Cover Page

Universiteit Leiden

Author: Hartmann, J.M.
Title: A blessing in disguise?! Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives
Issue Date: 2016-09-27

A blessing in disguise?!

Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives

A blessing in disguise?!

Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 27 september 2016
klokke 11.15 uur

door

Josephine Marna-Rose Hartmann

geboren te Berlijn, Duitsland

in 1982

Promotiecommssie:
Promotoren: Prof. dr. Wim Voermans
Prof. dr. Bernard Steunenberg

Overige leden: Prof. dr. Michael Kaeding (Universität Duisburg-Essen)
Prof. dr. Philip Eijlander (Universiteit van Tilburg)
Prof. dr. B. Frans van Waarden (Universiteit Utrecht)
Prof. dr. Ymre Schuurmans
Prof. dr. Arco Timmermans
Prof. dr. Stefaan van den Bogaert

Lay-out: AlphaZet prepress, Waddinxveen
Printwerk: Amsterdam University Press

Preface

'Courage is to have fear but to do it anyway.'
(B. S., 2013)

In August 2010 I was working in a multi-national environment, had nice colleagues, and was fortunate to work in all of 'my' three languages. I had just received my first working contract for a full-time position. And yet, I felt that something was missing. I did not feel strongly connected to the content of my work. I don't consider myself as an academic per se but as someone who likes reading, reflecting, writing and identifying connections between seemingly unrelated things. In a way, I had a feeling of estrangement. However, working in an inspiring and dynamic environment had turned out to be impossible at that time.

Changes often occur unexpectedly, though. Six months later the great opportunity arose to study a really fascinating topic in-depth: the role of discretion in EU negotiations and national transposition processes regarding European directives and the link between discretion and the legitimacy of these directives in national law. Transposition and the problem of non-compliance in this area has been a topic of lasting academic interest. In this dissertation deficient transposition certainly is a relevant part of the story but it remains a sub-plot. The spotlight is on discretion which has everything an intriguing research puzzle needs, involving tensions (discretion and law / legitimacy) as well as seeming contradictions (discretion impeding but apparently also facilitating the transposition of directives into national law). In short, discretion is a topic that in a number of respects matters, not least in the light of the alleged (democratic) legitimacy deficit of the European Union. But apparently research on discretion had left gaps and I was happy to be entrusted with the task to try filling a few of them.

Since then five years have passed. In retrospect, being a PhD candidate was demanding. This was not only due to the content of the job. It was also challenging to work as a 'non-Dutch', 'non-lawyer', 'non-Leiden alumni' in an environment with people mostly sharing one (professional) identity. Looking back, the situation I was then in appears funny to me now. Sure, my personal and academic background was different from many of those around me, which explains why I was considered the 'vreemde eend in de bijt' (= 'the odd one out'). On the other hand, though, I felt a strong connection with my topic. Just like discretion I could not readily be labelled.

Studying discretion was exciting. I liked the polyphony of voices which emerged from academic debates and the interviews I conducted. I liked catchy descriptions of discretion, such as the 'beauty of vagueness' – though, in my eyes, discretion turned out to be more than just the implication of a vague or broad concept. My dissertation seeks to underline that its 'beauty' exists, namely in the way it enables Member States to integrate EU rules into their own legal framework without necessarily breaking off traditionally

grown structures. Less easy but nevertheless interesting, was tracing discretion in directives' texts. Like a babushka doll, discretion can take many forms therein.

The PhD-period has a special place in my personal biography. It was a privilege to have the means to set up and conduct my own research project for which I am very grateful. I have learned a lot about myself and the world around me. I fully agree that a dissertation is no comfort zone as one of my supervisors once put it – and it should not be one. But every now and then also discomfort can be eased by the help of others. In this respect, I'd like to thank my supervisors, Wim and Bernard, not only for their effort, time, input and flexibility but especially for supporting me in taking postgraduate courses and involving me in research projects. Organising and conducting the field work would not have been possible without the help of Josien Stoop, from the Ministry of Infrastructure and the Environment, who spared no effort in providing me with relevant documents, valuable contacts and knowledge. I am very grateful to all my respondents for sharing their time and expertise with me. Here, I like to thank in particular Rob Duba, working at the Ministry of Infrastructure and the Environment and Bert Jan Clement as well as Melanie van Vugt from the Ministry of Health, Welfare and Sports who were very approachable and cooperative.

Other bright and kind people have supported me in one way or the other, by joining me on this journey. My special thanks go to my sister Jack, for proofreading parts of the book, despite her tight schedule: I am very proud of you! Tom for offering so generously your help from a distance: there should be many more of you in academia. Nathalie, for helping me with tricky layout questions, and joining me in what we both love doing in order to relax: dancing! Additionally, I am very thankful to my colleagues: Hans-Martien for our inspiring conversations in earlier stages of the project, Claar for your continuous involvement in it and belief in me: I still hear you saying: 'Josy, you are going to make it. I know it!' I am very grateful to you, Elly, for supporting me morally: I enjoyed our weekly laughter and chats about the most important thing in life: family; and Marga: you have inspired me and I admire your diligence and will power. Furthermore, I appreciate every input and support of colleagues that took a sincere interest in my research project and me as a person. Finally, I am greatly indebted to my dear friends, close by or far away: friendship does not know any distance! Thank you for enriching my life! Apart from this group I warmly thank Michel for his patience and understanding, and Niek for regularly dropping a line to ask how I am. Last but not least, I am particularly grateful for the support of my mother. Without your daily encouragements and unshaken belief that your 'little' daughter can do it, I wouldn't have made it. You are right, 'the road is tough, but the driver is tougher!'

I like to dedicate this book two my father and stepfather. Both of them passed away unexpectedly while I was working on it, and very sadly, cannot share this special moment with me. Nevertheless, in their very own way, they contributed to this work.

With every ending comes a new beginning. Now I am open for new challenges and the best period (s) of my life still to come!

Table of contents (in brief)

Table of Contents

List of boxes, figures, and tables

Boxes

Figures

Tables

List of abbreviations

Acquis	Acquis communautaire
Actal	*Adviescollege toetsing regeldruk* (Dutch Advisory Board on Regulatory Burden)
BNC	*Werkgroep Beoordeling Nieuwe Commissievoorstellen* (Working Group Assessment New Commission Proposals)
CDA	*Christen Democratisch Appèl* (Christian Democratic Alliance)
CFSP	Common Foreign and Security Policy
Commission	European Commission
Council	Council of Ministers
CU	*ChristenUnie* (Christian Union)
D66	*Democraten 66* (Democrats 66)
EC	European Community / Treaty establishing the European Community
EEC	European Economic Community
ECER	European Center of Expertise in EU law
EP	European Parliament
EU	European Union
EUR-Lex	Online portal for provision European Union law
Groen Links	Green Left (the 'Greens')
ICER	*Interdepartementale Commissie Europees Recht* (Interdepartmental Commission)
JHA	Justice and Home Affairs
LAP	*Landelijk Afvalbeheer Plan* – Dutch waste management plan
NRVD	*Koninklijke Vereniging voor Afval- en Reinigingsmanagement* – Royal Dutch Association of Waste Management and Cleaning
PvdA	*Partij van de Arbeid* (Labour Party)
PVV	*Partij voor de Vrijdheid* (Freedom Party)
ROW	*Regulier Overleg Warenwet* (Regular Consult Food and Non-Food Law)
SEA	Single European Act
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on European Union and the Treaty on the Functioning of the European Union
VVD	*Volkspartij voor Vrijheid en Democratie* (People's Party for Freedom and Democracy)

Part 1

Introduction and theoretical background

1 Unifying diversity

1.1 Introduction

In the introduction to the dissertation, discretion in European Union (EU)[1] directives is presented as the focus of the study. The context in which discretion comes into play is addressed and the legal and political implications it is assumed to have are mapped out. The debate on discretion has provided input for the research and given rise to questions which are introduced together with the envisaged approach to address them. Discretion is approached within a European as well as a national legal context. The discussion below therefore alternates between these two levels and revolves around three major subject matters that are interlinked in this context: discretion, implementation and legitimacy. Whereas discretion is addressed at length at a later stage, the concepts of implementation and legitimacy are further elaborated in the subsequent sections.

1.2 Discretion

EU law strives to unify or harmonise national laws. However, looking at directives, one of the EU's main legislative instruments, their provisions regularly provide Member States with the possibility to depart from EU rules. For instance, the EU aims to establish a common market for pyrotechnic articles meaning the free circulation of fireworks and other pyrotechnic products. And yet, despite the aim of one single market for pyrotechnic articles throughout the EU, Member States are allowed to restrict the possession, use, and / or the sale to the general public of specific categories of fireworks and other pyrotechnic articles.[2] In another case, not dealing with the market access of goods but with the access of non-EU third country nationals to Member States' territories for the purpose of highly-skilled employment, harmonisation at a minimum level leaves the possibility for Member States to continue applying their own national rules alongside European ones.[3] The flexibility that Member States apparently have in implementing EU rules, and which is a fundamental characteristic of European Union (EU) directives, is known as discretion. Discretion takes centre stage in this

1 For the sake of clarity as well as consistency the term European Union (EU) is used throughout the dissertation, even if this includes reference to instruments of the legal framework of the former European Community (EC).

2 See Article 6(2) of Directive 2007/23/EC, in short: Pyrotechnic Articles Directive.

3 See Article 3(4) and 4(2) of Directive 2009/50/EC, in short: Blue Card Directive.

book. Discretion does, however, not only flow from the directive text. Directives grant discretion by design in accordance with the EU treaty: directives prescribe the result that Member States have to achieve; how they do so, i.e. by means of which forms and methods, is up to them.[4]

With a view to the general legal context discretion has, in fact, been defined in various ways and found difficult to frame in a 'conclusive definition' (Brand, 2008: 218; see also Gil Ibañez, 1999: 199; Handler, 1992: 331). In the context of implementation it can be understood as providing a range of options to the authority in charge, all of them being compatible with the law to be implemented (see e.g. Calvert et al., 1989; Dimitrova and Steunenberg, 2000; Franchino, 2004; Thomson, 2010). But views on discretion differ in legal as well as political studies, especially with respect to the relevance and role it is supposed to have not only within an EU context but for legal systems more generally. This makes discretion a challenging concept but also one which is worthy of closer examination. This study particularly seeks to explore the role and effects of discretion within the context of EU and national decision-making processes regarding European directives. In doing so, it also takes into account insights from the study of discretion in broader national legal contexts.

The delegation of discretion from the legislature to the executive branch of government, meaning the administrative apparatus of the state, has to be seen in the light of modern legal systems that seek to cope with the amount of tasks they have to fulfil. To this end, legislatures do not produce detailed legislation but leave the elaboration of rules to the administration that has to apply them in practice. Hence, the importance of discretion for both legislature and administration: while the former grants discretion to achieve swift and efficient law-making, the latter needs flexibility for the implementation of generally formulated rules into specific contexts (e.g. Bakker and Van Waarden, 1999). The delegation of discretion from the legislature to the administration is not only evident from the development of the liberal constitutional state to the social welfare state. It is also evident at the EU level. The history of the EU has also been marked by a growth of competencies and scope of new policies which both have been described as 'one of the most striking features in the development of Western European Politics in the last 15 years' (Dimitrova and Steunenberg, 2000: 202).This development has progressed further ever since. Growing economic and monetary integration affecting also other fields (e.g. consumer protection, health care) has led to an increasing reliance on administration. Some therefore conceive the EU to be a regulatory state (Majone 1997; 2002; 2005), while others refer to it as a system of multi-level jurisdictions or multi-level governance (Hooghe and Marks, 2001) where besides public actors, unelected actors are also involved in the preparation and application of EU rules (Vibert, 2007: 129-143; Corkin, 2013). The role of independent (unelected) regulatory authori-

4 Article 288 TFEU, formerly Article 249 TEC.

ties and the administration in particular, has been described with regard to both national and EU contexts, as boiling down to a 'fourth branch of government' (Vibert, 2007: 2; Corkin, 2013: 642). Leaving aside whether or not this is an apt description of reality, it does in any case make clear that administrative (discretionary) rule-making is an integral part of modern legal systems, which contributes to ensuring the latter's proper functioning.

1.2.1 Discretion in implementation

The strong reliance of the EU on its own as well as Member States' administrations in particular is well exemplified by the preparation and application of EU law. EU directives are a case in point. While they are prepared and adopted at the EU level, their (formal) implementation (and thus also the use of the flexibility and hence discretion they include) is however, largely left to Member States' administrations and occasionally, where implementation concerns for instance technical issues, to the European Commission (hereafter also Commission).[5] In contrast to regulations, however, directives are not directly applicable but have to be put into effect, meaning that Member States have to incorporate their provisions into national law in line with the principle of sincere cooperation.[6] It is at this stage where discretion comes into play, being linked up with the concept of delegation. The EU legislature delegates decision-making competences, including discretion, to national actors for the purpose of the implementation and application of its rules.

In this dissertation the national implementation of EU directives is conceived to be a three-stage process: formal or legal implementation often referred to as transposition is followed by the practical application and enforcement of the directives' requirements (Prechal, 2005; Mastenbroek, 2007). Transposition, the focus of the present study, in several Member States rests primarily with the administration, usually national ministries (Falkner et al., 2005: 324; Steunenberg and Voermans, 2006; Vandamme, 2008). They are in charge of drafting transposition legislation, secondary and tertiary legal acts. In other words, transposition is largely dealt with as an administrative matter. In the Netherlands, nearly 90% of transposition legislation comes into being without the involvement of national Parliament (Bovens and Yesilkagit, 2010). In Member States such as Denmark, France, Spain, the United Kingdom, and Austria, so-called delegated or secondary legislation is used as a primary means to transpose EU directives.[7]

---

5 According to the principal of conferral Article 5(2) TEU and, as concerns the role of the European Commission in implementation, Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU). See Hofmann et al., 2011, pp. 239-241.

6 Cf. Article 4(3) TEU. See Van der Burg and Voermans (2015), pp. 71-72.

7 This is reflected by the following figures indicating the percentage share of delegated legislation in the overall number of transposition legislation: for Denmark (85%), Spain (84%), United Kingdom (80-90%) and France (60%), see Steunenberg and Voermans, 2005, and for Austria (around 60%), see Müller et al. (2010).

This implies a marginal role of national parliaments (Steunenberg and Voermans, 2005; 2006; Müller et al., 2010).

As mentioned in passing, the implementation of EU directives can, alongside the Member States, involve unelected bodies, most notably the European Commission. From a constitutional law perspective, vesting considerable discretionary powers in the executive (administration) – be it at the EU or national levels – may give cause for concern. The prevalence of administrative rule-making instead of legislative decision-making for transposition purposes appears to be in conflict with the concept of separation of powers applicable in the context of nation-states and its equivalent at the EU level, the principle of institutional balance of powers.[8] Both depart from the basic idea that branches of government and EU institutions respectively, have to act within the limits of their competences. In other words, with a view to the present context, while laws are made by the legislature, the role of the executive is confined to the application and execution of these laws.[9]

Regarding the EU, Jacqué has noted that 'the distribution of the powers between the EU institutions reflects the place that the authors of the treaties wanted to grant to each one of them in the exercise of the missions that they entrusted to the Community' (2004: 384).[10] That being said, the principle of institutional balance of powers may be upset, where broad discretion is given to the European Commission and, above all, other bodies than those established by the EU Treaties. The principle of institutional balance has been established and endorsed by the European Court of Justice in a range of judgments (Meroni, Romano and ESMA judgments).[11] While these judgments do not reflect the Court's resistance to delegation, they do show its attempts to limit especially broad delegation. Under the Treaty of Lisbon, this is also reflected in the attempt to more clearly circumscribe the Commission's spheres of competences by means of a new delegation regime (Voermans, 2011; Hardacre and Kaeding, 2013).

Turning to the national level, in light of the concept of separation of powers, at least two aspects seem to be at odds with it. To begin with, both national and EU law include legally-binding norms that may essentially affect those that have to obey them. If considerable discretion is available to administrative actors for the application of legal norms, it is just a short step from administrative rule-making to quasi-legislative rule-making (Koch, 1986: 483-484; Möllers, 2013: 84). As noted by Corkin, the detailed implementation of (discretionary) EU law, such as directives, is no mere admin-

8 According to Hofmann et al. a stringent separation of powers does not apply to the institutional structure of the EU. But the idea of a balance between decision-making institutions is implied by the principle of institutional balance of powers which takes the role of a part-substitute or an 'EU version' of the separation of powers concept. See Hofmann et al., 2011, p. 149 and 197.

9 The judiciary, as a third power, checks the legislature and interprets the law.

10 See in this context Article 7(1) TEC, now 13(1) TFEU.

11 Mere mentioning of these judgments shall suffice here, as they are addressed in the next chapter.

istrative or executive task (Corkin, 2013: 645). Hence, the strong reliance on state administration and its uses of discretion in decision-making seem to be in disharmony with a neat or well-balanced division of competences between the legislative and executive branches of government. Furthermore, discretion vested in the hands of actors without direct democratic mandate, does not seem to be in keeping with other principles upon which modern democratic states are based such as the rule of law, legality, legal certainty and justice. It may for instance be feared that subjective elements creep into administrative decision-making processes leading to arbitrary rule-making, administrative misconduct and eventually the deficient application of law. In other words, discretion may have negative implications for the legitimacy of administrative decision-making and outcomes. Second, and with specific regard to the transposition of EU directives, the lack of a more prominent role of the national parliament in the creation of transposition legislation and the use of discretion available to this end can be seen as being problematic for legitimacy and the separation of powers. This is especially the case where EU directives address more fundamental issues that affect citizens at large and that therefore require greater involvement of Parliament. In the Netherlands, being one of the Member States where the principle of supremacy of the legislature is enshrined in the national constitution, ideas about a more far-reaching use of secondary legislation and hence broad delegation from the legislature to the administration (ministries), was found by the Dutch Parliament to be difficult to reconcile with the legislature's supremacy. A corresponding proposal had been made by the Dutch Government with the aim of speeding up the transposition of EU directives. Due to resistance from Parliament, these plans, however, did not materialise (Steunenberg and Voermans, 2006: 15-18; Clement, 2007; Vandamme and Prechal, 2007: 44-48).

In view of the above, it becomes evident that the application of law and the transposition of EU directives in particular, raise vital legal and constitutional questions that focus on the exercise of decision-making powers and the discretion thereby available. Above all, the use of discretion triggers questions of legitimacy. For instance, questions such as how to implement a directive and whether or not and how to use discretionary provisions should not be left only to administrative actors but also national parliament, in any case where EU directives have crucial implications for those they address.

