te vertegenwoordigen. Zij doen dit door hun onafhankelijke besluiten inzake onder meer de belangen van marktwerking, het tegengaan van misbruik van dominante marktposities, de kwaliteit en capaciteit van netwerken, universele dienstverlening, leveringszekerheid, ordelijke financiële processen, toegankelijkheid, betaalbaarheid en kwaliteit van zorg, en transparante consumenteninformatie. Consumenten worden in meer recente wetgeving bovendien steeds meer een eigenstandige plaats als vertegenwoordigde belangengemeenschap toegekend. De NZa moet sinds 2006 wettelijk het 'algemeen consumentenbelang' voorop stellen in de uitoefening van haar taken. De samenvoeging van OPTA, NMa en Consumentenautoriteit in ACM in 2013 wordt in de preambule van de wet beargumenteerd als wenselijk in het 'belang van de consument'.

De instelling van onafhankelijke markttoezichthouders betekent daarmee een afwijking van het standaardmodel van de vertegenwoordigende democratie, waarin een algemeen belang voortdurend gerepresenteerd wordt door een gekozen parlement en de overheid die zij controleert. Nu worden daarnaast ook meer geconcretiseerde publieke belangen vertegenwoordigd door een reeks van onafhankelijke marktautoriteiten. De belangengemeenschap die zij vertegenwoordigen wordt door de wetgever bovendien niet meer uitsluitend geconstrueerd als burgers, maar op basis van economische analyse ook – en vooral – als economische actoren: als producenten en consumenten. Mensen afgebeeld als consumenten nemen in deze wetgeving steeds meer een bijzondere plaats in. De privatisering en liberalisering van economische en maatschappelijke domeinen zijn zo gepaard gegaan met een verschuiving in zowel vertegenwoordigende actoren (naast gekozen, ook onafhankelijke) als constructies van belangengemeenschappen (van burgers, naar consumenten).

De consument centraal: de publieke zelfpresentatie van onafhankelijke markttoezichthouders

Hoe construeren markttoezichthouders hun eigen rol, en welke belangengemeenschap claimen zij te vertegenwoordigen? De vier onderzochte markttoezichthouders presenteren zichzelf allen enerzijds als dubbel onafhankelijk, deskundig, en communicatief. Sectorale deelbelangen worden in het bijzonder uitgenodigd in gesprek te gaan met de instanties. Met name sinds de financiële en economische crisis van 2007-2008 presenteren sommige toezichthouders (NMa, AFM) zich ook als 'herstellers' van het publieke vertrouwen in marktwerking. Maar boven alles zijn zij door de jaren heen hun verschillende marktmakende- en regulerende taken steeds meer gaan presenteren als in het belang van de consument. Sinds hun oprichting stellen de vier markttoezichthouders zich in hun

publieke presentatie in toenemende mate op als onafhankelijke vertegenwoordigers van de consument in economische en maatschappelijke domeinen.

Een belangrijk onderdeel hiervan is de – deels wettelijk opgelegde, deels zelf opgevatte – taak van de onafhankelijke markttoezichthouders in het bestrijden van informatieasymmetrie onder consumenten. De vier instanties zijn toe gaan zien op de verstrekking van transparante consumenteninformatie door marktpartijen, of deze informatie zelf aan gaan bieden. Via websites zoals *ConsuWijzer* voorzien OPTA, NMa Energiekamer, AFM en NZa de consument van informatie en hulpmiddelen, en stimuleren zij hem zichzelf te helpen. Tegelijk beweren de vier instanties open te staan voor klachten en signalen van consumenten, en waar nodig op basis hiervan in te grijpen in gereguleerde sectoren. De onafhankelijke markttoezichthouders trachten zo een meer directe band te realiseren tussen henzelf als vertegenwoordigers, en consumenten als een deel van de vertegenwoordigde achterban. In de woorden van de NZa: zij treden op als onafhankelijke 'beschermengel' van de consument. Anderzijds zijn de markttoezichthouders daarmee ook onderdeel geworden van een proces van het 'omvormen' van burgers tot consumenten in liberaliserende economische en maatschappelijke domeinen. Waar dit proces in domeinen als de telecommunicatie- en energiemarkt niet tot controverse hoeft te leiden, kan dit in een domein als de zorg anders zijn. De vraag is in hoeverre burgers in dit domein zichzelf primair als consument wensen te beschouwen, en in hoeverre als burger of patiënt.