The link between discretion and legitimacy is evident in yet another way. In the last couple of years, the implementation of EU law has triggered political and academic debate. While legislative output has been high, implementation has been deficient in various fields, including the environment (Jordan, 1999; Börzel, 2006; Lenschow, 2010) and transport policy (Héritier et al., 2001; Kaeding, 2007). The transposition of EU directives by Member States needs to be correct, complete and timely (Eijlander and Voermans, 2000: 267-268). Due to its limited resources, the European Commission focuses on the timeliness of transposition which appears to be a problem in various Member States (Kaeding, 2007; König and Luetgert,

2008). Deficits in implementation are not confined to economically weaker Member States that lack administrative capacity or (for other reasons) fail to properly fulfil their implementation obligation. Also the founding Member States of what is nowadays the European Union have shown to suffer from implementation problems in forms of transposition delay – such as the Netherlands which can reasonably be assumed to have available the necessary resources and capacities and, additionally, has the image of being a rather progressive Member State in shaping and implementing EU law (Steunenberg and Voermans, 2006: 15-23; Mastenbroek 2003; 2007). Problematic and deficient implementation, for instance in the area of the internal market, consumer law or the environment, has been associated with the instrument of the directive (Jordan, 1999; Thomson, 2007; Steunenberg and Rhinard, 2010; Twigg-Flesner, 2011, 2012). Thomson notes that '[w]here directives are intended to eradicate differences in market rules across Europe, failures and delays in compliance cause uncertainty and transaction costs for market participants' (Thomson, 2007: 987). Participants in the political and academic debate have been at pains to explain the reasons for deficient transposition (*Parliamentary Papers II 2007/08*, 31498, no. 1-2; Kaeding, 2006; Mastenbroek, 2003; 2007; Steunenberg, 2006). Discretion in this context has been identified as one factor that affects transposition (see for instance Kaeding, 2008; Steunenberg and Toshkov, 2009). While a few scholars believe that in providing flexibility, discretion may facilitate transposition and therefore compliance with EU directives (e.g. Knill and Lenschow, 1998; Thomson, 2007; Zhelazykova and Torenvliet, 2011), others take the view that discretion impedes this process (Kaeding, 2007, 2008; Thomson et al., 2007).

Interestingly, both negative and positive effects have been ascribed to directives with higher margins of discretion. What's more, empirical results have shown that discretion contributes to transposition delay and therefore non-compliance (Thomson et al., 2007; Steunenberg and Kaeding, 2009). While the causes are manifold, it is opined that deficient transposition can put the whole implementation of EU law at risk (Mastenbroek, 2007; Steunenberg and Toshkov, 2009; Steunenberg and Rhinard, 2010). Steunenberg and Rhinard bring the discussion to a point: '[A] directive will not be fully integrated into the national legal order, and the acquis communautaire risks becoming fragmented and unevenly applied' (2010: 495). What's more, not putting EU directives correctly into effect also undermines the legitimacy of EU directives within national law (Haverland et al., 2011: 266).

1.3 EU legitimacy debate

One way to understand the consequences of the implementation deficit in terms of legitimacy is to view the EU's legitimacy as having an input and output side (Scharpf, 1999). If EU law is not properly implemented this can be seen to undermine the legitimacy of the EU because it reduces both input

and output legitimacy. The concept of legitimacy, including the two output and input dimensions, is addressed in more detail below and a brief explanation may therefore suffice at this stage. From the output side perspective, deficient implementation of EU law minimises the EU's overall effectiveness and problem-solving capacity. After all, the point of departure of EU action is to find a common solution for policy issues that Member States have to face but cannot tackle on their own. If solutions are, however, not properly applied, the principle of uniform application is undermined and therefore the EU's overall objective of aligning national legal orders with the EU's acquis in the area of the internal market but also others. This may have negative consequences not only in economic but also legal terms, damaging Member States as well as individual citizens: market disruptions as well as the exclusion of citizens from rights to which they are, according to EU law, actually entitled (Van der Burg and Voermans, 2015: 153-154). As a consequence, output legitimacy is at stake.

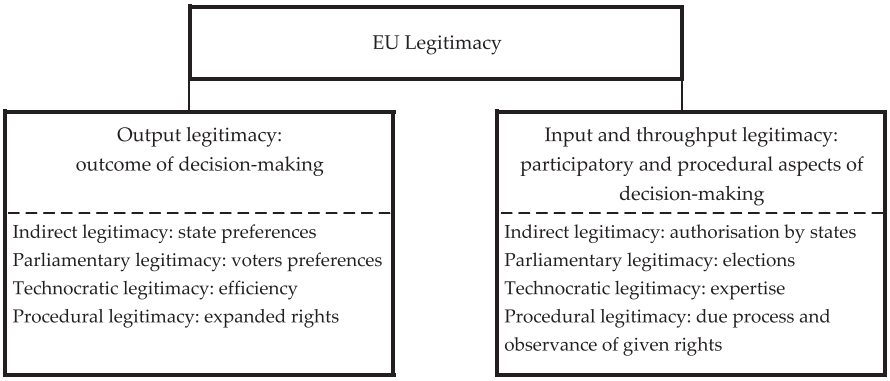
Moreover, implementation deficits also indicate that there are problems on the input side of legitimacy. For EU law to be complied with, more is needed than legitimation through the approval of Member States' governments in the Council of Ministers (hereafter also Council). In other words, more is needed to legitimise EU law than indirect legitimacy derived from the legitimacy of the national governments (Beetham and Lord, 1998, Lord and Beetham, 2001; Lord and Magnette, 2004). At the national levels various actors have to apply, enforce and supervise EU rules in practice. But if these actors have only insufficiently been involved, they may feel detached from EU decision-making outcomes and therefore obstruct the proper application of EU rules. This makes evident that justifying EU rules in terms of indirect legitimacy or technocratic legitimacy does not suffice. Technocratic legitimacy puts emphasis on government performance and therefore on the output side, the source of legitimation of political authority lying in the expertise of unelected office-holders and professionals involved in EU decision-making (Beetham and Lord, 1998; Lord and Magnette, 2004). This source of legitimation proves, however, particularly insufficient where EU decision-making outcomes have not merely a regulatory but also a redistributive character, meaning that EU law implies the reallocation of benefits and burdens (Beetham and Lord, 2001). In other words, next to advantages, EU law may also bring disadvantages which affect the wider public and therefore necessitate democratic legitimation from the input side, i.e. through national parliaments, stakeholders, and citizen groups.

In fact, all these aspects can be linked up with the EU's output and input legitimacy problems on a much wider scale, being clearly illustrated by the recent challenges faced by the EU. These relate to the 'no' votes of the French and Dutch to the Constitutional Treaty in 2005, and the 2008 Irish rejection of the Lisbon Treaty (Curtin, 2009: 294-296; Schmidt, 2009: 18) and Euroscepticism more generally, which seems to suggest that national citizens feel inadequately represented in supranational decision-making. Furthermore, the recent Euro and refugee crises make problems on the

output side of these processes obvious. Lacking understanding of how EU institutions work and what the common objectives and implications of EU law-making are also seem to play a role. These may render it difficult for national citizens to become politically more attached to the EU and represent a hurdle for the development of an EU identity based on a shared interest and set of values (Scharpf, 1997; Beetham and Lord, 1998: 33-58). This identity is, however, a crucial prerequisite for citizens' acceptance of political decisions taken at the EU level by majority rule. The missing EU identity and bond that is hence lacking between EU and national citizens is a shortcoming on the input side (Scharpf, 1997; 1999). It is also conceived to be a problem of the EU's social legitimacy which in contrast to its formal (legal) legitimacy, established by rules and procedures that are accepted by democratically legitimated Member States' governments, is far more fragile (Curtin, 2009: 283-284). Furthermore, EU policy processes and institutions are by no means a copy of the national democratic policy process, institutions and principles. Hence, if judged by these democratic standards, the EU does not score very well (Lord and Beetham, 1998; 2001; Thomassen and Schmitt, 2004; Føllesdal and Hix 2006). Both the Council of Ministers and the European Commission are not democratically elected bodies. The Commission, as 'guardian of the treaty' is an executive body which, however, also has legislative tasks by initiating proposals for EU law (Beetham and Lord, 1998; Føllesdal and Hix, 2006). As to EU decision-making in the Council, it has been criticised for its secrecy and even if the European Parliament has steadily gained more decision-making powers, compromises between Council and Parliament are at times struck in informal meetings (trilogues). This adds to doubts about the democratic credentials of EU legislation and decision-making, and emphasises, instead, the lacking access, transparency and accountability (Häge, 2007, 2013; Stie, 2013; Curtin, 2014).

It has been argued that EU law and policies do not derive their democratic legitimation from one prevalent legitimacy source as offered for instance through parliamentary legitimation. Instead, and in line with a pluralist view on democracy that arguably better matches the multi-level / multi-jurisdictional system embodied by the EU, democratic legitimation of its law and policies is based on elements built into the structural and procedural arrangements of the EU (Héritier, 1999). This is ideally complemented by the idea that legitimacy of the EU – its institutions and decision-making processes – rest on more than one legitimacy principle (Lord and Beetham, 1998; Lord and Magnette, 2004). Lord and Magnette (2004) identify four of these principles: indirect, parliamentary, technocratic and procedural legitimacy to which they refer as 'vectors' that should be understood as not being mutually exclusive but rather complementary.

Figure 1: Perspectives on EU legitimacy (dimensions and vectors)



While the output and input dimension of legitimacy – to which, as shown below, a throughput dimension can be added – are used to describe perspectives on legitimacy and its content on a more abstract level, the vector model addresses the content of the concept in more concrete terms. Conceiving legitimacy principles to be vectors which, additionally, can be described individually in terms of input and output legitimacy, the authors attempt to define EU legitimacy in greater detail and to distinguish the various perspectives on legitimacy which emphasise different vectors and dimensions. Figure 1 visualises the different perspectives on the legitimacy of the EU.

1.4 Research puzzle and questions

Bringing discretion back into play, it has been identified as a factor which is relevant to EU decision-making and the national transposition of EU directives, but also raises questions of legitimacy if vested in the hands of administrative decision-makers in charge of adopting national legislation intended to incorporate a directive into national law. This makes evident the connection between discretion and legitimacy. Ironically enough, scholars that look into the role of discretion in the implementation of EU directives hardly seem to pay attention to it. Nor does legitimacy itself loom large in implementation studies – besides a few exceptions (Mastenbroek, 2007; Rhinard and Rhinard, 2010; Börzel et al., 2012). On the whole, legitimacy seems to be rather missing in the literature on the implementation of European directives (Sverdrup, 2007). This is a striking fact considering that there has been a longstanding, persistent debate on the purported legitimacy deficit of the European Union to which transposition deficits apparently contribute.

While discretion is alleged to have negative implications for the transposition of EU directives and seems to be at odds with the principles of democratic legitimacy, the fact remains, that it is a fundamental character-

istic of directives. What's more, directives in some policy areas are the legislative instrument which is most frequently used by the EU to achieve its goals. Hence, there may be valuable reasons to think that discretion can play an important and positive role in the context at hand. Looking at discretion from the bright side, delegating discretion for the purpose of the application of law relieves legislatures from detailed law-making and provides implementing actors with the necessary flexibility to apply law in practice. With regard to the legal implementation of EU directives, the delegated implementation from the EU to national administrations as well as transposition by means of delegated legislation within domestic contexts appears to be necessary for both EU and national legislatures to cope properly with the large volume of tasks that negotiation and implementation processes of directives entail. In addition to that, it seems justified to ask how a more abstract-general directive provision should otherwise be applied in the various Member States with their specific and distinct legal-administrative contexts, if not by using available discretion to develop tailor-made decisions.

From the foregoing discussion, discretion emerges as a multi-facetted phenomenon which has triggered various reactions from scholars with regard to its role in the making and application of law. As aptly put by Brand when referring to debates in the legal studies: 'The concept of discretion is controversial, provoking passionate discourse in which it is either extolled or vigorously condemned' (2008: 218). Moreover, regarding the EU context, while discretion seems to be granted for good reasons, the national transposition of EU directives is found to potentially jeopardise this process. Thus, all in all, the role of discretion is not clear.

Notwithstanding this lack of clarity, one thing, however, is for certain: The diverging views on discretion are as puzzling as they are intriguing. What's more, the different interpretations of the role of discretion in legal systems, and in particular for the implementation of EU law, motivate further research on discretion within the context of the transposition of EU directives and their legitimacy within national law. In a nutshell, the study seeks to explain why and under what circumstances discretion is granted by the EU legislature and with what implications for both negotiations and national transposition processes of directives. With specific regard to national transposition, its aim is to clarify the circumstances under which discretion has facilitating or impeding effects on the process.

To this end my study focusses on the following research questions and subsequent questions.

RESEARCH QUESTIONS

1) What is the role of discretion in legislative decision-making and in the national transposition of European Union (EU) directives?
2) What is the relationship between discretion and legitimacy in the national transposition of EU directives?

SUBSEQUENT QUESTIONS

EU LEVEL
a) Under what circumstances is discretion granted from the EU legislature to national transposition actors?
b) How does discretion affect legislative decision-making on directives?

SUBSEQUENT QUESTIONS

NATIONAL LEVEL
a) How is discretion used in the national transposition of EU directives?
b) How does discretion affect the Dutch national transposition of EU directives?

Some of the questions relating to discretion that are presented here are not entirely new. They have been raised in similar ways within the context of national decision-making processes. In this regard, attempts have been made to explain why decision-making powers take discretionary forms and how discretionary power is exercised within state administration (Ringeling, 1978; Galligan, 1990). With respect to the national transposition of EU directives, however, these questions have not yet been addressed in the way I set out to do in this dissertation. In addition, the link between discretion and legitimacy within the context of the implementation of EU directives has to date been largely absent from academic debate. Therefore this study seeks to fill this gap.

Due to the various interpretations of the concept of legitimacy, one is indeed well-advised to clarify the content of the concept (dimensions, elements, principles) right from the start (Bokhorst, 2014: 22). Legitimacy is first and foremost conceived of as democratic legitimacy: EU and national decision-making regarding directives is legitimised by EU Member States which define themselves as liberal, representative democratic entities. Besides, the EU subscribes itself to the principles of representative and participatory democracy.[12] The object of legitimacy must also be made clear. Here, the focus is on the legitimacy of EU directives within national law. Transposition can be considered as legitimate if Member States meet their implementation obligations – i.e. timely and legally correct transposition. But there is more to the content of the concept and therefore it is addressed in more detail hereafter. In this regard, two remarks shall suffice. First, legitimacy is considered to be a multi-dimensional concept that has substantial and procedural aspects (Beetham, 1991; Majone, 1997: 159-163; Beetham and Lord, 1998; Lord and Magnette, 2004). Second, the discussion on legitimacy stands apart from the case study analyses in which the role of discretion

12 Article 10 and 11 of the Treaty on European Union (TEU) which aim to make the EU more accessible to citizens and achieve greater citizen participation in EU decision-making processes.

is empirically analysed. In other words, the aim is not to assess the legitimacy of the transposition cases addressed. Instead, a very modest approach is taken to legitimacy by focusing on the legitimacy of EU directives within national law more generally. The study thus reflects upon the legitimacy of process and outcome of national transposition, with a particular view to an alleged relationship between discretion and legitimacy. Examples from the case studies may, however, prove useful to illustrate points in this discussion.

This study furthermore shares the view of others (Bokhorst, 2014; Voermans et al., 2013) that the legitimacy of a political system or decision-making process cannot be expressed in quantitative terms. There seems little point in noting that the procedural legitimacy of the Dutch transposition of the EU Blue Card Directive was a legitimate process to the extent of 65%. Legitimacy can nevertheless be considered as a matter of degree. The degree of legitimacy can be assessed in both normative and empirical terms (Muntean, 2000). As is shown below, scholars have described legitimacy in qualitative terms by using approaches, models, and perspectives that are deemed suitable to assess legitimacy in a particular research context. This approach is also taken in this dissertation. The intention, however, is not to touch upon the big legitimacy issues that have been ascribed to individual EU bodies and decision-making processes in general or to offer solutions to legitimacy problems of the EU. After all, the dissertation's main concern is with the role of discretion in the national transposition of European directives. Regarding legitimacy, attention is instead paid to specific issues and implications for the political legitimacy of directives and related decision-making processes that result from the overall analysis.

Like Galligan (1990), my major concern is not only with the exercise of discretion in the implementation of law. By looking into the role of discretion, the objective is to find out for what reason it is incorporated into directives. As a consequence, the EU decision-making process on directives is also examined. Flexibility in the application of law is one argument presented in this regard but there may be others. For instance, it is reasonable to assume that besides a long-term function with regard to national implementation discretion has a more immediate function with regard to the negotiations on the directive under consideration. In addition, the study seeks to transcend the theoretical discussion on discretion by means of an empirical analysis (case study analysis) in which the role of discretion is assessed in order to substantiate theoretical claims about it.

Examining the role of discretion in both negotiations and formal implementation (transposition) of EU directives takes account of the latter's 'life cycle' which includes a range of activities that are carried out at both EU and national levels (Falkner et al., 2005; Kaeding, 2007). Or put in another way: national implementation constitutes part of a larger decision-making process (Falkner et al., 2005: 5-10; Kaeding, 2007; Voermans and Steunenberg, 2006), starting at the EU level with the preparation and formulation of the directive before it is incorporated into national law and applied in prac-

tice, enforced and supervised (Steunenberg Voermans, 2006: 8-10; Kaeding, 2007: 3-4). What's more, paying attention to both EU and national levels is in line with other implementation studies and other research on Europeanisation that looks into the question of how EU law and policies affect Member States.[13] EU negotiations and the national transposition of directives are thought to take place in mutually distinct decision-making arenas. These two arenas are characterised by their own dynamics, processes and actors which pursue different interests. Nevertheless, from a legal as well as political point of view both the EU and national systems are interrelated (Schwarze, 2001: 12; Corkin, 2013: 647). In this connection, it is argued with specific regard to EU negotiations, that these are shaped by Member States with a view to their own legal-administrative contexts into which a directive shall be implemented (Thomson, 2007, 2010, 2011; Thomson et al. 2007). Taking this aspect into account is vital in reflecting upon the legitimacy of EU directives in national law – and its link with discretion. The following aspects give impetus to this debate.

1.5 Legitimacy

Legitimacy is a concept which has been discussed widely and these debates reflect various ideas about the concept. On a more general note, legitimacy can be understood as an umbrella term for a variety of notions that are linked to the exercise of decision-making power and the reactions of those that have to obey the decisions made. As such legitimacy brings together substantive and procedural aspects. Procedural aspects for instance are linked to the transparency and fairness of decision-making procedures, and the accountability of decision-makers. Substantive aspects refer, for example, to the compatibility between decision-making outcomes on the one hand and interests and preferences of those affected by these outcomes on the other hand, but can also boil down to more basic notions of recognition, acceptance and support of decision-making power. From a legal point of view, for decision-making power to be legitimate and obeyed, legal principles such as the rule of law, legality and the separation of powers have to be followed when power is exercised. In addition, the exercise of power must respect fundamental rights and it must be possible to subject it to judicial review (Burkens et al., 2006: 16).

13 According to the more general understanding of the concept, Europeanisation refers to the EU's impact on politics and policy-making as well as its effects on processes, policies and institutions (assessed along the dimensions of policy, polity, and politics). See Börzel and Risse, 2003, Graziano and Vink, 2007 and Exadaktylos and Radaelli, 2009. In this study, the concept of Europeanisation is used to describe, and characterise the relationship between the EU and its Member States without, however, examining convergence of national law under the influence of EU law and policies.

Scholars of legitimacy have sought to bring more order into the debate by identifying different elements, levels, dimensions and vectors to describe the concept in a national as well as an EU-context (Beetham, 1991; Beetham and Lord, 1998; Majone; 1999; Lord and Magnette, 2004; Scharpf, 1999). One way to do so is the principles / vectors model proposed by Lord and Magnette (2004) that was mentioned above. Another way is suggested by Beetham and Lord (1998) who also discuss legitimacy with specific regard to the political system of the European Union. At the heart of their concept of legitimacy lie three elements: legality, normative justifiability and legitimation. The condition of legality is met if the acquisition and exercise of decision-making power within a political system is based on established rules. Normative justifiability deals with the political context of these rules. For rules to be accepted by those subjected to them they have to be justifiable on the basis of socially accepted beliefs about what is the rightful source of authority, and the proper objectives and means of governing. In other words, for a political system to be normatively justifiable, its subordinates must accept how rules are imposed to what ends and by what levels of authority. Hence, they should feel that decision-making power is exercised according to the right ends and procedures. Finally, legitimation entails that a decision-making authority is accepted with the explicit approval and confirmation of its subordinates and is recognised by other legitimate authorities (Beetham and Lord, 1998: 3-11). Alongside these elements, Beetham and Lord introduce three dimensions of legitimacy: democracy, identification and performance. Democracy pertains to structural aspects in the exercise of decision-making power like representation of the population and the separation of powers; identification points to the recognition by the people of the exertion of power but also relates to issues such as identity and citizenship. Performance, as a third dimension, finally refers to the question of whether the exercise of decision-making power serves the ends and purposes of a political system and reflects the effectiveness of its decision-making procedures (Beetham and Lord, 1998: 22-30; see also Beetham, 1991).

The merit of Beetham's and Lord's study is that they illustrate the multifacetted and multi-dimensional character of the concept of legitimacy. It is felt however, that for the purposes of this study, to conceptualise and examine legitimacy, the focus should be narrowed down from the legitimacy of a political system to the decision-making processes taking place within its framework. To this end, the concept of input, throughput and output legitimacy which has been introduced in system theory (Maytnz, 2010) and meanwhile further developed and applied (Scharpf, 1999; Schmidt, 2012; Curtin, 2009) is just as suitable. What's more, this concept is deemed particularly appropriate to show the link between discretion and legitimacy and to illustrate that discretion, contrary to expectations, can enhance the legitimacy of EU directives in national law.

1.5.1 Discretion and legitimacy

This concept of legitimacy takes into account that legitimacy can be described in substantial and procedural terms. Substantial aspects relate to output legitimacy and procedural aspects to throughput legitimacy. Input legitimacy largely addresses substantive aspects but is closely related to throughput legitimacy. Formulated in more catchy phrases, referring to Lincoln's idea of democracy, input legitimacy refers to 'government *by* the people'; output-oriented legitimacy refers to 'government *for* the people' (Scharpf, 1999; Curtin, 2009: 285; Mayntz, 2010; Schmidt, 2013). Along these lines, throughput legitimacy, finally, is connected to the idea of 'government *with* the people' (Schmidt, 2013: 2). If linked to Beetham's and Lord's concept, the input and throughput dimensions, in fact, tie in well with the level of identification and the output dimension with the level of performance. Democracy then represents the top level, being strengthened through decision-making that encompasses all three (input, throughput and output) dimensions.

Output, input and throughput dimensions can be used to describe and assess the legitimacy of law-making processes and their outcomes. Output legitimacy relates to the effectiveness of law-making, understood as the 'effectiveness for the people', in other words, how well law reflects the interest of the public at large and serves to solve a commonly identified problem. How can discretion be linked up with output legitimacy? Given the nature and content of an EU directive, Member States can meet EU requirements in whatever way they see fit (as long as they stay within the parameters of the directive). In other words, due to discretion Member States are enabled to incorporate EU rules while achieving the best possible fit with their domestic legal frameworks. Thus, since discretion embodies the necessary flexibility to apply law on the ground, it is assumed to enhance the effectiveness and problem-solving capacity of EU directives. This may boost legitimacy on the output side. Besides, as 'functional flexibility', discretion allows transposition actors to respond to sudden changes or unforeseen circumstances and therefore to transpose directives even in dynamic environments (Prechal and Van Roermund, 2008). Input legitimacy refers to the 'input participation by the people', indicating to what extent the public at large has been involved in the making of law done to reflect their interests (Scharpf, 1999). Participation is closely related to aspects of procedures. Thus, finally, throughput legitimacy refers to governance processes with the people, analysed in terms of their efficacy, accountability, transparency, inclusiveness and openness to interest consultation (Schmidt, 2012; Van Schooten, 1998; Voermans, 2011b). In this context, discretion can be a valuable tool in strengthening the 'communicative discourse', which is found to be lacking at the national level (Schmidt, 2004: 991-992). This kind of public discourse about EU law and its implications is seen as important in legitimising law (Van Schooten, 1998; Schmidt, 2004; Bovens; 2005; Scharpf, 2010; Voermans 2011b) and could be used to enhance both its input and throughput legitimacy.

The input and output dimensions of legitimacy, within the context of the EU, have received quite some attention from scholars in the fields of political science and public administration (Føllesdal, 2004; Thomassen and Schmitt 2004; Schmidt, 2012). They are thus particularly interested in aspects of public involvement and participation in decision-making as well as government capacity to properly address public concerns, in short, aspects of performance. Alongside these two dimensions, the throughput dimension of EU legitimacy has been given increasingly closer attention in academic debates (Curtain, 2009; Wimmel, 2009; Schmidt, 2012). This is possibly due, amongst other things, to politics and practice in Brussels and the European Commission's efforts in particular, which in accordance with EU Treaty objectives are targeted at strengthening transparency and accountability mechanisms through relevant initiatives, consultation and dialogue with organised civil society and representative associations within EU decision-making processes (European Commission, 2001; Héritier, 1999; Curtain, 2009: 287-289).

Figure 2: Legitimacy and discretion in the context of transposition

Legitimacy	Discretion
Output legitimacy: efficient decision-making *for* citizens	Contributing to the effectiveness and problem-solving capacity of EU directives in Member States
Input/throughput legitimacy: decision-making *by* citizens and just procedures *with* citizens	Contributing to the acceptance and support of the formal and practical implementation of EU directives in Member States

Legal scholars are also in particular concerned with procedural aspects of rule-making (Tyler, 1988; 1990) and therefore throughput legitimacy (Curtain, 2009: 287-300). In this respect, Tyler's work is particularly interesting from a compliance perspective. Looking into the question of why people obey the law he analyses legal procedures using the concept of 'procedural justice' as a touchstone for (throughput) legitimacy, assessing these procedures from a citizen point of view on the basis of procedural criteria such as the representation of parties affected by legal decision-making, impartiality of the decision-making authority and accuracy, to mention but a few (Tyler, 1988: 110-113). In this way Tyler seeks to substantiate the claim that people accept even unfavourable outcomes as long as they perceive the way these came into being as fair (Tyler, 1988). This has also been emphasised by scholars that suggest participatory and deliberative approaches to (administrative) rule-making in the implementation of (EU) law to enhance its democratic legitimacy (Lord and Beetham, 2001: 452-453; Hunold and Peters, 2004; Schmidt, 2004). Figure 2 visually summarises how discretion can contribute to increase the output, input and throughput legitimacy of EU law in the context of transposition.

1.6 Approach and research design

This book presents the outcome of a research project that is part of an interdisciplinary profile area which addresses questions on political legitimacy in different research contexts. In the present study a multidisciplinary as well as interdisciplinary approach is applied.

In the theoretical as well as methodological chapters an eclectic use is made of insights from political and legal studies while at the same time, these insights are combined to develop the analytical framework and research design to tackle the research questions of the study. The analytical framework is composed of sets of expectations which are used to assess the role of discretion in the negotiation and transposition processes of EU directives. Transposition deficits have more than one reason. Therefore a few other factors are taken into account, derived from literature study, which besides discretion may affect the incorporation of directives into national law. It has been emphasised in implementation research that the national implementation of EU directives should not be studied in isolation from the political context (Jordan, 1999; Falkner et al., 2005; Mastenbroek 2005; 2007; Toshkov, 2008). Mastenbroek for instance points out that implementation scholars have meanwhile shifted their attention from legal and administrative factors to domestic politics in explaining Member States' (non-) compliance (Mastenbroek, 2007: 6-7). This view is also adopted in this study. Hence, implementation and discretion are conceived of as phenomena that are much better understood if approached from both legal and political-institutional perspectives. Hence, the literature study informing the theoretical part of the book covers strands of both disciplines. Legal research includes socio-legal studies as well as constitutional, (Dutch) administrative and European law studies. As for the socio-legal perspectives discussed use was made of Anglo-American literature on discretion which has considerably contributed to the treatment of the concept.

They were reviewed alongside political science and public administration research, and above all studies on legislative decision-making processes and implementation of EU law. Hence, an attempt is made to build a bridge between these areas of literature in the study of discretion offered here. In my view insights from both legal and political studies taken together can make a valuable contribution to a better understanding of the role of discretion in this particular context.

The analytical framework which emerges from the theoretical discussion is subsequently applied in the empirical analysis including six directives which address different policy areas and issues and vary regarding their margins of discretion. These directives are analysed with regard to the process of EU decision-making that brought them into being and the subsequent national transposition processes carried out in the Netherlands with the ultimate aim to elucidate the role of discretion in each of these processes. The six individual cases are complemented by three paired comparisons. Each comparison includes a pair of directives that grant discretion by differ-

ent degrees (small versus large). Variation of margins of discretion is necessary to take into account the fact that discretion is found to affect transposition differently and that different effects are ascribed mainly to directives that have a higher discretion margin. Another useful variation which is considered in shedding light on the relationship between discretion and transposition outcome pertains to the policy areas addressed including consumer protection, the environment and justice and home affairs with migration as a specific sub-domain. In short, variation in this respect stems from the idea that the relevance and role of discretion differ among policy areas depending on the scope of supranational (EU) versus intergovernmental (Member State) influence in a particular area. This is explained with a view to competence distribution according to the EU's pillar structure.[14]As a consequence, consumer protection and environmental directives are expected to imply higher harmonisation levels, therefore leaving Member States with less discretion for implementation. This is in contrast to directives of the area of migration where EU influence is not yet as advanced. For the purpose of case (directive) selection and conducting the case study analyses, several other methods and techniques were applied. With the application of content analysis and the presentation of a codebook, this study offers a first albeit preliminary attempt to describe discretion in directives more thoroughly than has hitherto been the case.

Discretion has certainly received some academic attention but its role in the context of this study is not clear and the same applies to its link with legitimacy. Therefore the dissertation aims to provide a more in-depth approach to discretion to further extend knowledge on it and contribute to the proper assessment of its role. The approach adopted in the dissertation is qualitative in nature in that it seeks to provide a thorough understanding of discretion and the contexts where it comes into play: why is discretion used, under what circumstances and with what effects for the transposition and legitimacy of EU directives at Member State level. In line with qualitative research, the empirical analysis is based on a smaller number of transposition cases. In addition to this, data gathering is carried out to provide a detailed and comprehensive view of the cases analysed, applying flexible methods and techniques such as semi-structured expert interviews, besides literature review and the analysis of political and legal documents. The study is exploratory in the sense that it also seeks to look into discretion from a different perspective than has so far been applied. As pointed out above, discretion is not necessarily negative for legal systems. It is, as rightly pointed out by Möllers, a result of a democratic decision-making process (Möllers, 2013: 100). And as argued in this book, discretion may

14 The Treaty of Maastricht (1993) divided the areas of EU legal activities into three pillars characterised by a different distribution of competences between the EU and its Member States. With the Treaty of Lisbon (2009) the pillar structure was abolished. A threefold division of competences into exclusive, shared and supporting competences came in its place, laid down in Articles 3, 4 and 6 of the TFEU.

positively affect both negotiations and transposition processes regarding directives and contribute to their legitimacy within national law. In other words, in this study an attempt is made to do more justice to the beneficial role which discretion is considered to play in modern legal systems, while nevertheless still taking a nuanced approach to the subject.

In the methodological chapters of the book the components of the research design shall be further elaborated. Developing a research design, however, requires choices to be made and these need some further explanation.

1.7 Scope of the study

Certain choices have been made pertaining to the time frame, country and policy areas covered by the empirical analysis. To allow for better comparison, the six directives addressed here all originate in the same period, 2007 to 2009; i.e. the period prior to the Treaty of Lisbon entering into force. Consequently, the EU legal context against which the directives emerged and had to be implemented formally was the same in all cases. From a pragmatic point of view, dealing with more recently adopted directives made it also more likely that the relevant transposition actors would still be available for interviews.

The book presents a single-country study. The negotiation and transposition analyses focus on the Netherlands. There are several reasons to examine the processes from the viewpoint of the Netherlands. First, the Netherlands provides an environment which brings together factors that are relevant for the research context at hand. The Dutch transposition performance has suffered from deficits despite the Netherlands' more general reputation as a frontrunner in some policy areas such as the environment and its overall good record in influencing and applying EU law. Second, unlike for instance Germany, the Dutch constitutional and administrative legal system does not seek to keep the use of discretion in administrative decision-making processes to a minimum but is relatively open towards both delegation and discretion. This is a relevant given if the use of discretion in transposition is to be looked into. Finally, even though directives are mostly transposed by state administrations, the Netherlands is one of those Member States where transposition may also involve national Parliament. This makes it possible to take into account a broader political-administrative context when addressing not only the effects of discretion on transposition but also its link with legitimacy.

Last, but not least, certain considerations have motivated the choice for the policy areas from which the six directives analysed are derived: consumer protection, environment and justice and home affairs / migration. If further divided by topic, these directives address the areas of product safety, waste and air pollution as well as legal and irregular migration. In contrast to other policy domains such as agriculture, all three policy areas

represent realms of EU activity where directives are the primary regulatory instruments as opposed to regulations. Hence, directives are not sporadically used but consistently play a relevant role as legislative instruments in these areas. This allows for more systematic findings to explain the link discretion has with each of the policy areas. What's more, as mentioned above, the three areas have been subjected to different degrees of EU influence. As shall be argued, this is a relevant aspect in examining the role of discretion in EU negotiation processes regarding directives. Moreover, in addressing six cases, I seek to ensure that the empirical analysis covers all relevant dimensions of the key factors of interest: directives with different margins of discretion (smaller vs. larger), cases of deficient and proper transposition, policy areas showing different scopes of EU impact. Finally, in examining two instead of only one directive from each policy area, I have sought to increase the reliability of my findings: the veracity of the alleged link between discretion and compliance (legitimacy) can be established beyond one transposition case.

1.8 Outline of the book

The book is organised along the following structure. The remainder of it is divided into a theoretical, methodological, empirical and concluding part. The theory chapter deals with the notion of discretion and how it has been addressed in legal and political scholarship. From these debates insights are derived that are considered relevant for the study of discretion within the context of EU negotiation and national implementation processes of directives. These insights inform the analytical framework which is developed to examine both EU negotiations and the national transposition processes regarding directives. How these processes are analysed empirically is explained in the methodological chapters that set out the main methods and techniques used in the book: content analysis and codebook application for case selection purposes as well as case study methodology and research including literature review, document research and expert interviews. The empirical part of the study comprises six individual case studies, each of them including the EU negotiation and national (Dutch) transposition processes regarding directives. This is followed by a paired comparison of negotiation and transposition cases to shed further light on the role of discretion. In the concluding chapter the research findings are summarised and discussed with regard to the research questions. In addition, outcomes are assessed in terms of their academic contribution and possible future lines of research are proposed.

2 Discretion in the legal sciences

2.1 Introduction

In this and the following chapters theoretical insights into the concept of discretion and its role in administrative and legislative decision-making processes are provided. It is argued that both legal and political science research provide perspectives and findings that are pertinent for the study of discretion in EU legislative decision-making and national implementation processes. How can discretion be identified in legislation and how is it perceived by legal scholars and political scientists? These are the relevant questions addressed in the subsequent sections. To this end, I examined different strands of legal literature, including administrative and constitutional law as well as the sociology of law. It should be noted that the resulting discussion draws for some part on the Anglo-American literature since this body of literature has strongly informed the discussion on discretion. At the same time, however, discretion is also discussed in this chapter with regard to the European and Dutch context to take into account those aspects that are pertinent for an understanding of the role of discretion in these settings.[1]

As for the study of discretion in the political sciences, in particular the literature on legislative decision-making processes in the EU and national contexts as well as research on the national implementation of European directives, transposition in particular, was reviewed. The discussion on discretion from the legal science perspectives aims to elaborate on the concept and presents different perceptions of it with the aim of contributing to a more general understanding of discretion. Insights into the study of discretion from the political science perspectives are used to derive expectations for the case study analyses in which the role of discretion within processes at the EU and national level regarding directives is examined.

2.2 The notion of discretion

This chapter commences by defining the term discretion in the general context of law as well as with regard to the Dutch and European law contexts. The remainder of this chapter focuses on the legal discourse on discretion to highlight specific features which are deemed important for the later empirical analyses of discretion.