Hier wordt later op teruggekomen. Eerst zijn in het onderzoek nog het bestuursniveau en het werkvloerniveau van de onafhankelijke markttoezichthouders onderzocht op representatieve claims.

Paradoxale selectiecriteria: representatieve claims op het bestuursniveau van markttoezichthouders

De vier onderzochte onafhankelijke markttoezichthouders kennen collegiale besturen. Deze nemen de besluiten van de instituties. Sommige toezichthouders kennen daarnaast ook een raad van toezicht (AFM) of advies (NZa). Verschillende regelingen moeten een mate van politieke controle over de besturen waarborgen, terwijl andere regelingen een mate van onafhankelijkheid moeten garanderen. Tegelijk dienen selectiecriteria voor bestuurders – bij de meeste zelfstandige bestuursorganen in Nederland afwezig, maar bij de vier onderzochte toezichthouders aanwezig – om de institutioneel-representatieve claims van de markttoezichthouders te ondersteunen en te versterken. Daarmee creëren zij een vertegenwoordigende leiderschapsklasse voor en van markttoezichthouders, aan welke verschillende persoonlijke kwaliteiten wordt toegedicht.

Negatieve selectiecriteria in de instellingswetten van de toezichthouders dienen ter voorkoming van belangenverstrengeling door bestuursleden gedurende de uitoefening van hun functie. Deze criteria dienen om hun dubbele onafhankelijkheid ten opzichte van politiek en deelbelangen te waarborgen. *Positieve* selectiecriteria schrijven voor wat bestuursleden moeten zijn: deskundigen. In sommige gevallen moeten zij tevens in

het bezit zijn van 'maatschappelijke kennis en ervaring', of 'betrouwbaar' en 'geschikt' zijn. Dit kan blijken uit voorheen vervulde functies, bijvoorbeeld bij de overheid of in de sector zelf. Van bestuurders wordt informeel bovendien veelal verwacht dat zij een natuurlijke 'autoriteit' of een reputatie in de sector genieten. Bij sommige toezichthouders kan een beperkte afwijking van dit beeld geconstateerd worden, waarin bijvoorbeeld beperkte belangen in de onder toezicht gestelde sector toelaatbaar werden geacht voor bestuurders met slechts een adviserende stem, of bestuurders divers moeten zijn in een niet nader omschreven 'affiniteit' met de sector, of hierin een 'netwerk' moeten bezitten.

Deze afwijkingen, en potentiële contradicties zoals die tussen onafhankelijkheid enerzijds, en deskundigheid blijkend uit eerdere functies of ervaring in of met de gereguleerde sector anderzijds, werpen de vraag op hoe het bestuurskader van markttoezichthouders omschreven kan worden in termen van enkele descriptieve kenmerken (geslacht, partijlidmaatschap) en professionele achtergronden. Wie worden benoemd in de besturen van onafhankelijke markttoezichthouders? Dit betreft 73 personen in de periode van hun oprichting tot het heden. Het blijkt dat van het in overgrote meerderheid mannelijke, doch relatief a-partijpolitieke bestuurskader van markttoezichthouders, 30 procent een achtergrond bij de overheid (topambtenaar) heeft. Eveneens 30 procent heeft een achtergrond in het bedrijfsleven of een maatschappelijke sector (bestuurder, CEO), waarvan een meerderheid aan de aanbieders- of producentenkant in de gereguleerde sectoren. 19 Procent heeft een wetenschappelijke achtergrond (hoogleraar), 16 procent een juridische achtergrond (hoogleraar, advocaat, rechtspraak), en 5 procent een achtergrond in de nationale politiek (minister, Kamerlid). 0 Procent heeft een achtergrond in het consumenten- en patiëntenwezen. Vele bestuurders hebben bovendien eerder nevenfuncties gehad in een raad van toezicht of commissarissen in een economisch of maatschappelijk domein.