---

1 For the same reason and due to the case studies' focus on the Netherlands, the use of discretion within the Dutch legal context is addressed in more detail in chapter 5.

Unlike political scientists who are mainly interested in quantifying discretion (in legislation) and its effects taking into account the political and institutional circumstances under which it is granted, reflecting upon the meaning of discretion is a major concern for legal scholars. The resulting plethora of definitions, in the legal sciences, seems to indicate the difficulty that has been ascribed to this exercise (Hawkins, 1992; Gil Ibáñez, 1999; Brand, 2008). One reason is, as Prechal suggests, that discretion is 'always subject to interpretation' (2005: 248). The various interpretations suggested by scholars, however, overlap each other to some extent which makes it possible to arrive at an overall idea of what discretion means.

In constitutional theory, democratic legal systems like states are governed by the rule of law and the principle of legality, which is closely connected with it. Taken together, they shall guarantee that government action does not interfere with the freedom of the individual. The rule of law addresses government and citizens alike: both shall not violate the law. Furthermore the principle implies that the government is not above the law but bound by it. The principle of legality requires that the exercise of governmental powers has an explicit legal basis (Van Ommeren, 2010). Another fundamental element in democratic theory is the concept of separation of powers which is based on the idea of the trias politica[2]: the clear separation of the three basic functions of government, the legislative, judicial, and executive shall preclude the arbitrary exercise of power and ensure neutrality and impartiality of the government vis-à-vis its citizens (Burkens et al., 2006: 16-19). The understanding of the role of the administration as well as discretion is influenced by this context. Consequently, discretion is conceived as part of a legal competence which is delegated from the legislature to administrative authorities. The legal competence may also be delegated from one legislative body to another one such as in the case of EU directives where the EU legislature transfers decision-making powers to Member States for the purposes of formal and practical implementation. In a national context such as in Dutch legal doctrine these possibilities appear as follows: Next to the legislative competence which includes the making of law addressed to a wider public, the delegated legal competence may also imply that an administrative authority has the competence to make rules that either apply in general or individual cases (Eijlander and Voermans, 2000).[3]

Being conceived as part of a legal competence, discretion does not seem to be problematic for the principle of legality. After all, the delegation of discretionary decision-making powers to administrative actors is legally grounded and results from a democratic decision-making process (Möllers,

2 The idea of the trias politica was decisively shaped by Locke in his Two Treaties of Government (1690) and Montesquieu in De l'esprit des lois (1748).

3 The corresponding distinction in Dutch law is made between 'besluit' and 'beschikking', the former pertaining to an administrative decision applying in general cases, the latter representing an administrative decision having individual application.

2013: 100). Administrative discretion may, however, be in tension with the concept of separation of powers, especially where administrative rule-making has taken on an important role, turning in fact, into quasi-legislative rule-making. This may happen in today's national welfare states where governments, in carrying out the multitude of public policy tasks, rely on various actors. Above all, this concerns the administration which, additionally, may be linked up to other public institutions and private actors in decision-making. Strong reliance on the administration and the delegation of (broad) discretionary competences[4] to corresponding actors is thus necessary for the government to remain capable of acting. In this way, however, the administration gets increasingly involved in the interpretation and application of substantial parts of law (legal norms) which, in principle, should be the primary task of the legislator. Put differently, legislative and executive activities get intermeshed. Seen in this light, discretion vested in the administration is not easily reconcilable with a neat division of the legislative and executive branches of government as implied by the concept of separation of powers. This has been identified as problematic for the legitimacy of democratic states (Burkens et al., 2006: 32-33). In parallel to that, at the EU level, regulatory processes may tie actors from within the EU administration as well as independent regulatory agencies into discretionary decision-making. These discretionary decision-making processes can exceed mere technical subject matters and touch upon more fundamental issues that in line with democratic standards should be addressed by the legislature. Also here it becomes evident that the delegation of discretionary competences to actors without direct democratic mandate and non-majoritarian institutions[5] does not sit happily with the classical separation-of-powers-doctrine and raises questions of legitimacy due to lacking accountability and insufficient interest representation (Majone, 1997; 1998; 1999; Scharpf, 1997; Lord and Beetham, 2001).

Turning to attempts to define discretion, it becomes evident that discretion is not only embedded in legal systems but also constrained by them. Discretion is for instance defined as 'the room for choice left to the decision-maker by some higher ranking source or authority' (Carranta, 2008) or 'as the space, as it were, between legal rules in which legal actors may exercise choice' (Hawkins, 1992: 11). With regard to European directives, discretion is taken to denote 'the latitude on the part of the Member States to act according to their own judgment, leaving them a number of choices as to what they will do, while it is lawful to choose any of them' (Prechal, 2005:

4 The terms 'discretionary (decision-making) competences' and 'discretionary powers' are used interchangeably.

5 Majone (1997) considers two concepts of democracy: majoritarian and non-majoritarian democracy. The former emphasises decision-making and control by majority, whereas according to the latter non-majoritarian concept the rule of the majority is limited because decision-making powers are conferred upon officials with only little accountability to those affected by their decisions.

313). This particular leeway granted by EU directives is understood, in this study, by the term 'legislative discretion'.

Socio-legal scholars do not necessarily question the definition of discretion as part of a legal competence. However, they think of discretion rather as part of decision-making. In their view discretionary decision-making is characterised by choice and (personal) interpretation or judgment of the decision-maker. Galligan's notion of discretion provides a good example. He describes discretion as having 'a sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment' (Galligan, 1990: 8). Moreover, socio-legal scholars think about the relevance of discretion for the law believing that it has certain functions to fulfil in legal systems. At the same time they also argue that discretion should not only be studied in a legal but also in relation to its social context (Galligan, 1990; 1997; Hawkins, 1992; Lacey, 1992).

What the various views have in common is to think about discretion in terms of restrictions – be it legal or, as socio-legal scholars like to emphasise, social ones. Hence, there should be no absolute discretion. Rather, discretion is considered as being granted in relative terms in decision-making contexts – that is in relationship to the constraints imposed on it (Hawkins, 1992). In this regard, Hofmann et al. use the notion of a spectrum in arguing that legal competences are neither completely bound nor pre-determined nor do they provide unrestricted decision-making competence. Legal competences grant discretion by various degrees (Hofmann et al., 2011: 492-493). As will be shown below, European directives are a case in point in this regard. With specific regard to the EU context, discretionary powers, implied by a legal competence, need to be based on a delegation granted by provisions of primary or secondary legislation (EU treaties, directives). Even seemingly open-ended and broad delegations are subjected to limitations by a legal framework of substantive and procedural principles and rules (Hofmann et al., 2011: 492). The case law of the European Court of Justice had a decisive influence on approaches to the delegation of discretionary competences in EU legislative decision-making procedures. Accommodating the necessity of delegation for regulatory purposes has gone hand in hand with attempts to control the exercise of it. Most prominently, the Meroni-doctrine of non-delegation[6] implied that the conferral of broad discretionary powers on a body other than the EC Commission was incompatible with the treaty, putting the institutional balance of power at stake. The delegation of discretionary powers should therefore be confined to technical details and was restricted by further criteria. The Court's strict approach, also becoming evident in his Romano judgment,[7] has meanwhile been tempered as shown in

6 This doctrine is named after the 1958 Meroni-judgments of the Court of Justice: CJEC 13 June 1958 C-9/56 [1958] ECR 133 (Meroni I) and CJEC 13 June 1958 C-10/56 [1958] ECR 157 (Meroni II).

7 See case 98/80, Romano v Institut National d' Assurance Maladie-Invalidité [1981] ECR 1241.

its recent ESMA judgment.[8] From this judgment it follows that the delegation of discretionary competences for the purpose of taking legally binding decisions to other bodies than the EU Commission is possible under specific conditions, and in any case if tasks are precisely and narrowly defined (Van der Burg and Voermans, 2015: 45-48).

The foregoing aspects do not change the fact that the conferral of discretionary powers upon non-elected actors within legislative decision-making processes is not something that stands apart from law but is rooted and takes shape within the context of a legal system. For the purposes of the present study the notion of discretion within the Dutch and particularly European Union legal context are of high relevance.

2.2.1 Sources and terminology

In the next sections discretion is addressed in specific contexts by dealing first with discretion in the Dutch legal setting. It then turns to the role of discretion within the context of EU law. The discussion shall serve to introduce the legal sources of discretion and terminology used to describe it with regard to both national and EU levels.

2.2.1.1 Discretion in Dutch law

In Dutch administrative law competences delegated from the legislature to the administration for the purpose of rule-making to elaborate legislation can be bound or unbound depending on the way they are established by law. The delegation of these competences has a legal foundation which is provided by the Dutch Constitution or parliamentary acts.[9] Relatively unbound competences are discretionary competences. In Dutch administrative law there is, however, no term used that uniquely relates to administrative leeway implied by discretionary competences. Instead, in referring to it, inconsistent use is made of the two terms 'free discretion' – meaning 'freedom to decide what policy shall be pursued – and 'scope for appraisal'

8 See case C-270/12, United Kingdom v Parliament and Council (ESMA case). Judgment of the Court (Grand Chamber) of 22 January 2014.

9 For the sake of precision, whereas the transfer of competences based on parliamentary acts other than the Constitution, is denoted as 'delegation', the transfer of competences based on the Dutch constitution is referred to as 'attribution' (in Dutch: attributie). The transfer of competences follows along the lines of the principle of supremacy of the legislature. With regard to the transposition of EU directives into Dutch law this means that essential elements of the EU measure (such as rules on its scope or key legal norms that a European directive entails) shall be incorporated by means of formal law and must not be transposed at lower government levels. Cf. Eijlander and Voermans, 2000, pp. 277-278; see also Van der Burg and Voermans, 2015, pp. 45-48.

(Schwarze, 2006: 291).[10] A distinction, however, is made in practice and relates to two different aspects that concern the use of competences delegated from the legislature to the administration (see table 1).

Table 1: Discretion in Dutch administrative law

Scope of appraisal and freedom of assessment
whether or not a legal competence is applied, decision on *circumstances of application*
Freedom to decide what policy should be addressed
how to use the legal competence, decision on *content of competence*

First, the term 'scope for appraisal' addresses the situation in which the administrative authority has to make a decision and is free to assess if the conditions for making this decision, which are provided by law, are fulfilled. Hence, the 'scope for appraisal' centres on the 'whether or not' question. The scope for appraisal may be wide or narrow, depending on how precise the conditions are determined by law. A wider scope for appraisal is available and therefore more discretionary leeway for the administration in assessing whether or not the conditions are fulfilled if these conditions are rather unspecified. In this case the legislator may have acted deliberately: deliberate discretion in assessing conditions of applicability of a legal competence is then captured by the term 'freedom of assessment'.[11] Since the legislator is supposed to have acted intentionally, the scope of judicial review of the administrative decision can only be limited (Van Wijk et al., 2008: 149-150).

In a second step, hence once the question relating to the applicability of the competence has been cleared up, the issue of how to use the legal competence becomes relevant (De Haan et.al, 1996: 246): this centres on the 'how'- question and is related to the content of the legal competence. If delegation is broad because the content of the competence are not prescribed in detail, 'free discretion' is provided. The limited scope of judicial review of administrative decisions applies also in this case (Van Wijk et al., 2008: 148).

10 'Free discretion' should be understood as equivalent of the Dutch terms 'beleidsvrijheid' or 'beleidsruimte' and 'scope for appraisal' as equivalent of 'beoordelingsruimte '. In this regard, it is interesting to note that inconsistent use in terminology that refers to discretion does also occur at the European level where the European Court of Justice uses 'discretion' alongside other expressions such as 'margin of appreciation' or 'liberty to decide' to refer to the same phenomenon. Cf. Brand, 2008, pp. 218-219. Also Prechal points out that there is no consistent use of terms. Cf. Prechal, 2005, p. 313. In Van Roermund's view discretion functions as an umbrella term under which even different phenomena are gathered. Cf. Van Roermund, 2008, pp. 316-320.

11 Hence, the authority's scope for appraisal ('beoordelingsruimte') is identical with 'freedom of assessment' ('beoordelingsvrijheid').

Schwarze points out that discretionary decision-making can, however, be limited (2006: 291-293). For instance, even if a legal concept is not further specified but it can nevertheless be assumed that it is clear to the administrative authority what it entails; hardly any discretion will be available to the latter. A different situation applies, on the other hand, if undefined legal concepts require the weighing of interests of the parties involved. Administrative discretion may then be exercised. By means of example, Schwarze refers to the Dutch housing legislation which uses the notion of 'general needs'. It requires from the administration an interest consideration, and hence the use of discretion. Schwarze furthermore notes that administrative actors like majors are provided with discretion more explicitly through permissions, indicated in national legislation by 'may-clauses' or by explicit conferral of decision-making competences upon these actors ('to be determined by x'). In case that a legal competence is delegated without any further conditions limiting its scope, it is considered to leave both 'freedom of assessment' (beoordelingsvrijheid) and 'free discretion' (beleidsvrijheid) – hence, the two coincide (Van Wijk et al., 2008).[12] However, this does not imply that discretionary leeway is absolute. It is, in fact, bound by the implementing rules and general principles of sound administration.[13] In addition, and in line with the so-called prohibition against détournement de pouvoir and the principle of motivation, administrative actors have to ensure that discretion is not used for other purposes than those laid down by the law. Moreover, they have to motivate their decisions (Schwarze, 2006: 292).

This short outline of the way the concept of discretion is expressed in Dutch administrative law hints at the fact that discretion varies among pieces of legislation and that taking a closer look at how legislation is formulated may serve to assess if more or less discretion is provided. It gives, thus, a little foretaste of the approach taken in this dissertation to determine margins of discretion in European directives. From a constitutional law perspective, it should finally be noted that national legal systems have different approaches to discretion exercised by administrative authorities. This is a relevant point since it suggests that the national legal context matters in determining how discretion is used and therefore also how much discretion may be exercised.

In dealing with the question of how administrative conduct and discretion are treated within national legal systems, scholars point first and foremost to legal constraints such as judicial review (Schwarze, 2006; Brand,

12 Translations, however, differ. In Prechal and Van Roermund, for instance, the terms 'power of appraisal' and 'discretionary power' are mentioned as equivalents of 'beoordelingsvrijheid and 'beleidsvrijheid'. See Prechal and Van Roermund, 2008, p. 13.

13 The term used in the Dutch legal system is 'beginselen van behoorlijk bestuur'. Examples refer to the statement of reasons for an administration decision, and, from the viewpoint of the public, the right to be heard and the right to access the file that is relevant to their case, to mention a few. See Schwarze (2006).

2008; Caranta, 2008; Möllers, 2013). Brand makes in this regard the relevant observation that '[t]he differences in the views on the desirability and scope of administrative freedom […] can be traced back to the constitutional outline of a legal system' (2008: 226). In this connection, discretion has been linked to the concept of separation of powers (Vibert, 2007; Carolan, 2009; Hofmann et al., 2011; Möllers, 2013). The idea which connects the two concepts is that decisions informed by non-legal expertise should be made by institutions that have the competence as well as the mandate to take these decisions (Hofmann et al., 2011: 495). In democratic legal systems, it is common to have a constitutional outline that gets its shape from a nationally distinct interpretation of the concept of separation of powers that deals with the relationship between the three branches of government, to wit the executive, legislative and judiciary. For instance, and with specific regard to judicial review, an assertive judiciary will likely reduce the scope of administrative action, and hence discretion. The contrary will most likely hold for legal systems where judicial self-restraint is exercised in reviewing administrative discretion (Brand, 2008). To illustrate this point, the United Kingdom's legal system knows a strong executive and courts appear reluctant in assessing administrative discretionary decision-making (Caranta, 2008: 193-195).[14] Following from this is a higher bandwidth of discretion left to the executive. In Germany, on the other hand, where the legal system has been heavily influenced by recent history – the Nazi's fascist totalitarian regime in which executives took an inglorious role within the state apparatus – the legal doctrine implies that stringent judicial review seeks to keep administrative discretion to a minimum (Brand, 2008: 223-224; Caranta, 2008: 187-188). As to the Dutch context which was addressed above, it seems to take a middle position when it comes to the use of discretion by administrative authorities. National legislation provides for legal provisions allowing for delegated legislation which is illustrated by the case studies presented later on. In other words, the Netherlands has a legal system that is relatively open to the delegation of discretionary legal competences and hence adoption of secondary legislation as long as it is ensured that delegation can be traced back to a legal basis of domestic law (Müller et al., 2010: 81). Nevertheless and with regard to the transposition of European directives, Dutch transposition authorities, usually national ministries, act within certain boundaries which are set not only by the Directive but by national legal-administrative factors. Provisions of Dutch administrative law[15] as well as the Instructions for drafting legislation (Aanwijzijngen voor de regelgeving)

14 In this context Caranta (2008) and also Möllers (2013) point out that there is a lack of specialised courts and a lack of a clear and structured approach in the British judicial review of discretion.

15 Cf. Articles 1.7 and 1.8 of the General Administrative Law Act (Algemene Wet Bestuursrecht). These articles were introduced with the aim of simplifying and speeding up transposition in order to achieve timely compliance with EU directives. See W. Voermans and B. Steunenberg, 2005, pp. 205-217.

prescribe the procedure of preparing transposition legislation (*Parliamentary Papers II* 2007/08, 31 498, no. 498, p. 53). These factors can also determine the use of discretion in transposition. For instance, instruction no. 331 requires that transposition measures only incorporate the Directive's rule and no other national extras in order to avoid lengthy procedures resulting in transposition delay.[16] Next to observing legal-administrative instructions and guidelines, national ministries have to consider European case law while transposing EU directives. All these factors may further reduce the scope of discretion. With regard to discretionary provisions concerning sanctioning systems (Gil Ibáñez, 1999: 213-215; Prechal, 2005: 88),[17] the interpretations of the European Court of Justice have further reduced discretion. Moreover, judicial review has sought, albeit inconsistently, to determine the scope of discretion flowing from discretionary concepts such as 'public policy' and 'public order' (Kessedijan, 2007; Brand, 2008: 226-230; Lindhal, 2008) that are sometimes used in directives to allow Member State departure from EU rules.[18] Having addressed discretion within the Dutch transposition setting, the focus will now shift to discretion within the context of EU law.

2.2.1.2 EU law

The European Union has a set of legal instruments of which alongside regulations, European directives are the most commonly used to achieve the objectives set out in the treaties. European directives have specific features, pertaining to their structure, sort, length and complexity. Discretion, however, is a key characteristic of European directives, since it lies at the very heart of the instrument distinguishing it from others: Member States are bound to the directive's objective, while they may choose how to achieve this objective. This describes the discretionary latitude for own judgment and choice within legal boundaries and ties in well with the definitions mentioned above. In granting discretion, directives essentially differ from

16 In the Dutch context, this is known as the debate on 'nationale koppen'. Cf. J. Stoop (2012) 'Nationale koppen op EU-regelgeving; een relevante discussie?', *Nederlandse Tijdschrift voor Europees Recht* 6: 229-237.

17 Directives that entail the obligation of introducing a sanctioning system used to offer Member States the (discretionary) choice to decide on the legal type of sanctions – whether to base these on provisions of public law or private law (administrative law or civil law) when legally implementing corresponding EU rules. This changed when the requirement became that sanctioning has to be 'effective, proportionate and dissuasive', a standard clause introduced by the European Commission in the 1990s. These are conditions that have meanwhile been specified by case law. See Prechal, 2005, p. 88 and Gil Ibáñez, 1999, pp. 213-215.

18 See for instance case C-363/89 Roux [1991] ECRI-00273 and case C-277/02 EU-Wood-Trading [2004] ECR I-11957 referring to the application of EU secondary law (directives). In these cases the European Court of Justice, by invoking the principle of cooperation, sought to put constraints on Member States' option to derogate from EU rules on the free movement of goods, persons, and services (Article 30 TEC now Article 36 TFEU). See Kessedijan, 2007, pp. 33-35.

regulations which hardly leave any discretion as they are entirely binding and directly applicable in the Member States.[19]

Legislative discretion, hence discretion granted by directives, flows from two legal sources, EU primary law being one of them. Article 288 of the Treaty on the Functioning of the European Union (TFEU) stipulates that:

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

The second source from which legislative discretion derives is EU secondary law, more precisely, from the directive text, its content and wording. Since the content of directives differs, the scope of discretion varies among them. It is certainly so that directives entail above all obligations for Member States. However, the rules laid down in directives, do not exclusively prescribe what Member States have to do ('shall' do). Rules can also be formulated as permissions ('may' do) and therefore entail discretionary leeway. In fact, as argued in this study, legislative discretion may take different forms in directives. What's more, these instances of discretion provide discretion to different degrees. Whereas studies addressing legislative discretion usually do not take into account the different forms discretion can take, the current study addresses them explicitly further below.

The distinction between discretion flowing from EU primary law on the one hand and EU secondary law on the other hand is also made by Veltkamp (1998) in her study on the implementation of EU environmental directives. It is one of the few legal studies that address discretion in this particular context. In a different manner than described in this dissertation, Veltkamp applies the term 'discretion' more restrictively, to denote the leeway granted by the directive text whereas discretion flowing from the Treaty (Article 288) is referred to as 'leeway in implementation' (1998: 20).[20] The latter term, however, lacks precision because discretion based on the Treaty is intended to be used for transposition while the term 'implementation' extends beyond that stage.[21] But there is a more important reason not to use the distinction suggested by Veltkamp. Alongside the fact that it is

19 Legislative discretion is, hence, what distinguishes directives from regulations. At the same time, in practice EU directives may be very detailed, boiling down to quasi-regulations. Regulations, on the other hand, may appear to be less detailed. They may, thus, require Member State enforcement which is usually only required in the case of directives. See Van der Burg and Voermans, 2015, p. 139.

20 The Dutch equivalent is 'implementatievrijheid'.

21 It should, however, be pointed out that Veltkamp elsewhere in her study does recognise that implementation is a multi-stage process. See Veltkamp, 1998, pp. 7-8.

difficult to disentangle the two types of discretion she identifies,[22] in view of the present study, more analytical clarity is provided by distinguishing between *legislative* discretion and *administrative* discretion. To establish the difference between the two types has the advantage that discretion is captured with regard to the formal implementation (transposition) process as a whole. Such a distinction takes account of the specific nature of the directive as a 'two-tier legal act' encompassing the directive proper as issued by the European institutions and national transposition legislation by means of which the directive's rules become part of Member States' legal systems. In other words, I believe that instead of different legislative sources, a more appropriate ground on which to make a conceptual distinction is to differentiate between EU-level discretion or 'discretion-in-legislation' (legislative discretion), and national-level discretion or 'discretion-in-implementation (administrative discretion). Furthermore, it considers the possibility that discretion granted to Member States within the legislative decision-making process differs, in terms of amount, from discretion available to national implementing actors once the directive has to be transposed into national law due to differences between the EU and national settings. It is possible, for instance, that legislative discretion decreases once it is exposed to national legal-administrative settings like it has been suggested in implementation research (Steunenberg, 2006).[23] The relevance of the national legal systems regarding the use of discretion by administrative authorities has also been highlighted in constitutional law. I shall return to this point in a moment.

From my perspective, an adequate way of taking the foregoing aspects into consideration is proposed by Schwarze's definition of 'legislative discretion' and 'executive discretion'. Schwarze is one of few (legal) scholars who acknowledge the difference between the two types. In his definitions emphasis is put on the authority that exercises discretion vis-à-vis and

22 In my view, EU primary and secondary law are very much intertwined and directives provide a good example of this. Being secondary law, directives are made under the terms set out in the EU treaties and give expression to the legal principles established by them. For instance, the principle of institutional autonomy, which in this study is considered to be an instance of discretion, is explicitly laid down in EU directives. A directive provision may, for instance, allow Member States to confer implementing tasks upon national authorities they consider to be suitable to carry out these tasks. At the same time, the principle of autonomy directly flows from the EU treaties, in particular from Article 4(2) of the Treaty on the European Union (TEU) establishing that the Union shall respect the 'territorial integrity' of Member States and the aforementioned Article 288 TFEU: Member States are free in choosing how to implement a directive, i.e. they decide on which national authorities will carry out this task.

23 Steunenberg, for example, pays particular attention to the difference in degree between EU-level and national-level discretion to which he refers as 'higher-level discretion' and 'lower-level discretion'. He shows that national coordination mechanisms can reduce the scope of the former, higher-level type of discretion, which results in less discretion being granted for the purpose of implementation than initially was the case. See Steunenberg (2006).

under recognition of the other two functions of government. Whereas legislative discretion denotes the 'freedom of drafting employed by the lawmaker under the constitution', executive discretion is considered to refer to 'the freedom of the executive under the law and vis-à-vis the courts' (Schwarze, 2006: 298). For the purposes of this study and with specific regard to the EU context, I slightly adapt Schwarze's terminology (see box 1). I distinguish between legislative discretion and administrative[24] discretion which are defined as follows:

Box 1: Defining discretion

Legislative discretion
The term denotes the latitude based on both primary and secondary EU law (Article 288 TFEU and the directive text) granted by the EU legislator to Member States for transposing a directive.
Administrative discretion
The term refers to the actual discretionary latitude left to national implementing actors, once factors that further determine the use of legislative discretion at the national level have been taken into account.

In my view, it is important to show that there is a conceptual difference between discretion at the EU level and discretion at the national level in order to gain a sound understanding of the concept within the context it is studied. However, it is not my intention to make an analytical distinction and to differentiate between the two types of discretion in the case studies that follow. While in subsequent chapters discretion in directives takes centre stage from a methodological point of view and is therefore referred to as 'legislative discretion' (as a synonym of 'discretion'), I stick to the term 'discretion' in the empirical analysis where the focus is on discretion within a broader, EU- and national-level decision-making context.

So far the discussion serves to filter out relevant aspects and facts that are important for a conceptual understanding of discretion. In the next sections my approach is slightly different. I try to discuss the legal science discourse from a bird's-eye view, paying specific attention to how scholars from administrative, constitutional and the sociology of law have thought and written about discretion. My intention is to highlight certain aspects of the debate that I deem important for the study of discretion in the national transposition of European directives. In doing so, I also aim to show that

24 The term 'administrative discretion' is not only used in the context of EU administrative law but also in connection with administrative law in the United States where it is often referred to as 'executive discretion'. To clearly distinguish the present context from the latter one, I decided to use the term 'administrative' instead of 'executive' discretion throughout the dissertation.

discretion's potentials have long been overshadowed by a prevalent negative image of it in the legal sciences.

To sum up the discussion, discretion in democratic legal systems is a topic of interest for scholars from administrative, constitutional and the sociology of law. The former two view it as part of a legal competence, the latter as part of decision-making determined not only by rules but also the social context. The rules-based impact on the use and scope of discretion has been illustrated by referring to discretion's place in national legal systems, Dutch administrative law in particular. Definitions relating to the general as well as EU legal context show that choice, interpretation and judgment are considered to be central elements of the notion of discretion. Discretion is a key feature of European directives and determined by both EU and national settings. To account for this fact and for the sake of clarity, legislative discretion is distinguished from administrative discretion.

2.3 Bird eye's view on legal discourse

By showing how discretion has been described, a specific attitude that legal scholars have taken towards discretion can be revealed. In the subsequent discussion reference is made to studies that have tackled questions concerning discretion within a national and European Union legal framework as well as in the legal Anglo-American context. My main concern is with the relationship between discretion and rules. This relationship appears to be of vital importance to legal scholars from all legal disciplines addressed here. What's more, in presenting how these scholars have thought about discretion, a perspective takes shape that serves to explain why discretion has been described in a particular way, of which it is thought here, that it does not do justice to the potential discretion is considered to have for the making and application of rules.

2.3.1 Discretion in context

The ubiquity and importance of discretion for state administration, which seems to be reflected by its place within regulatory welfare states, has not gone unnoticed among scholars. In fact, it has attracted attention to discretionary decision-making in various administrative contexts: discretion, usually referred to as administrative discretion,[25] has been addressed with regard to police and prosecution services (Davis, 1969; Fletcher, 1984), the administration of justice (Shapiro, 1983; 1985) as well as, more generally, in the context of public and welfare policies (Goodin, 1986; Bell, 1992; Han-

25 The term 'administrative discretion' is used by various authors in their contributions on discretion. Their definitions of the term at best overlap with the definition of the term applied in the dissertation where administrative discretion is dinstinguished from legislative discretion in the context of the transposition of EU directives.

dler, 1992). But also beyond the national context, in the area of European law, scholars have looked into discretion (Prechal and Van Roermund, 2008; Hofmann et al., 2011; Weber, 2013). What becomes apparent in the different studies is the emphasis on discretion as being constraint by rules, but also the difference between discretion and rules as expressed by laws, legal principles or case law is highlighted. This idea about the difference between discretion and rules is well reflected by Dworkin's metaphor of a doughnut (1977). Dworkin was a prominent scholar of legal philosophy and it therefore may not come as a surprise that his view on discretion has invited others to reflect upon the role of discretion in the legal sphere, including state administration (Goodin, 1986; Galligan, 1990; Hawkins, 1992). To Dworkin, discretion is 'like the hole in a doughnut [which] does not exist except as an area left open by a surrounding belt of restriction' (1977: 31). In fact, Dworkin's shorthand description of discretion implies that discretion is not only restricted by rules but also separated from them. As Galligan points out, Dworkin implies that discretion is a 'distinct species of legal power' (1990: 20). Others believe that Dworkin treats discretion as a residual notion to marginalise it from the world of rules (Goodin, 1986; Lacey, 1992). Be it as it may, Dworkin's idea and that of others (Fletcher, 1984; Goodin, 1986; Koch, 1986) seems to imply that discretion and rules are opposites. The purported advantages of rules are contrasted with the purported disadvantages of discretion: whereas rules are seemingly clear and open to the public as they are established by law (legislative processes), administrative decision-making and the use of discretion herein remains obscure and inaccessible to a wider audience (Hawkins, 1992). And, as Lacey notes, if exercised in the public sphere, discretion is considered as problematic from an individual rights perspective that constitutional scholars emphasise (1992: 370).

Next to describing discretion – in contrasting it with rules – Dworkin identifies three different types of discretion when analysing decision-making by actors in the military service: two 'weak senses' of discretion alongside a 'strong' one. A strong sense of discretion entails that standards are missing which are otherwise set by a legal authority. The absence of standards then leaves a lot of leeway for decision-making by sergeants even though principles such as rationality, fairness, and effectiveness preclude absolute (unbound) discretion. Discretion in the presence of standards is supposed to be weak and comes in two forms: discretion is weak if the standards require interpretation and judgment, or if discretionary decision-making is not subject of final supervision or reversal (Dworkin, 1977: 31-9; 68-71; see also Galligan, 1990: 14). In a nutshell, weak discretion involves interpreting a standard of rules already set by another authority, whereas strong discretion brings with it freedom in setting up own standards.

Dworkin is not the only one who tries to describe and structure discretion. Others have followed suit in distinguishing between types of discretion within the administration (Goodin, 1986; Koch, 1986; Shapiro, 1983; 1985) or situations in which discretionary decision-making manifests itself in different ways (Lacey, 1992; Galligan, 1997; Gil Ibáñez, 1999). Koch, for

example, distinguishes between types of discretion that are reviewable (individualising discretion, executing discretion and policymaking discretion) and types of discretion that are not reviewable by the courts (unbridled discretion and numinous discretion).[26] Galligan maintains that there are three applications of discretion: discretion in finding facts, in settling standards, and in applying the standards to the facts (1997: 16). With regard to the implementation of EU law, Gil Ibáñez points to different stages of decision-making in which discretion comes into play: decision-implementation, decision-application, supervision and enforcement (1999: 199).

Koch's division into reviewable and unreviewable types of discretion already hints at the fact that administrative discretion is of major concern to legal scholars that discuss administrative conduct in the context of jurisdiction. The question that preoccupies them in particular is how judges, lawyers and other legal actors within law courts shall treat and assess discretion (Wright, 1971; Goodin, 1986; Shapiro, 1983; 1985).[27] Furthermore, they seem to be concerned with the effects that discretion exercised by the executive may have for constitutional democratic states. In this regard, scholars look particularly into the question of how discretion relates to fundamental legal principles such as the rule of law, the balance of power, legality as well as the legal doctrines of direct effect and effective judicial protection – not only within a national but also a European context (Prechal and Van Roermund, 2008; Hofmann et al., 2011).

2.3.2 From opposite to threat

The attention dedicated by legal scholars to questions on discretion in thinking about its causes and consequences can be seen as an attempt to better understand discretion and its meaning for modern legal systems. It can, however, and with a view to the attention that has been paid to the judicial review of different forms of discretion, also be seen as an attempt to 'get a grip on discretion' and to put it under control by means of law.

---

26 These examples are mentioned for the purpose of mere illustration and are therefore not further discussed. It is interesting to note, however, that Koch's executing discretion and policymaking discretion types come close to what I refer to as administrative discretion. Whereas according to Koch executing discretion boils down to extending legislation or filling in details, thereby following a defined path, 'policymaking discretion' allows the administrative decision-maker to define the path itself in exercising decision-making competences. Cf. Koch, 1986, pp. 479-491. It is conceivable that the transposition of European directives entails both of these activities, depending on how much discretion is available for the incorporation of EU rules into national law. In choosing implementation forms and methods, national actors may decide upon the path of transposition and elaborate further on (discretionary) EU rules.

27 Even though legal discretion is not the focus here, it is interesting to note, with reference to Brand, that judicial review of administrative discretion may in itself be considered as a discretionary act because judges act on their own judgment in applying established legal standards to scrutinise discretion. Cf. Brand (2008).

Hawkins' (1992) reading of various legal writings on discretion points in the same direction.

Having said this, it becomes clear that discretion and rules are not merely perceived as opposites. To put it starkly, a central theme in the legal discourse seems to be the tension between discretion and rules as epitomised by the antithesis between the rule of men (discretion as 'unbridled' power) and the rule of law (rules as 'legal' power). This view on discretion exhibits a certain degree of suspicion, which is also immanent in the work of Dicey, the 19th century British constitutional scholar and lawyer. Being not entirely opposed to the idea of administrative discretion in general Dicey, however, was a strong proponent of the rule of law. His works have been interpreted as showing disapproval of the conferral of wide amounts of discretion upon the administration because he seemed to consider it likely that discretion would be used in an arbitrary fashion, undermining the rule of law (Galligan, 1990; Gil Ibáñez, 1999: 202; Carolan, 2009: 49). But it is not only the rule of law that seems to be at stake. From the perspective of constitutional theory, it is also the concept of separation of powers, and therefore the neat division between the executive, the legislative and the judicial branches that might get undermined (Waldron, 1999; 2013). Making discretion available to unelected officials within state administration whose task is to put law into practice may exceed regulatory rule-making and include taking quasi-legislative measures. This may foster the intermeshing of the executive and legislative functions of government.

Going back to the notion of arbitrary decision-making, it re-appears in a somewhat different way in Davis' *Discretionary Justice* (1969) centring on discretionary decision-making in the administration of justice, police and prosecutors in particular. Davis, in fact, is a historian but a common reference point of legal scholars and one of the first contemporary scholars to have analysed intensively discretion in state administration (Fletcher, 1984: 274). According to Davis, a public official has discretion whenever 'the effective limits on his power leave him free to make a choice among possible courses of action or inaction' (1969: 4). Davis, however, also introduces the notion of 'unnecessary discretion' which implies that he concedes that some discretion is 'necessary'. The idea of 'necessary' discretion is based on the consideration that in exercising their tasks police officers need some flexibility to apply abstract rules in specific individual situations. The justification for discretion is often the need for individualised justice. Nonetheless, Davis is also convinced that there is 'unnecessary' or 'undesirable' discretion which is likely to lead to illegal discretionary action and therefore to the improper application of rules. It is considered a consequence of lacking control by legal authorities, and hence, too much room for the police officer for own interpretation, judgment and choice (1969: 1-14). In the eyes of Handler who focuses on social and not legal justice, administrative action as described by Davis leads to 'subjective justice' (1986: 169). That discretion can be misused, is a present topic in constitutional law. The legal doctrine of 'acting ultra vires' addresses exactly the fact that in exceeding their legal

competences, administrative actors act outside the lawful powers that have been conferred upon them (Hofmann, et al., 2011; Möllers, 2013).