Deze samenstelling kan op verschillende manieren verklaard worden. Deze benoemingen konden door het benoemend orgaan (de ministerraad, bij AFM in samenspraak met de raad van toezicht) de beste worden geacht in het licht van de representatieve claims over markttoezichthouders: om onafhankelijk en deskundig publieke belangen te representeren. Ook kan zij een behoefte aan waardevolle contacten in verschillende voor de markttoezichthouders belangrijke sectoren demonstreren. Tenslotte kan zij een streven naar indirecte descriptieve representatie van verschillende voor de markttoezichthouders belangrijke sectoren in de besturen van toezichthouders laten zien. Welke verklaring ook gehanteerd wordt, het is enerzijds opvallend te noemen dat het bestuurskader van markttoezichthouders in meerderheid professionele achtergronden in overheid en gereguleerde sector heeft: de twee domeinen waarvan markttoezichthouders zich in hun claim onderscheiden door hun dubbele onafhankelijkheid. Anderzijds is ook de afwezigheid van bestuurders met een directe achtergrond in de consumenten- en patiëntenbeweging, in het licht van de representatieve claims van markttoezichthouders ook hun belangen te vertegenwoordigen, opvallend te noemen.

Het representatietheater: het maken van representatieve claims op het werkvloerniveau van markttoezichthouders

OPTA, NMa Energiekamer, AFM en NZa onderhouden contacten met een veelheid aan externe organisaties, waaronder die van door toezicht geraakte partijen ('deelbelangen'): bedrijven, maatschappelijke organisaties, beroepsgroepen en consumenten of patiënten. Op werkvloerniveau hebben de vier toezichthouders gremia opgezet voor de interactie met deze deelbelangen. Dit betreft veelal de voorbereiding of implementatie van op bestuursniveau te nemen of genomen besluiten. In het onderzoek is nagegaan welke gremia voor interactie met de toezichthouders op welkvloerniveau hebben opgezet; wat de criteria voor inclusie van vertegenwoordigende partijen hierin zijn; en hoe het proces van het maken van representatieve claims werkt binnen deze gremia. Dit is gedaan op basis van interviews met 45 medewerkers van toezichthouders en vertegenwoordigers van belangenorganisaties, en voor deze vier toezichthouders op deze manier niet eerder in kaart gebracht.

De gremia voor interactie met externe partijen binnen OPTA, NMa Energiekamer, AFM en NZa kunnen allereerst worden ingedeeld in drie types. Enerzijds zijn er gremia die uitsluitend bedoeld zijn om de door toezicht geraakte partijen de gelegenheid te geven hun belangen te vertegenwoordigen. Anderzijds zijn er gremia die bedoeld zijn om technische informatie en deskundigheid te onttrekken aan een veelheid van externe partijen, waaronder deelbelangen. Ten derde zijn er gremia die niet uitsluitend één van deze doelen hebben, en openstaan voor allerlei externe partijen, waaronder door toezicht geraakte partijen.

De criteria voor inclusie in deze gremia hebben verschillende bronnen. Met uitzondering van de technische gremia en publieke consultatiedocumenten geldt voor deelbelangen dat hun inclusie in interactiegremia bepaald wordt door een aanvankelijke beoordeling door de toezichthouders van hun vertegenwoordigende claim als organisatie. Deze beoordeling kan plaatsvinden op basis van wettelijke normen (bijvoorbeeld het vertegenwoordigen van een objectief of onderscheidend belang), of op basis van door de toezichthouders zelf opgestelde normen (bijvoorbeeld het hebben van een interne democratische structuur). Voor diverse gremia worden besluiten over inclusie van externe partijen echter *ad hoc* genomen, zonder duidelijke normen, of op basis van staande praktijk. Geïnterviewde respondenten aan beide zijden van de toezichttafel beschrijven consultatie over markttoezicht in Nederland als een 'kleine wereld'. Ook merken respondenten op dat vertegenwoordigers van consumenten- en patiëntenorganisaties, in tegenstelling tot vertegenwoordigers van bedrijven en beroepsgroepen, in verschillende gremia veelal afwezig zijn, zelfs wanneer ze uitgenodigd zijn. Wel verrichten de markttoezichthouders soms onderzoek onder consumenten, of werken zij met consumentenpanels.