At the same time, discretion is also thought of as being inevitable and as having a certain function within legal systems. Hence, it is not only rejected but also accepted. According to Goodin, '[i]t is widely agreed that a certain amount of discretion will inevitably prove necessary' (1986: 237). Referring to the implementation of welfare state programmes and the provision of social assistance in particular,[28] he points out that there is a 'need to leave officials with discretionary powers to make extraordinary payments to people in truly exceptional circumstances, such as fire or flood' (1986: 237). Again discretion is recognised as useful, namely in making general rules work in practice. On the other hand, Goodin dedicates a considerable part of his article to discuss the downsides of officials' discretionary decision-making in the distribution of welfare state resources. Next to arbitrariness, Goodin argues that discretion can have other negative consequences for the system of law and therefore also for those this system is expected to protect. According to him, these downsides are manipulation, exploitation, uncertainty, insecurity, privacy and intrusiveness. All of these phenomena suggest that officials may (mis)use discretion in assigning the resources to be distributed, by imposing high demands on those in need. Furthermore, discretionary decision-making may make those asking for support subject to the official's arbitrary will. As a consequence, the position they are put in is characterised by legal uncertainty and insecurity as well as a disproportionate encroachment on their privacy in having to prove their entitlement to receive social welfare benefits (1986: 239-250). In contrast to other scholars, Goodin does not believe that rules are a solution to these alleged problems of discretion being exercised. Rules merely provide justifications for the decisions that officials make. Therefore, Goodin comes up with a more radical solution by suggesting that dilemmas can be alleviated only by removing discretion from officials. Interestingly enough, Goodin does not consider the dilemmas mentioned as being inherent to discretion. In his view, discretion is not the root of the problem. It is the practice of discretion which is beset with problems (1986: 258).

In considering the foregoing, the prevalent view emerging from the legal debate seems to be that discretion is in one way or the other problematic for legal systems. Opposite arguments, underpinning that discretion may also be conducive to legal systems, appear to be largely absent. Instead, discretion is associated with arbitrary decision-making and a number of negative effects expected to follow from its use. Seen in this light, the exercise of discretion by the administration is to the detriment of legal principles that are at the core of democratic legal systems. To mention a few but nevertheless key ones: the rule of law, legality and legal certainty, as well as the separation of powers. In fact, criticism of discretion is not confined to

28 Goodin applies the term 'official' which is in the Anglo-American context used to denote an office-holder within public administration and government.

its role within national settings. Also regarding administrative rule-making in the context of the European Union, discretion is 'blamed' for it is considered to undermine the legal protection of individuals, above all in the area of asylum and migration law. In this regard, legislative discretion granted by directives is characterised as being a counterpart to legal harmonisation and the principle of uniform application which implies that EU rules are interpreted and applied in the same way by the Member States. With a view to EU asylum and migration law, discretion is criticised for allowing Member States to implement minimal standards of protection where higher standards are deemed necessary as argued by scholars in the debate on immigration from non-EU countries. The implications that discretion is considered to have are found incompatible with human rights (Guild, 1999; Baldaccini, 2009; 2010; Strik, 2011; Eisele, 2013).

In sum, the above discussion of legal scholars' views on discretion being exercised by administrative actors within a national or European setting seems to reveal a rather negative attitude towards it. This is not least because of discretion's alleged negative legal implications which also appear to raise questions of legitimacy. After all, the principles discretion is supposed to undermine (the rule of law, legality, legal certainty, the separation of powers, amongst others) can be understood as basic pillars upon which democratic and legal systems are founded and preserved.

And yet, among the voices of criticism, there are also those that point to the necessity of discretion for the application of rules. Then again, discretion does not exist without rules. Hence and as very well reflected by Dworkin's metaphor of a doughnut mentioned above: discretion and rules are closely related to each other (Hawkins, 1992: 13). After all, only with the hole (discretion) the doughnut (rules) can exist.

2.3.3 Discretion re-visited

Interestingly enough, the sceptical, if not critical attitude towards discretion has itself become a subject of the debate. Lacey, for instance, takes issue with the prevalent negative viewpoint on discretion resulting from, as she views it, a dogmatic approach adopted within the legal sciences, in particular in the Anglo-American legal studies. According to her this approach is characterised, by a specific paradigm that she considers to be rooted in a distinct 'liberal legal theory':

> This kind of jurisprudential approach to judicial discretion flows in part from the centrality of courts in jurists' conception and in part from association of the rule-of-law ideal with the value of formal justice (treat like cases alike) and with the protection of individual rights (1992: 369).

Apparently the approach and paradigm Lacey describes here, rest on the idea that discretion is in fundamental conflict with the rule of law – at least if the rule of law is, as pointed out by Galligan – narrowly conceptualised

as 'the rule of rules' – and the values associated with it (1997: 18). Galligan argues in a similar vein as Lacey, when he contends that criticism of discretion from within the legal studies is voiced by those exponents of constitutional theory that take a legalistic approach to the rule of law and share the belief that the administrative government should be organised according to a set of general, legal standards (1997: 11-14). Discretion in such a setting is viewed as an ultimate challenge to established rules and to the ideal concept that supporters of a concept like the liberal legal paradigm have in mind: the application of general standards to all legal activities for both substantial and procedural grounds (Lacey, 1992: 369).

Lacey's reflections on discretion make part of the volume *The uses of discretion* (1992).[29] This collection of essays written by socio-legal scholars and legal practitioners seems to reflect a change of attitude towards discretion and a possible paradigm shift within the legal discourse on the subject as a result. As outlined in the introduction to the volume, the authors depart from a common starting point. They challenge the idea that discretion and rules are opposites and consider the traditional legal approach as being too limited in explaining discretion by merely contrasting it with rules. Discretion, in their view, makes part of decision-making on how to apply rules. Therefore, they strongly suggest analysing discretion not in isolation but in connection with the wider social context in which it is embedded. To this end, a more adequate approach is, as they put it, a 'pluralist' one which combines insights from the legal and social studies to take into account the impact of organisational structures such as norms on the way administrative discretion is exercised (Lacey, 1992: 363; Schneider, 1992: 79-88). Legal scholars are therefore well-advised to make use of empirical and analytical approaches applied in the social sciences (Lacey, 1992: 365). Furthermore, the dogmatic view is questioned that discretion and rules are two separated phenomena as expressed in the work of Dicey and his students (Bell, 1992; Hawkins, 1992; Lacey, 1992; Galligan, 1997). It is argued to the contrary, namely that discretion is immanent to rules, flowing for instance from vague parts of legislation (Schneider, 1992). In this regard, the interesting observation is made that in formulating law, the legislature chooses between different combinations of rules and discretion implying that discretion varies amongst pieces of legislation (Schneider, 1992: 49).

Furthermore, it is noteworthy that next to the fear of discretion's potentially negative effects on legal systems (and their legitimacy), other arguments have been put forward that reflect a more positive view on discretion. In more recent debates, discretion is not associated anymore with disadvantages it is believed to entail for the rule of law. Galligan (1997), for instance, rejects the idea of many of his colleagues that discretion is incompatible with legal values featuring prominently in rule of law systems. He makes the interesting case that scepticism and negativity towards discretion

29 Keith Hawkins (ed.) (1992) *The uses of discretion*. Oxford: Clarendon Press.

result from the fact that only legal standards are used as a benchmark for assessing if discretion is 'legitimacy-proof'. Once it is realised that there are, alongside rules, also normative standards generated within administrations which can be used to make judgments about discretion, 'discretionary powers may be brought within acceptable notions of legitimate authority' (1997: 15). He even takes this point further in arguing that discretion can be a form of legitimate authority (1997: 35).

Galligan's account provides a good example of the part of legal scholarship that seeks to integrate empirical insights into the legal analysis of discretion. His writings (1990; 1997) also exemplify that legal scholars have not only focussed on the purported dilemmas posed by discretion but that attention has been shifted to the advantages that discretion can have for legal systems in general and legislative and administrative decision-making (processes) in particular. It is emphasised that discretion facilitates the application of rules under particular circumstances. Additionally, in providing flexibility, discretion is considered to help reconciling different interests and reaching agreement in administrative contexts (Lacey, 1992: 361). Legal scholars as well as legal practitioners do not consider discretion to be necessarily problematic for legal systems (Prechal and Van Roermund, 2008: 18). Carolan, for instance, opines that discretion should not be treated as a problem but as an 'institutional opportunity' (2009: 131). Like other authors that stress the relevance of interest representation and deliberation in decision-making processes (see for instance Hunold and Peters, 2004), Carolan suggests that administrative discretion should be used to let citizens be involved and contribute to accurate decision-making by which they themselves are affected. Thus, in his view the conferral of discretion on administrative actors is well-reasoned (Carolan, 2009: 130-134). In the same vein, Möllers (2013) highlights the advantages of discretion vested in the administration, which he considers to have a mediating role in exercising state authority that affects citizens. He takes the opinion that discretion helps to fulfil this function since it facilitates the application of abstract laws to concrete situations. What's more, through discretion, administrative actors are made sensitive to the circumstances of a specific situation and in this context, discretion may be used to protect individual freedoms and rights (2013: 100; 143).

Very important for the present context are the arguments that have been put forward regarding the role of discretion in EU law. In this context, the notion of vagueness becomes relevant. Vagueness, however, alongside ambiguity, has been considered as negative for the implementation of law. The argument goes that vagueness might contribute to the misinterpretation and misapplication of EU rules in the Member States (Falkner et al., 2005; Beijen, 2011). However, representatives of legal scholarship on the EU argue to the contrary. Discretion is positively acknowledged, precisely because it provides vagueness. This vagueness is considered as 'constructive ambiguity' and therefore as valuable leeway that can facilitate striking a compromise in decision-making and reaching a decision outcome (such

as the adoption of a directive) (Prechal, 2005: 33). Likewise, ambiguity is not considered as being negative for the (formal) implementation of European law (directives) by Member States. As an instance of 'conceptual divergence', discretion is regarded to carry the valuable potential to facilitate translating EU rules into the various national legal orders, exactly because it leaves room for more than one interpretation (Prechal and Van Roermund, 2008). This ties in well with the observation that a directive, due to the discretion that it grants, represents a compromise among Member States, unifying national laws to a certain extent while additionally taking into account national particularities (Härtel, 2006: 173). As Twigg-Flesner notes, Member States have some choice in deciding how to achieve the outcomes required by a directive, using suitable legal concepts and terminology in transposing EU rules while regulations imply the use of terminology and concepts distinct from national ones (2012: 8-9).

A number of relevant points have been mentioned in the above sections. Taken together, they indicate a second line of reasoning regarding legal scholars' approach to discretion. In legal thinking the tendency has become apparent to positively embrace discretion by emphasising its potentials. In contrast to those that have seemingly been caught up in fear, suspicion and prejudice, being reflected in their views of discretion, there are other legal scholars that are more concerned with discretion's virtues instead of its purported vices. It, thus, seems that the idea is increasingly endorsed that discretion has an important function to fulfil within democratic legal systems: it can be beneficial for both, the making and application of law. Furthermore, taking a closer look at the whole debate, pertinent aspects have been touched upon which show some connection between discretion and legitimacy. Insights as provided by Prechal and Van Roermund (2008) as well as Galligan (1990; 1997) indicate that there is a link valuable to be explored further.

The previous sections have brought to light a number of aspects that are considered vital for understanding the concept of discretion within the context of this study. The next chapter continues on this path. It zooms in further on discretion within the context of legislative decision-making and law implementation processes. This debate has mainly been shaped by political scientists. From their writings pertinent findings can be derived for a more complex understanding of discretion which further informs the theoretical assessment framework of the dissertation.

2.4 Conclusion

How does the foregoing characterisation of discretion link with the present context of this study? I believe that the legal debate provides a number of insights that are of particular relevance for the analysis of discretion as it is envisaged here.

To begin with, the idea voiced in the legal debate and embraced in the dissertation is that discretion is inherent to rules (laws) and that it is provided by different degrees. These are precisely the two key characteristics of European directives. Second, analysing discretion in a wider social context, taking into account 'social forces' instead of rules alone, is consistent with the approach taken in this study where discretion is analysed in a political, institutional setting, namely in EU legislative decision-making and national implementation processes regarding directives. In this respect, also the observation that the legislature consciously decides to grant discretion to certain amounts plays a significant role. Third, to differentiate between the notion of discretion including its potentials for legal systems on the one hand and, on the other hand, how discretion is used including the possible, improper use or misuse of it is deemed relevant. It may serve to show a more nuanced picture of discretion which is not biased towards discretion's purported negative effects but takes into account the difference between normative ideas about discretion – how it should be used – and empirical examples which may illustrate its actual (mis-)use. In that context, it is important to understand that the misuse of discretion does not lie in the concept of discretion but is linked to how it is used by administrative actors. Hence, it seems necessary to have a closer look at how actors use discretion when transposing EU directives. Fourth, as was finally brought to light, discretion may entail advantages for actors in decision-making processes – such as the flexibility it provides in applying rules. Thus, as argued in the dissertation, discretion can play an important role in legal systems, especially within the context of EU- and national-level decision-making processes concerning directives. Here it shows that reviewing the Anglo-Amercian literature on discretion makes it possible to identify different perspectives on discretion: both negative and positive ones. What's more, it becomes apparent that legal approaches of the concept of discretion differ among each other. This part of the legal theory on discretion was used to put into perspective, first, the idea that legal theory is mainly negative about the role of discretion in rule-making – there are views that do not emphasise the downsides of discretion but, by contrast, seek to highlight its advantages for decision-making processes related to the making and implementation of rules – and, second, to put into perspective the view that rules and discretion do not go well together.

Finally, also the traditional approach towards discretion is found to have an important merit with its emphasis on the tension between discretion and rules. In fact, it is this part of the legal discourse, in which important questions as to the impact of administrative discretion on democratic legal systems arise, including questions that have been touched upon in the introduction to the dissertation. It can be considered as a prelude to the later debate on the relationship between discretion and legitimacy within the context of the transposition of EU directives. This debate will follow after the presentation of the empirical case studies.

3 Discretion in the political sciences

3.1 Introduction

Next to legal scholars, also political scientists[1] have taken a vested interest in the relevance of discretion for processes of legislative decision-making and law implementation. In analysing these processes they shed light on aspects that are pertinent for the present study of discretion. This chapter starts out with some general remarks concerning discretion in implementation research. Hereafter more specific aspects are addressed: the reasons for delegation and discretion in the context of legislative decision-making are dealt with, as well as the conditions under which discretion is made available for the purpose of implementing law. Findings derived from the analysis of legislative decision-making and the transposition of EU directives finally serve to formulate a set of expectations for the empirical analysis.

3.2 Discretion in implementation research

Discretion has been addressed in a number of implementation or compliance studies that largely centre on Member States' transposition of European directives.[2] Implementation is a domain of political scientists; apart from a few exceptions in the legal studies (Veltkamp 1998, Beijen, 2010; De Boer et al., 2010; Strik 2011). Implementation scholars address various questions. For instance, they take a closer look at Member States' non-compliance with EU law by investigating the reasons for failure of legally correct and timely transposition (e.g. Kaeding, 2007b; 2008; Mastenbroek, 2007; Thomson, 2010). Some of them aim to identify implementation patterns from which they derive distinct approaches to compliance applied by old as well as new EU Member States (Falkner et al., 2005; Toshkov, 2007; 2008). Others are interested in the development of compliance over time and in compliance with EU law in particular policy areas (Kaeding, 2007b; Haverland et al., 2011). Specific attention has also been paid to the variation of compliance (Haverland and Romeijn, 2007; Thomson, 2007; Börzel et al., 2012) and, in

1 The term political science is used broadly, and hence, understood as including the science of public administration.

2 Few exceptions are Carroll (2014) who looks into the post-transposition implementation of EU directives in the area of animal welfare and Versluis (2007) who addresses all stages of the national implementation of the Safety Data Sheets Directive. Both focus on implementation across EU Member States.

particular, timeliness in the national transposition of EU directives (Thomson, 2009; Haverland et al., 2011), including the question why some Member States outperform others in transposing directives (Börzel et al., 2010).

In these implementation studies the notion of discretion is usually explained in brief. Explanations refer to the fact that discretion offers room in transposing directive provisions into national law. Discretion is thus understood as providing a range of policy options which are all supposed to be compatible with the piece of law to be implemented (Kaeding, 2007b; Thomson, 2007; Zhelazykova and Torrenvliet, 2011).[3] Discretion has been identified, amongst many others (Sverdrup, 2007; Toshkov et al., 2010),[4] as a factor assumed to affect the transposition of EU directives into national law. Accordingly, delay in transposition is considered to be caused by a combination of different factors, instead of being regarded as a mono-causal problem (Falkner et al., 2005: 22-26). Factors, which potentially impact transposition, are organised into three categories (Kaeding, 2007b; Mastenbroek, 2007). The first category comprises specific characteristics of a directive (directive features); the second category includes features of the legislative decision-making stage, i.e. EU negotiations concerning a directive, and the third category pertains to characteristics of the domestic context into which a directive is implemented (referred to as national-level characteristics or state-based explanations). Discretion is a prominent but, apparently, not the only directive feature that potentially affects the timeliness of transposition. The type of directive (new directive or amendment), its length, its level of complexity, its legislative quality, and the time allotted for implementation as well as the policy sector the directive addresses are further factors that possibly have an effect on transposition. As for EU-level features, the position or preference of Member States towards the directive proposal (being for or against it) may provide some hints as to their later transposition performance. Finally, state-based explanations refer to the administrative culture of a Member State and the socio-political structure of its society, in other words, they refer to whether a Member State is a federal or unitary state, whether interest intermediation at the national level follows a corporatist or pluralist model. This list is certainly not exhaustive but gives an idea of 'where' to look for causes of impacts on transposition alongside dis-

3 These largely quantitative studies are usually more preoccupied with the question of how to measure discretion granted by EU law. See also in this respect the recent study by Carroll focussing on the effects of discretion in the post-transposition application of EU directives. Cf. Carroll, 2014, pp. 153-154.

4 A comprehensive overview of implementation studies and therefore factors that have been examined in their relation to the national implementation of EU directives can be obtained from the online database of quantitative and qualitative studies of transposition, implementation and compliance with EU law. See: D. Toshkov, (n.d.) Implementation of EU Law: An Online Database of Existing Research, in cooperation with the Institute for European Integration Research at the Austrian Academy of Sciences, available at: www.eif.oeaw.ac.at/implementation and http://www.eif.oeaw.ac.at/compliance/ (accessed 1 December 2015).

cretion. Taking one step back, however, how does discretion relate to legislative decision-making processes?

3.3 Discretion in legislative decision-making

The discussion sheds light on three specific aspects: the reasons for the transfer of discretionary decision-making powers for the purpose of transposition from the (EU) legislature to (national) state administration, the circumstances under which more or less discretion is granted, and discretion's potential effects on legislative decision-making and national transposition. In the political science literature discretion is addressed in close connection with the concept of delegation. Addressing the question of why discretionary powers are granted is therefore intrinsically linked with the question of why delegation from the legislature to the executive occurs in the first place.

3.3.1 Why delegate, why discretion?

The concept of delegation within the political decision-making context of the EU and the United States has drawn attention of numerous scholars (Epstein and O'Halloran, 1997; Pollack, 1997; Majone, 1999; 2002; Huber and Shiphan, 2002; Talberg, 2002; Thomson, 2011). Delegation implies a share of decision-making powers between the legislative and executive branches of government and therefore links up both, the law-making and implementation stages. As Thomson points out, '[i]n most political systems, decision makers delegate at least some discretionary power to implementers' that are, however, also seen as political actors in their own right (Thomson, 2011: 222; 258). The idea underlying the use of delegation is based on the assumption that lacking legislative capacity motivates the legislature to transfer, for the sake of implementation, discretionary decision-making powers to the executive (state administration). To explain the reasons for the delegation of discretion, scholars make use of the principle-agent and transaction cost models applied in the field of political science and economics (Epstein and O'Halloran, 1997; Huber and Shiphan, 2002). These explanatory models emphasise the importance of efficiency and propose cost-effective solutions for problems of decision-making such as lacking legislative capacity. Together with the concept of delegation they are used to explain the motivation which underlies EU integration, i.e. the transfer of national decision-making powers to the institutions of the EU (Pollack, 1997; Majone, 1999; 2002). Another explanation for delegation has been linked to the notion of 'blame avoidance' (Majone, 1999; Thatcher and Stone Sweet, 2002). In this context, delegation is considered to be motivated by the wish of those principally in charge of decision-making to shift the responsibility for unpopular decisions or policy failures to others in order to insulate themselves from political responsibility and accountability and to avoid loss of legitimacy. Delegation, however, may also be seen as an attempt of the legislature to

achieve credible policy commitments, above all in cases where decision-makers such as Member States in the EU Council agree to decision outcomes that, actually, differ from their preferred policy. To enhance credibility in the subsequent implementation of this policy by Member States, also the European Commission is given an active part in this process. For this purpose, the EU legislature delegates implementing powers to the Commission (Majone, 1999: 4; Talberg, 2002: 26; Thomson, 2011: 259-60).[5]

Regarding the delegation of decision-making powers from the EU legislature to national administrations, there are various reasons for the transfer of these powers which are addressed in the next sections. Recourse is thereby taken to arguments derived from the so-called principle-agent and transaction cost models as well as related approaches. What seems to link the various explanations is that they revolve around two themes: information asymmetries between the law-making and application stages, and, consequently, the legislature's attempt to seek expertise for the implementation of legislative acts as a result.

3.3.1.1 Information asymmetry

The principle-agent model rests on the assumption of information asymmetry between the legislature (the principle) and the implementing authority (the agent). This asymmetry results from differences in time and space between the processes of law-making and implementation of the law. This is well exemplified by EU legislative decision-making regarding directives which on average takes a good two years before Member States can implement them. What's more, decision-making takes place within two different settings: negotiations at EU level and transposition of the directive at the national level.

Law-making usually occurs with a distance to the actual situation in which the law concerned needs to be applied and it therefore cannot anticipate on changes that may spontaneously occur 'on the ground'. According to the incomplete contracting theory of multilateral agreements, members of a community are unable to construct complete agreements due to the complexity of real-world phenomena and their unpredictability (Gil Ibáñez, 1999: 202; see also Pollack, 2010: 32). Hence, the assumption that principal decision-makers have only limited knowledge of the policy issue a proposal under negotiation addresses and are therefore unable to make very detailed legislation. What's more, knowledge gaps on the part of the legislature may not only concern the content of the law to be implemented but also pertain to the circumstances under which implementation shall be carried out and the consequences resulting from it (Calvert et al., 1989; Epstein and O'Halloran, 1994; Franchino, 2004). This can also constitute a reason for

5 These are the implementing powers - formerly addressed in the context of Article 202 and 211 TEC – which, with the entry into force of the Treaty of Lisbon, became Articles 290 and 291 entailing the delegation of power to adopt delegated and implementing acts. See for instance Hofmann et al., 2011, p. 491.

the legislature to refrain from spelling out the details of legislation and to leave the elaboration of a new piece of law to implementing actors, which are often situated within state administration and supposed to make more informed decisions. Delegation has, as a result, that institutional stalemate is avoided: the legislature remains capable to act even with regard to highly unknown situations. Interestingly, since it refers to the idea of legislative discretion granted by EU directives, Epstein and O'Halloran argue that due to the lack of legislative capacity and existing uncertainty characterising legislative decision-making, implementing actors will, by default, receive at least a 'minimum amount of discretion' to implement legislation. In their view each piece of legislation contains such a minimum or 'discretionary floor' (Epstein and O'Halloran, 1994: 702).

3.3.1.2 Seeking expertise

Where the settings in which law-making and implementation take place differ, like in the case of EU law that has to be implemented on a national level, facing information gaps may not only impede informed decision-making but also make it too costly for the legislature – in terms of times and other resources – to come up with detailed legislation (Epstein and O'Halloran, 1997: 36-42). That being said, a possible solution for the legislature is to seek expertise from (national) implementing actors, especially when it comes to assessing the effectiveness of different policies. For this reason, the legislature formulates discretionary rules that enable implementing actors to choose from a range of possibilities what they perceive as the most effective measure (Thomson, 2011: 275). The transaction cost perspective has been applied in studies on legislative decision-making and the delegation of discretion, in particular, within the context of the political system of the United States (Epstein and O'Halloran, 1997; Huber and Shiphan, 2002). These studies have provided the basis for later research on legislative decision-making in the European Union, including the delegation of discretion (Franchino, 2004; Thomson, 2007; Thomson et al., 2007; Thomson, 2011). In this context, relying on national expertise by engaging domestic actors in the implementation of EU law is assumed to lower the costs of aligning national laws with, for instance, EU directives. Drawing on the particular usage of Epstein and O'Halloran and what they term the 'transaction cost politics approach', the idea is that the legislature trades off 'internal' and 'external' production costs in the making of legislation in order to arrive at a solution that guarantees relatively low costs. In other words, the (in-) efficiencies of both legislative rule-making and administrative rule-making (for the sake of implementation) are weighed up against each other (Epstein and O'Halloran, 1997: 7-9).

With a view to the above, delegation and discretion can be considered as resulting from strategically calculated acts of the legislature who seeks to keep law-making costs low while trying to ensure that law is properly implemented by those actors to whom implementation has been assigned. This view ties in well with Thomson's (2007; 2011) observation regarding

EU negotiations on directives. Thomson points to the relevant fact that Member States take a double role in the negotiation process because they are principally involved in both the legislative decision-making and the implementation of directives. In transaction cost theory they are considered to be both political actors and implementers (2011: 256). In this double role and as argued by Thomson, Member States, negotiating a directive, anticipate the need for flexibility, i.e. discretion for implementation 'at home'. In ensuring the availability of this flexibility, they seek to keep transaction costs to a minimum: flexible arrangements ensure that implementation can be shaped according to their preferences. Resulting from these considerations is the incorporation of discretion into a directive (Thomson, 2007: 1004; Thomson, 2011: 253-254).

3.3.2 Discretion as a normative choice

A further explanation for the transfer of discretionary powers from one actor to another has been provided by the consensus-building perspective on the delegation of decision-making powers to EU Member States (Dimitrova and Steunenberg, 2000; Thomson et al., 2007; Thomson, 2011). With regard to EU legislative decision-making, it is argued that Member States formulate discretionary decision outcomes to resolve mutual disagreement – an approach to conflict settlement which has been applied with even higher frequency since the 2004 EU enlargement (Thomson, 2011: 277). Discretion is considered important in this context, not only because it apparently facilitates a compromise between Member States. Its relevant role is ascribed to the fact that it provides Member States with the prospect of not having to change too much of their national legal orders. As Thomson puts it, '[d]ecision outcomes that delegate discretionary power to Member States allow states to keep their national arrangements to at least some extent' – also in case that they are afforded only a narrow scope of discretion (Thomson, 2011: 260; 262).[6] This argument can be linked to ideas about discretion as a normative choice.

Reflecting upon the reasons for the delegation and the function of discretion is important. It allows concluding that discretion is not merely a coincidence or side-effect of decision-making. This view on discretion, supported in this dissertation, ties in well with the notion of 'deliberate discretion' (Huber and Shipan, 2002) which has been coined in studies on legislative decision-making in the United States but also regarding decision-making processes on EU law (Dimitrova and Steunenberg, 2000). The notion of 'deliberate discretion' emphasises that the legislature consciously chooses to delegate discretion for the purpose of law implementation, for the reasons discussed above. This aspect of intentionally granting discretion, however, can also be connected with a more normative idea about how

6 Moreover, I shall return to this point below when addressing in more detail the circumstances, degrees and effects pertaining to the delegation of discretion in the context of EU negotiations on directives.

EU law should be made to ensure that it is implemented and applied at the national level. At the same time, by deliberately granting discretion, the EU legislature accepts a certain level of legal diversity resulting from the national implementation of EU rules (Dimitrova and Steunenberg, 2000).

To understand this 'normative' idea, as it is referred to here, it is necessary to take recourse to EU primary law. In the pre-Lisbon period, the use of directives or regulations as regulatory instruments was determined, at least for a number of particular policy issues, by the relevant legal base in the EU treaties (Prechal and Vandamme, 2007: 13). Thus, EU primary law provides further insights into why the EU legislature makes use of directives and hence delegates discretionary decision-making power for implementation purposes to the Member States.

3.3.2.1 Discretion – Subsidiarity – Proportionality

In the context of EU law-making discretion relates to the principles of subsidiarity and proportionality. All three are concerned with the distribution of competences between the EU and national levels. The principles of subsidiarity[7] and proportionality are laid down in Article 5(3) and 5(4) TEU respectively. Together they regulate the exercise of decision-making powers by the European Union, by aiming to ensure that the EU acts within the limits conferred upon it by the treaties and the objectives they establish. More concrete, the principle of subsidiarity takes due account of the basic idea of democracy that decisions in the Union are taken as close as possible to citizens. The key question that the principle of subsidiarity addresses is therefore whether EU action is justified in terms of effectiveness if it is compared to decision-making at the national, regional or local levels. The principle of subsidiarity is closely bound up with the principle of proportionality which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the treaties. Put differently, the principle of proportionality emphasises that actions by EU institutions must be carried out within clear boundaries. Regarding their content and form those actions must be in keeping with the goals envisaged by the EU legislature.

Next to these two fundamental principles of EU law-making, discretion being granted to Member States shall also ensure – albeit in a different way – that EU rules do not encroach upon national law and respect the sovereignty of the Member States. As shown by the example of the Netherlands, national assessments of EU legislative proposals for directives pay due consideration to the principles of subsidiarity and proportionality, particularly in view of the question whether or not EU action and its scope are

7 From the viewpoint of legitimacy, it is interesting to note that the principle of subsidiarity has gained in importance in the post-Lisbon period. Being first introduced by the Treaty of Maastricht (1993), the principle of subsidiarity has to be respected by all Commission legislative proposals. It was strengthened by the Lisbon Treaty giving national parliaments the task to ensure compliance with the principle of subsidiarity through so-called 'subsidiarity checks' (Protocol 2 of the Lisbon Treaty).

justified. In the Dutch transposition context, corresponding assessments are carried out by a ministerial working group, including the ministry that is chiefly involved in the negotiations and transposition of a directive. Unlike subsidiarity and proportionality, discretion, however, is not a principle. It is, in fact, the central component of a directive which by design – precisely because it grants discretion – reflects the respect of the EU legislature towards the sovereignty of the Member States (Mastenbroek, 2007: 17). While the principle of subsidiarity promotes decentralised decision-making and therefore prevents power monopolisation at the EU level, discretion implies decision-making power to shape these decentralised decisions at the national and sub-national levels. The implementation of European directives illustrates this well: Member States have to meet the aims set out in directives but are free to decide how to do so since the decision on implementation forms and methods is left up to them.

The use of directives and therefore discretion is interpreted as a reaction of the EU legislature to national perceptions of EU integration. Accordingly, Member States view European legal integration as a challenge to their national legal orders, fearing that EU law with its supremacy over national constitutions could interfere too much into traditional frameworks to the detriment of national sovereignty, culture and identity. In this respect, Haverland et al. note:

> The European legal instrument of 'directive' is meant to be a response to this challenge. It unifies legislation across Europe, but leaves the different Member States some discretion in choosing means and instruments, hence mediating between unity and diversity (2011: 265-266).

This response of the EU legislature, in other words, its motives for using directives and granting discretion with a view to Member States' legal identities, are firmly rooted in the EU treaties. Two examples shall illustrate this. The first one pertains to the provision on national identities which is now to be found within Article 4(2) of the Treaty of European Union (TEU). It stipulates that:

> The Union shall respect the equality of Member States before the treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

The second example is taken from Title V of the Treaty on the Functioning of the European Union (TFEU) which sets out the conditions for establishing an Area of Freedom, Security and Justice:

> The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.[8]

8 Cf. Article 67(1) TFEU. Likewise Article 141 of the Euratom Treaty. See also Vandamme, 2008, p. 275.

In its legislative proposals the European Commission takes recourse to the idea that directives, owing to the discretion they imply, carry the potential to preserve national legal structures while at the same time EU law seeks to harmonise national laws. For instance, in its proposal for a directive on waste management the Commission explains the choice for a directive by arguing that:

> A less flexible legal measure would be disproportionate, given the need to allow for national differences in the management of waste as well as cultural and geographical differences.[9]

Hence, among the legal instruments that the EU legislature has at its disposal, directives seem to be the most appropriate to give effect to the Treaty's objective of respecting and protecting national identities reflected in the fundamental political and constitutional structures of the Member States, precisely because they typically grant discretion. Against this background, directives have been characterised as an instrument with an ingrained respect for not only the sovereignty but also legal diversity of the Member States, used by the EU legislature to safeguard national identities (Vandamme 2008: 275).

As a consequence, the importance of discretion results from the fact that it enables Member States to take account of national particularities, while having to transpose the content of European directives into their own legislation. Additionally, with regard to Article 288 TFEU, discretion enables Member States to involve national actors in decisions on the form and methods of transposition. This gives a hint as to how discretion is linked to the legitimacy of EU directives within national law. Conceiving of legitimacy as having an input, throughput and output side, it can be argued that discretion can enhance all three dimensions: in offering sufficient flexibility to address national peculiarities discretion can strengthen the directive's effectiveness at the national level, while allowing national actors to participate in the implementation of the directive may increase the throughput and input legitimacy of EU rules in national law. These are points that I shall argue more fully at a later stage of the dissertation.

---

9 Example taken from the European Commission's proposal for a revised Waste Framework Directive, see COM(2005) 667 final. This is, however, not to ignore that the European Commission, in striving for harmonisation of national law, is known for prefering regulations over directives since regulations, due to their direct applicability, guarantee the achievement of this objective. See for instance, Gil Ibáñez, 1999, p. 207. However, the question is if regulations are politically feasible since they reduce national sovereignty more than directives. See in this context Twigg-Flesner (2014) who discusses this question with a view to EU Consumer Law. With the entry into force of the Treaty of Lisbon this issue has gained additional significance. Unlike before, when this was determined by the EU Treaty, the EU legislature may now choose, in most cases, the legal instrument to be used for the implementation of EU policies. See Van der Burg and Voermans, 2015, p. 44.

In summing up the previous sections, it can be noted that the delegation of discretion from the (EU) legislature to (national) transposition actors is motivated by considerations of cost-efficiency, legislative quality as well as normative reasoning relating to the legal foundations and principles of the EU. In the remainder of this chapter, I shall concentrate more on the political and institutional context of legislative decision-making with specific regard to the EU legislative process in order to address the questions under which circumstances, to what extent and with what implications for decision-making the EU legislature grants discretion to (national) administrative actors for the purpose of the implementation of law. The expectations for the assessment framework used in the empirical analysis are thereby developed.

3.3.3 Delegation of discretion – circumstances, degrees and effect

Next to the reasons for granting discretion, scholars of legislative decision-making processes have also looked into the circumstances under which discretion is delegated and to what extent. In this respect, Huber and Shipan (2002) provide insightful ideas in their study on legislative decision-making in the United States. They argue that varying degrees of discretion can be explained by the fact that the legislature, in order to preclude bureaucratic drift, seeks to control the use of discretion by implementing authorities. Whereas delegation may be intended to curb decision-making costs and seek expertise, it is apparently not without risks (Majone, 2001: 103; Thomson, 2011: 252). The concept of bureaucratic drift, arguably similar to the notion of subjective justice used by legal scholars to describe arbitrary decision-making, refers to a purported negative effect of the delegation of discretion, namely the 'ability of the agent [implementing actor, added] to enact outcomes different from the policies preferred by those who originally delegated powers [the legislature, added]' (McCubbins et al., 1987; see also Epstein and O'Halloran, 1994). The varying degrees of discretion result from different needs for control: if more control is needed, legislation will be rather detailed and long whereas, if less control is necessary, more discretion is left to implementing actors. The latter is indicated by vague and relatively short legislation (Huber and Shipan, 2002: 2). It is interesting to note that, with respect to European directives, Kaeding (2007a) also refers to the level of detail from which he derives that directives grant larger or smaller margins of discretion. The idea is that discretion margins are indicated by the number of recitals in a directive's preamble. The higher the number of recitals, the more the margin of discretion decreases. Recitals, which are not legally binding, indicate the purpose of the directive and describe its provisions. Their high number can be regarded as resulting from attempts by both Member States and European Commission to insert preferences they have failed to get into the main, legally binding part of the directive (Kaeding, 2008: 29).

With regard to legislative decision-making, Franchino (2004) offers a good starting point to take a closer look at the role of discretion. Franchino departs from the assumption that there is a pattern with regard to the delegation of discretion to Member States as well as the European Commission which according to Articles 290 and 291 TFEU can likewise be involved in implementation.[10] Based on an examination of 158 EC legislative acts, including directives, he arrives at the conclusion that more discretion is delegated from the EU legislature to Member State institutions, in cases where implementation requires further specialisation and technical knowledge or when a directive is adopted at unanimity in the Council. The adoption of a directive by qualified majority, as well as the need for general managerial skills, result by contrast, into the delegation of discretion to the European Commission (Franchino, 2004: 291-293).