Wanneer organisaties van deelbelangen zijn toegelaten tot interactiegremia, gaat het maken van representatieve claims door. Hun vertegenwoordigers pleiten ten overstaan van markttoezichthouders en hun medewerkers vóór of tegen voorgenomen maatregelen, en doen daarbij veelal een beroep op het belang van hun achterban. Op basis van

de interviews kan geconstateerd worden dat deelbelangenafgevaardigden in consultatieprocedures vier retorische strategieën hanteren in het maken van vertegenwoordigende claims. Dit zijn ideaaltypes: in de praktijk worden de strategieën door elkaar gebruikt. In hun vertegenwoordigende claims presenteren deelbelangenafgevaardigden zowel zichzelf, als het belang dat zij claimen voor te staan. De (re)presentatie van beiden moet gezien worden als een strategische retorische constructie, bedoeld om markttoezichthouders te overtuigen van een standpunt inzake een maatregel.

In de eerste strategie presenteren sectorale deelbelangenafgevaardigden zichzelf simpelweg als lobbyist. Zij argumenteren voor of tegen een voorgenomen maatregel op basis van het deelbelang dat zij vertegenwoordigen. In een tweede strategie presenteren deelbelangenafgevaardigden verschillende deelbelangen als een gezamenlijk belang voor of tegen toezichtbeleid. Een derde strategie voor deelbelangenafgevaardigden is om te argumenteren in naam van een groter of breder belang, zoals dat van hun klanten of afnemers, de markt als geheel, publieke belangen zoals de hierboven geïdentificeerde, of het consumenten- of patiëntbelang. Zij doen hierbij een appèl op de institutionele claim van markttoezichthouders op representatie van publieke- en consumentenbelangen. Tegelijk zijn de meer directe vertegenwoordigers van consumenten en patiënten dus veelal niet aanwezig in interactiegremia. Een vierde strategie voor deelbelangenafgevaardigden is om zichzelf te presenteren als beleidsdeskundige, en niet expliciet te argumenteren als een vertegenwoordiger.

Deze retorische strategieën worden in interviews door respondenten aan beide zijden van de toezichttafel vrijwel gelijkluidend geëvalueerd. Medewerkers van markttoezichthouders worden gezien als in hun beleidsvoorbereiding minder open voor argumentatie op basis van een enkel deelbelang, en meer voor één op basis van gezamenlijke deelbelangen of grotere (publieke) belangen, of deskundigheid. In hun receptie van de representatieve claims van deelbelangenvertegenwoordigers speelt de institutionele claim van markttoezichthouders op representatie van publieke- en consumentenbelangen voor medewerkers een rol. Niettemin leeft er een brede erkenning onder de geïnterviewde respondenten aan beide zijden van de toezichttafel dat sectorale afgevaardigden vooral geacht worden *deel*belangen te representeren. Dit verleent aan hun inzet van retorische strategieën een theatraal karakter. Belangenafgevaardigden worden ondanks de inzet van strategieën blijvend gezien als deelbelangenafgevaardigden, en dit gedeelde besef speelt een rol in de evaluatie van hun argumenten door toezichthouders.

Medewerkers van toezichthouders trachten daarom de 'vierde muur' te doorbreken. Ten behoeve van beleidsvoorbereiding trachten zij 'feit' van retorische strategie in door deelbelangen geleverde argumentatie te onderscheiden. Hiertoe steunen markttoezichthouders op de professionaliteit van hun medewerkers, de toepassing van *checks and balances* op geleverde informatie, het trachten aan te brengen van een organisatorische scheiding in gremia, en uiteindelijk op besluitvorming door het bestuur.

De representatie van deelbelangen in consultatiegremia wordt niettemin gefaciliteerd (de afgelopen tien jaar zelfs in toenemende mate), omdat deze in de perceptie van geïnterviewde medewerkers van markttoezichthouders – waar zij niet al

wettelijk verplicht is – *an sich* legitiem is, informatie en deskundigheid kan opleveren, en gradaties van wederzijds begrip of steun kan opleveren. Tegelijk wordt erkend dat de levering van informatie door sectorale afgevaardigden vrijwel altijd doorspekt is met belangenvertegenwoordiging. Gecombineerd met de volgens geïnterviewde respondenten opvallende absentie van consumenten- en patiëntvertegenwoordigers in vele van de hier onderzochte gremia, levert dit een voortdurend gevaar op van een eenzijdige levering van informatie en representatie van belangen. Zoals omschreven trachten de vier toezichthouders hier op verschillende wijze mee om te gaan.

Positieve en normatieve voordelen van een representatiebenadering van markttoezichthouders

In dit proefschrift zijn vier onafhankelijke markttoezichthouders, hun besturen en hun consultatieprocedures op werkvloerniveau bestudeerd vanuit de theoretisering van representatie als een proces van het maken van claims van Michael Saward (2010). Aangetoond is dat OPTA, NMa Energiekamer, AFM en NZa door de Nederlandse wetgever zijn neergezet als onafhankelijke vertegenwoordigers van economische en niet-economische publieke belangen in geliberaliseerde domeinen. De vier toezichthouders zelf claimen in hun publieke presentatie steeds meer de rol van consumentenvertegenwoordigers. De persoonlijke eigenschappen van de leiderschapsklasse van de instanties worden geclaimd een versterking te zijn van de representatieve claims van de instituties, maar de daadwerkelijke bestuursbenoemingen laten in zeker opzicht een contrast zien met één aspect van deze claims: consumenten te vertegenwoordigen. De vier toezichthouders faciliteren tenslotte de representatie van deelbelangen in hun besluitvormingsstructuren, hoewel consumentenorganisaties daarbij veelal afwezig blijven. Verre van 'onrepresentatief' of 'niet representerend', zoals zij in wetenschappelijke literatuur worden afgeschilderd, zijn markttoezichthouders dus doordrenkt in representatie.

Maar wat is het nut van een dergelijke representatiebenadering van onafhankelijke markttoezichthouders? In het proefschrift wordt beargumenteerd dat deze benadering van markttoezichthouders positieve en normatieve voordelen kent. Dit geldt voor wetenschappers, toezichthouders, en burgers of consumenten. Voor de eerste groep laat het onderzoek zien hoe vertegenwoordiging tegenwoordig niet alleen meer gestalte krijgt in verkiezingen, maar geclaimd wordt door een variëteit aan gekozen en ongekozen organen en instanties. Ook in een op het oog bestuurlijk en technocratisch domein als onafhankelijk markttoezicht worden op verschillende niveaus vertegenwoordigende rollen geconstrueerd, claims voor anderen te spreken of handelen gemaakt, en (strategisch) belangengemeenschappen geconstrueerd. Dit inzicht is enerzijds van belang voor historische duiding van het fenomeen onafhankelijk markttoezicht: als voortkomend uit een diepgaande beweging van liberalisering van economische en maatschappelijke domeinen en verzelfstandiging van overheidsdiensten, die geleid heeft tot een reeks onafhankelijke (geclaimde) representanten van een gemeenschap deels geconstrueerd

als economische actoren, waaronder consumenten. Anderzijds is het van belang voor de politicologische en bestuurskundige duiding van deze instituties: het laat, meer dan de drie eerder geïdentificeerde benaderingen van markttoezicht, in één oogopslag zien voor *wie* of *wat* deze onafhankelijk instanties opgericht zijn, wat hun veronderstelde *rol* is ten opzichte van deze doelgroep, en hoe zij deze claims moeten trachten waar te maken en daarbij reproduceren. Bovendien werpt deze benadering nog eens het licht op de vraag – in het huidige beleidsdebat over toezichthouders actueel – in hoeverre deze onafhankelijke instanties zelf de door hen gerepresenteerde publieke belangen zouden moeten mogen afwegen in hun beslissingen, en in hoeverre de gekozen politiek dat zou moeten doen.

Dit is een positieve analyse, die normatieve voordelen kent. Voor toezichthouders en hun medewerkers zelf, ten eerste, kan het besef een vertegenwoordiger te zijn bijdragen aan identificatie met de eigen missie. De representatiebenadering laat zien voor *wie* of *wat* markttoezichthouders hun taken uitoefenen: het publiek en haar belangen, inclusief consumenten. In plaats van gezien te worden als een onrepresentatieve anomalie in de vertegenwoordigende democratie hebben markttoezichthouders in deze benadering een eigenstandige vertegenwoordigende rol. Door zichzelf te profileren in deze – hen door de politiek toegekende – rol zouden toezichthouders mogelijk meer publiek begrip kunnen kweken wanneer zij zich uitspreken over (politiek) delicate kwesties. Tegelijk kan dit besef ook een verantwoordelijkheid met zich meebrengen, bijvoorbeeld om zich tegenover zowel gekozen politiek als deelbelangen daadwerkelijk op te stellen als een (onafhankelijke) vertegenwoordiger van het publiek en haar belangen, wanneer de situatie daarom vraagt. Blijkens interviews zien diverse medewerkers van toezichthouders zichzelf overigens nu al als vertegenwoordigers van publiek en consument; om die reden sluit een representatiebenadering ook aan bij een beleefde realiteit onder toezichthouders.

Anderzijds kan voor burgers het besef grotendeels vertegenwoordigd te worden *als* consumenten aanleiding geven tot reflectie over de wenselijkheid om – in bepaalde domeinen – als 'consument' gezien en gerepresenteerd te worden. Zien burgers, bijvoorbeeld in de gezondheidzorg, zichzelf als consument, in plaats van als burger of patiënt, en willen ze als zodanig door markttoezichthouders gerepresenteerd worden? En indien zij het hiermee eens zijn: zouden ze dan geen mechanismes wensen die tot (nog) meer responsiviteit van markttoezichthouders ten opzichte van hun doelgroep zouden leiden? Dit vraagstuk betreft enerzijds de verschuiving in concepties van burgerschap door toedoen van de liberalisering van economische en maatschappelijke domeinen: van burger naar consument. Anderzijds betreft het de publieke receptie van de vertegenwoordigende claims over en van onafhankelijke markttoezichthouders: voelen burgers, of consumenten, zich door hen gerepresenteerd? Dit vraagstuk is in dit proefschrift niet onderzocht, maar dat zou in toekomstig onderzoek wel gedaan kunnen worden.

Deze positieve en normatieve voordelen van een representatiebenadering van markttoezichthouders betreffen voornamelijk het institutieniveau. Voor wat betreft het werkvloerniveau van markttoezichthouders laat de representatiebenadering zien hoe de interactie met door toezicht geraakte partijen in consultatieprocedures een rollenspel is dat gekenmerkt wordt door een voortdurende uitwisseling en receptie van vertegen-

woordigende claims. Ook in consultatie over onafhankelijk markttoezicht worden vertegenwoordigende rollen geconstrueerd, claims voor anderen te spreken of handelen gemaakt, en strategisch belangengemeenschappen geconstrueerd. Waar de betrokkenheid van sectorale deelbelangen in markttoezicht veelal gewaardeerd wordt vanwege de deskundigheid en informatie over de dagelijkse praktijk die het oplevert, benadrukt een representatiekader tegelijk in hoeverre sectorale partijen belangen hebben in deze praktijk, en deze op verschillende manieren afschilderen. Voor deelbelangen is het spelen van de rol van beleidskundige veelal ook een manier om belangen te vertegenwoordigen; informatieverstrekking en belangenvertegenwoordiging zijn soms moeilijk van elkaar te scheiden. Dit stelt markttoezichthouders voortdurend voor een dilemma. Ook een relatief technisch domein zoals markttoezicht is daarmee een belangenspel, en zou daarom ook als zodanig gezien – en bestudeerd – moeten worden. Dit inzicht maakt daarnaast de veelvuldige absentie van directe consumentenvertegenwoordigers in consultatieprocedures extra pregnant.

De positieve en normatieve voordelen van de in dit proefschrift ondernomen representatiebenadering van markttoezichthouders laten zich dus samenvatten als een amendering op de drie eerder geïdentificeerde benaderingen van onafhankelijk markttoezicht in de literatuur. Ten opzichte van de 'technocratische' benadering laat zij zien dat markttoezichthouders niet alleen legitimiteit (trachten te) halen uit de veronderstelde kwaliteit van hun deskundige beslissingen, maar dat deze genomen worden *in naam van* een belangengemeenschap. Niet alleen zijn markttoezichthouders onafhankelijk en deskundig, ze claimen ook een vertegenwoordigende rol. Ten opzichte van de 'delegatie'-benadering laat zij zien dat markttoezichthouders niet alleen indirecte democratische legitimiteit halen uit hun band met de gekozen politiek, maar dat zij ook juist hun eigen claims op vertegenwoordiging hebben. Politieke instituties hebben markttoezichthouders ingesteld met het expliciete doel onafhankelijk te zijn, en in die hoedanigheid publieke belangen te vertegenwoordigen. Ten opzichte van de 'relationele' benadering, tenslotte, laat zij zien dat in de relaties die markttoezichthouders onderhouden met velerlei actoren – veelal bestudeerd als participatie, interactieve beleidsvorming, deliberatie, of horizontale verantwoording – de *vertegenwoordiging* van groepen en belangen een voortdurende rol speelt. In het onderzoek naar deze vorm van legitimatie van markttoezichthouders zou hier ook aandacht voor moeten zijn.

Democratische representatie bij markttoezichthouders?

In het onderzoek is zijn representatieve claims over, door en binnen onafhankelijke markttoezichthouders non-normatief bestudeerd. In navolging van Saward (2010) wordt gesteld dat representatie een proces is dat gestalte krijgt in het maken van vertegenwoordigende claims, die niet noodzakelijkerwijs (geheel) democratisch of electoraal ondersteund zijn, en de daaropvolgende receptie hiervan door een publiek (waarbij dit laatste een onderwerp voor vervolgonderzoek zou zijn). Het argument

van dit proefschrift is dat een dergelijke benadering positieve voordelen biedt voor de bestudering van markttoezichthouders, en daarmee gepaard gaande normatieve voordelen. Niettemin zou ook vanuit het perspectief van de representatieve claim- en receptiebenadering *zelf* een normatief oordeel over de democratische legitimiteit van markttoezichthouders geveld kunnen worden.

Volgens Saward moeten we de gemeenschap waarvan vertegenwoordiging geclaimd wordt zelf beschouwen als de ultieme arbiter van de democratische legitimiteit van een claim. Hierbij moet wel aan bepaalde voorwaarden voldaan worden: onder andere aan voldoende gelegenheid voor de gemeenschap om de claim te controleren, en aan bewijs van acceptatie door de vertegenwoordigde gemeenschap. Zoals blijkt uit het huidige onderzoek bestaat althans een deel van de vertegenwoordigde belangengemeenschap van onafhankelijke markttoezichthouders uit consumenten. In economische en maatschappelijke domeinen zoals de telecommunicatie- energie- financiële- en zorgsector bestaan deze consumenten uit *iedereen*. Vrijwel welke inwoner van een land heeft een belang bij de levering van goederen en diensten in deze domeinen, en de regulering daarvan. Om een oordeel te vellen over de democratische legitimiteit van onafhankelijke markttoezichthouders vanuit de in dit onderzoek gehanteerde benadering, zou bekend moeten zijn in hoeverre het publiek van consumenten in Nederland voldoende gelegenheid heeft om de representatieve claims van markttoezichthouders te controleren, en of zij deze accepteert en zichzelf als vertegenwoordigd beschouwt.

Dat laatste is niet bekend. Uit het onderzoek is niettemin wel gebleken dat de meest directe vertegenwoordigers van consumenten en patiënten – ledenorganisaties van consumenten en patiënten – veelal niet aanwezig zijn binnen de gremia die de markttoezichthouders organiseren voor consultatie met door toezicht geraakte partijen, ook niet wanneer zij hiervoor uitgenodigd zijn. In tegenstelling tot belangenorganisaties van bedrijven en beroepsgroepen ontberen consumenten- en patiëntenorganisaties veelal de financiële middelen, technische expertise, en het veronderstelde directe belang om bij consultaties over marktregulering- en toezicht aanwezig te zijn. Hoewel dit geen algemeen bekend feit is, zou dit feit indien het bekend zou zijn waarschijnlijk niet bijdragen aan verdere publieke acceptatie van de representatieve claims van onafhankelijk markttoezicht. Om deze reden zou het vermogen van consumenten- en patiëntenorganisaties om de achterban te representeren binnen consultatieprocedures van onafhankelijke markttoezichthouders versterkt moeten worden, desnoods met publieke middelen. Blijkens ook de interviews met medewerkers van markttoezichthouders wordt het 'tegengeluid' van deze organisaties ten opzichte van bedrijfs- en beroepsbelangen in interactiegremia soms node gemist. Hoewel de markttoezichthouders gegeven hun onafhankelijke positie niet aan elke wens van deze organisaties gehoor zouden hoeven te geven, zou hun claim ook consumenten te representeren in hun beslissingen versterkt worden indien meer directe representanten van deze doelgroep – bestaande uit vrijwel elke inwoner van Nederland – zouden participeren in hun consultatieprocedures. Hieraan zou worden bijgedragen indien ook de veelal complexe en technische beslissingen van onafhankelijke markttoezichthouders meer transparant en inzichtelijk voor het consumentenpubliek zouden worden gemaakt.

Naast de huidige activiteiten van OPTA, NMa Energiekamer (tegenwoordig ACM), AFM en NZa met onder andere *ConsuWijzer* en consumentenpanels, zou dit de publieke acceptatie van de claim die zij hebben consumenten te vertegenwoordigen bevorderen, en daarmee hun democratische legitimiteit versterken.

Curriculum Vitae

Adriejan van Veen (1984) studied History at Utrecht University, the Netherlands, between 2002 and 2009. In addition to his History bachelor, he took courses in Public Law, and Political Science at the University of Amsterdam. In 2007, Adriejan studied Political Science at the University of California Los Angeles (UCLA), and received his Bachelor of Arts (BA) degree in History. In 2009 he graduated *cum laude* in the Research Master History: Cities, States and Citizenship at Utrecht University (degree: MA).

From 2009 until 2014, Adriejan worked as a Ph.D. researcher at the School of Governance (USBO) of Utrecht University. Here he was involved in the Netherlands Organisation for Scientific Research (NWO) funded research project *Alternatives of Parliamentary Democracy. The Netherlands in a European Comparative Perspective, 1880 to the present*. This project was part of the NWO research program *Contested Democracy*.

In addition to his thesis, Adriejan taught courses at the Department of History and the School of Governance of Utrecht University. He has published in *Governance* and *BMGN Low Countries Historical Review*.

Currently, Adriejan is a lecturer at the Department of History of Utrecht University.

Independent regulatory authorities today have important functions. They regulate and oversee marketplace and societal domains, can impose heavy fines and sanctions, and often have quasi-judicial functions. Yet because of their independent status, their place in representative democracy is still uncertain. Who, or what, can these powerful unelected bodies claim to represent?

Regulation without Representation? offers a multi-level analysis of the representative character of four independent regulatory authorities in the Netherlands. Applying recent advances in representation theory to the domain of independent market regulation, it argues that despite their unelected status, independent bodies have claims to representation. Just like other public and private bodies, they claim to speak and act for certain groups and interests. At the same time, the unelected bodies are involved in moulding these very constituencies to a desired image.

Exploring legislative frameworks and public self-presentation, investigating who gets appointed to the executive boards of the agencies, and offering an inside look on the interaction between interest groups and the independent authorities on the basis of 45 interviews, **Regulation without Representation?** is about the nature of representation in a time when public and political decisions are increasingly made beyond elected parliaments. Can representation exist beyond democracy?

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