Franchino's findings may not only serve to predict whether discretion is delegated to national administrations or the European Commission. They also shed light on the circumstances under which smaller or larger amounts of discretion are delegated to the national level. Less discretion is granted to the European Commission, and therefore more of it to national actors, whenever profound knowledge is required regarding the policy issue the directive addresses. This is an interesting observation which shows a connection between the scope of discretion incorporated into directives and the policy issue they deal with. More concrete, it links up well with the idea that in issue areas where the EU does not yet play a prominent role, hence where Member States' influence prevails, higher margins of discretion are granted to national administrations for the purpose of transposition. This holds especially for issue areas such as asylum and migration law where EU law has much less influence if compared to other policy areas where supranational cooperation beween Member States is more advanced. Where this firm influence is lacking, the EU still interferes with Member States' national sovereignty, in other words their ultimate decision-making powers (Koukoudakis, 2014). For this reason, corresponding directives usually grant larger margins of discretion to Member States. In short, discretion amounts incorporated into directives vary amongst policy domains and issue areas (Thomson, 2007).

10 Formerly, the decision-making competences of the European Commission were established by Article 202 TEC and the Comitology Decision 1999/468/EC of 28 June 1999 which was amended by Council Decision 2006/512/ EC of 18 July 2006. The Treaty of Lisbon has further specified the conditions of the delegation of these powers to the Commission by introducing the distinction between delegated and implementing acts (Articles 290 and 291 TFEU). With delegated acts (Article 290) the Commission is granted the power to supplement or amend the non-essential elements of the basic act. Article 291 on implementing acts implies that the Commission (and the Council in specific circumstances) is granted the power to implement the legislative act. See Hardacre and Kaeding (2013).

In this regard the distribution of competences between EU and national levels is another relevant aspect to consider. In the context of EU decision-making, competence distribution is based on the principle of conferral: EU action in a policy area is justified as long as it is in line with the competence conferred upon it by the Member States (Article 5 TEU, ex Article 5 TEC) (Van der Burg and Voermans, 2015: 63-67). While the Treaty of Maastricht (1993) established a three pillar structure, distinguishing between one area of high EU influence (supranational pillar) and two intergovernmental pillars, and therefore areas where Member States' interests prevailed, the Treaty of Lisbon (2009) abolished this structure. It maintained, however, a threefold classification of competences by dividing them into exclusive, shared and supporting competences which implies a corresponding increase of discretion afforded to Member States.[11] In other words, Member States are afforded hardly any discretion if the EU has exclusive competence but have larger margins of discretion at their disposal in areas where competences are shared depending on the policy issue in question. In areas where the EU merely exercises supporting competences, Member States are likely to have considerable discretion in the implementation of EU legal acts. With a particular view to the three policy areas addressed in the dissertation – consumer protection, environment and migration – they all fall in the area of shared competences of the EU and its Member States. On the face of it, this may suggest that competence distribution, and hence also the conferral of discretion, is similar for all three areas. But the matter is more complex. This shall be illustrated briefly by referring to two directives that are addressed in the case studies presented later on. The Toy Safety Directive is a consumer protection directive and the Return Directive originates from the area of justice and home affairs, addressing irregular migration in particular. In the case of consumer protection, however, legislative harmonisation is more advanced and with regard to the Toy Safety Directive, the EU has meanwhile gained exclusive competences with respect to the revision of safety requirements for toys and conditions of their placing on the market. Having exclusive competence in this regard was used by the Commission to justify its corresponding proposal,[12] whereas the Return Directive was proposed in acknowledging that competences are shared with the Member States and compliance with the subsidiarity principle has to be ensured.[13] Hence, both Directives imply different levels of harmonisation and therefore variation in margins of discretion: in case of the Toy Safety Directive a considerable degree of harmonisation leads to a small scope of discretion. The Return Directive, by contrast, implies a low level of harmonisation and, hence, has a wide scope of discretion.

11 See Title I of Part I of the TFEU'Categories and Areas of Union Competence' (Articles 2 to 6).

12 See Article 95 TEC (now 114 TFEU).

13 See Article 63(3) TEC (now Article 79 TFEU). In addition to that, in the area of migration specific legal arrangements applied which shall be addressed in the case study analyses.

The foregoing examples suggest that it is worth taking a closer look at the link between discretion and policy area which a directive addresses. As pointed out in the introduction to the dissertation, the legislative impact exerted by the EU on its Member States is considered as one aspect of the notion of Europeanisation which is furthermore understood in terms of EU institutional development, including non-legal activities in a policy area. Hence, the more Europeanised a policy area is – meaning the more it is characterised by EU institutional and legal involvement – the less discretion is granted to Member States.

The foregoing considerations inform the first expectation of the analytical framework, which is referred to as the *policy area expectation*.

Discretion and Policy Area
The less a policy area is influenced by the EU in institutional and legal terms, the more discretion is granted to Member States.

From studies of legislative decision-making it has emerged that if a law under negotiation (e.g. an EU directive) addresses an issue of 'saliency' (Epstein and O'Halloran, 1994: 710), i.e. an issue of vital importance to those involved in legislative decision-making, or an otherwise politically sensitive issue, disagreement is likely to arise between the negotiating parties. In this connection, discretion is associated with political controversy (Thomson et al., 2007). With specific regard to EU negotiations on directives, the granting of more or less discretion is explained by referring to the position of Member States on the European Commission's legislative proposals for directives (Thomson, 2007; Thomson et al., 2007; Zhelazykova and Torenvliet, 2011). Thomson (2007; 2010) claims that discretionary amounts are higher in cases where the preferences of the negotiating parties differ (see also Steunenberg, 2006). Preference divergence can relate to the fact that Member States have different ideas about the directive to be adopted – a scenario that is not very unlikely in the case of the EU where meanwhile twenty-eight Member States with diverse legal-administrative but also cultural, economic, and social structures have to reach an agreement. Member States may be in disagreement with a proposed directive because they consider it as encroaching too much upon their ultimate decision-making powers and therefore national sovereignty.[14] In particular fields, mostly those that are of vital policy importance to their citizens, they may prefer to stay in the driver's seat and therefore be reluctant to cede too readily crucial decision-making competences to the EU level. Hence, where politically delicate matters are discussed and preferences of Member States diverge, it is likely that

14 In the implementation literature incompatibility is also referred to as 'misfit'. See T. A. Börzel, 'Towards Convergence in Europe? Institutional Adaptation to Europeanisation in Germany and Spain', *Journal of Common Market Studies* 1999, vol. 37, pp. 573-596.

controversy arises. Controversy, however, makes it difficult for Member States to find a compromise, impeding the general progress in the negotiations. Member States may then seek to increase the directive's scope of discretion to ensure that with sufficient flexibility potential problems related to political sensitive issues arising from a directive's content can be eradicated during implementation. Thus, in order to avoid legislative deadlock and delay of negotiations, higher levels of discretion are incorporated into the directive to increase flexibility for transposition (Thomson et al., 2007). The foregoing makes two things clear. First, the granting of discretion is linked to the political sensitivity of a directive and political controversy triggered by it. Second, Member States' position on the proposed directive is influenced by domestic considerations (Knill and Lenschow, 1998; Falkner et al., 2005; Kaeding, 2007b; Mastenbroek, 2007).

It becomes evident that discretion can facilitate decision-making among actors with different preferences, in particular if compromises have to be made on contentious issues (Franchino, 2004: 292). Compromises are made feasible by giving Member States the prospect of having a range of options available to transpose the directive in whatever way they see fit – as long as implementation stays within the limits of the legislative act. This point links up with the aforementioned consensus-building approach to decision-making processes which presents discretion as a solution to conflicts in the EU Council. But it also ties in well with the observation of socio-legal scholars previously mentioned, that discretion can mediate between different interests and lead to conflict settlement (see section 2.3.3). In any case, it should be noted that discretion can affect EU decision-making on directives in a positive way. The granting of discretion can serve to reconcile different Member States' positions and facilitate reaching a common agreement, exemplified by the adoption of a directive.

In the light of this knowledge the next expectation is formulated. The *political sensitivity expectation* takes account of the link between discretion and the political sensitivity of the directive negotiated.

Discretion and Political Sensitivity
The more politically sensitive the directive's policy issue is, the more discretion is incorporated into the directive.

Picking up on the aspect that Member States' perception of a directive proposal is affected by domestic considerations, their disagreement with the requirements of a directive may be based on the reasoning that these are incompatible with their national legal-administrative frameworks (Thomson, 2007). In the research on Europeanisation[15] of which the implementa-

15 As pointed out in the introduction to the dissertation, Europeanisation research deals with the impact of EU-law-making and policies on Member States' politics, institutions and policies.

tion of EU law represents one strand (Jordan and Liefferink, 2004: 4; Sverdrup, 2007), considerations about the (in)compatibility between EU and national arrangements have been referred to as the 'goodness-of-fit' or '(mis)fit' argument (see for instance Börzel and Risse, 2003). Meanwhile various kinds of misfits have been identified by scholars, ranging from institutional, legal, normative to policy misfit – to mention a few (Toshkov et al., 2010: 19; see also Carroll, 2014: 46-53). The central argument is that so-called 'policy-shapers', roughly put, Member States with sufficient resources (e.g. administrative, economic), seek to export or 'upload' national legal arrangements to the EU level. 'Policy takers', on the contrary, i.e. Member States that are economically rather weak and have only limited capacity to act, rather download EU arrangements. Getting own legal arrangements incorporated into a directive has the aim to minimise the incompatibility between EU and national legal arrangements because it reduces the costs incurred by adapting to EU law (Börzel, 2005). In other words, the relationship between the EU and its Member States is conceived as having a vertical, 'top-down' dimension (Ladrech, 1994) as well as a 'bottom-up' dimension (Börzel, 2005; 2007) which are both reflected in the life cycle of a directive: the EU legislature adopts a directive that has to be implemented by the Member States (top-down dimension). But during the negotiations Member States may seek to upload own legal arrangements into the directive (bottom-up dimension).

Having said this, in my view, two strategies can be identified that are used by Member States to assert their preferences during the Council negotiations with the aim of securing a better match between EU and national rules. One strategy is to upload own national legal arrangements, i.e. to translate them into the directive text. The other is seeking to increase the amount of discretion of the directive under negotiation. In reflecting upon the chances of success of each of the two strategies, I expect that where national systems highly diverge, seeking more discretion and getting it incorporated into the directive is more feasible than uploading own national legal arrangements. The latter is not only more difficult for a Member State acting alone. Preference divergence also precludes coalition-building among Member States which may otherwise facilitate that shared preferences are uploaded to the EU level. The foregoing considerations lend substance to the *compatibility expectation*:

Discretion and Compatibility
The less compatible the EU directive and already existing national legislation are, the more likely that discretion is incorporated into the directive.

So far the discussion has been confined to the Member States in the Council which are key actors in EU decision-making as well as to the question of how they influence the scope of discretion eventually being granted for the

national implementation of directives. However, being also involved in legislative decision-making, the position of the European Parliament has to be taken into consideration.

3.3.3.1 European Parliament

Depending on the applicable legislative procedure, other actors may be involved in the decision-making process on directives – above all the European Parliament.[16,17] The main concern here is with the scope of legislative discretion granted by a directive. Therefore the aim is to take a closer look at the European Parliament's position on the Commission proposal. In this respect it becomes a vital question whether or not the European Parliament supports the granting of more or less discretion to Member States. To this end, either its non-binding opinion – in case that the consultation procedure applies or, if it is involved as co-legislator, its legislative resolution on the relevant Commission proposal may provide information that serves to answer this question. Like Member States, the European Parliament has certain preferences concerning the policy issue addressed by the directive. In this regard, it is relevant to note that empirical research of the European Parliament's policy position on various Commission proposals throughout three legislative periods (from 1999-2009, thus including the time frame under study here) has shown that, on the whole, the median Member of Parliament favours harmonisation and strong regulation of free markets (Thomson, 2011: 130). This observation has been found to apply in spite of the existence of 'national groups' within the 'political groups' of the European Parliament inclined to adhere to national interests when voting on a policy issue (Thomson, 2011: 104). With regard to EU environmental law-making, for instance, it is conceivable that, due to the European Parliament's traditionally 'green' (meaning favourable) attitude towards the environment, it will support legislative proposals that promote high environmental standards. In my view, it makes sense to assume that the same applies in case that both the health and protection of consumers or, human rights issues, featuring prominently in the area of migration, are at stake. All this leads me to expect that the European Parliament in promoting legislative harmonisation will disapprove EU directives that confer considerable discretion for national-level implementation – in any case if its preferences diverge from those of the Member States in the Council. It may then seek to reduce Member States' discretion (Franchino, 2005). Next to that,

16 Depending on the legislative procedure applied, advisory bodies, like the Committee of the Regions and the European Economic and Social Committee may additionally be involved in the negotiation process. However, their role is a rather passive one as the opinions they deliver are non-binding and in contrast to the European Parliament, they generally have a far less prominent role to play. This is why their view has largely been left out in the analyses presented in this dissertation.

17 But also the role of the European Commission shall be addressed in the case studies, in particular its legislative proposals which provide the starting point for the negotiations on directives in the Council of Ministers.

and as convincingly argued by Selck and Steunenberg (2004), to have influence on the content of a legislative proposal (and therefore on the amount of discretion incorporated) preferences need to be asserted, and to this end decision-making rights are indispensable (see also Young, 2010: 61). Due to different legislative procedures, the European Parliament's decision-making rights vary among policy areas (Wallace, 2010: 84). Considering the period under study (2007-2009), its influence is not negligible under the consultation procedure but without doubt, the European Parliament will have greater chances in asserting its preferences, if it acts as co-legislator[18] and if qualified majority voting applies in the Council (Thomson, 2011). In delivering an opinion under the consultation procedure and unanimity voting, by contrast, it stands only little chance to influence the final decision outcome, especially where controversial issues need to be settled such as matters related to the area of justice and home affairs (Hosli and Thomson, 2006: 414).[19] From the foregoing insights and considerations another expectation is deduced that seeks to describe the European Parliament's influence on the scope of discretion which is finally made available to the Member States once a directive is adopted: the *European-Parliament-matters expectation*.

Discretion and European Parliament
The greater the role of the European Parliament in the legislative process, the less discretion is granted to Member States.

To sum it up, features that pertain to the EU-level (decision-making process) and the directive (policy issue) shape the conditions for the delegation of discretion to Member States. The perspective adopted in the dissertation, which links EU- and national-level processes, furthermore casts light on not only how the granting of discretion can affect EU negotiations on directives. It also gives a preliminary idea of how transposition may play out if discretion is made available to Member States for the implementation of directives into national law.

In the next chapter, the analytical framework for the discussion of the national transposition process is presented. It provides a review of the relevant literature on the (formal) implementation of directives, taking due account of the role of discretion in transposition. Moreover, it takes a closer look at the wider national context in order to consider the relevance of factors other than discretion that are posited to affect transposition.

18 That means if it acts under the co-decision procedure, which with the entry into force of the Treaty of Lisbon became the ordinary legislative procedure (Art. 289 TFEU).

19 Interestingly, however, they also contend that under the consultation procedure the European Parliament may have some leverage on the content of the law to be decided, namely if consultation is accompanied by the qualified majority procedure. Cf. Thomson and Hosli, 2006, p. 414.

3.4 Conclusion

Discretion is granted in EU decision-making on directives under particular circumstances which influence the extent to which it is incorporated into a directive. Variation may be explained by at least the following reasons: the need perceived by the EU legislature for efficient decision-making as well as more national expertise in the later implementation to compensate for information asymmetries between the law-making and application stages. Furthermore, the need for conflict settlement in case of disagreement resulting from Member States' attempts to assert own preferences in the Council of Ministers. In addition, the granting of discretion follows from the intention of the EU legislator to make legislation which respects traditionally grown structures and firmly established national legal identities. Moreover, insights relating to both EU decision-making and the directive negotiated are important and have been used to formulate a number of expectations regarding the reasons for discretion and the circumstances under which it is granted. These expectations make part of the assessment framework that shall be applied in the empirical analysis. Finally, looking into the reasons for why discretion is granted for the implementation of directives into national law has shed light on the effect and advantages of discretion. In this respect, discretion has been found to facilitate decision-making on directives.

4 Discretion in national transposition

4.1 Introduction

It has just been established that the granting of discretion to Member States may facilitate EU decision-making on directives. In the following sections, the implementation literature is addressed with the aim of providing insights into the potential effects of discretion on the national transposition of EU directives. The implementation literature gives a rather mixed picture in this respect which is examined more closely. Further up, the discussion of views on discretion in the legal sciences has brought to light a number of disadvantages associated with the granting of discretion to administrative actors for the implementation of legislation. In the context of the EU, one of the perceived disadvantages is that discretion contributes to legal diversity. This is considered to undermine the principle of uniform application leading to an increase in legal uncertainty. Viewed like this, discretion can only be incompatible with the objectives of a directive, harming the latter's effectiveness which is supposed to unfold once EU rules make part of the national legal framework. National transposition, however, is a complex process, which requires an approach that takes a closer look at the national setting, by taking into account actors and factors that shape the incorporation of EU rules into national law. In this regard implementation research provides a number of insights that shed light on the national transposition of directives and the role that discretion can play therein.

4.2 The purported effects of discretion

Most studies that look into the effects of discretion on the national transposition of EU directives are quantitatively orientated, meaning that they examine a large number of directives in contrast to the analysis of a handful of directives such as it is envisaged in this dissertation. Some scholars suggest that discretion can have a positive impact on the process, in respect of especially timely but also legally correct transposition (Knill and Lenschow, 1998; Thomson, 2007; 2010; Zhelazykova and Torenvliet, 2011; Zhelyazkova, 2013). The common view is that discretion facilitates transposition. It provides the necessary flexibility to make tailor-made implementing legislation that takes account of national circumstances and results into the timely transposition of EU rules (Steunenberg and Toshkov, 2009: 954). As explained by Thomson:

> For directives that grant member states more discretion, broader ranges of policies at the national level are consistent with their provisions. For this reason a positive relationship between discretion and compliance [transposition success, added] is to be expected (2007: 995).

Regarding legal correctness, a similar argument is put forward:

> [W]hen higher levels of discretion are granted to member states, wider ranges of policy performances are compatible with the decision outcomes contained in a policy […]. In other words, we expect that the level of discretion decreases the costs of adaptation to a specific EU provision and consequently increases the likelihood of compliance (Zhelazykova and Torenvliet, 2011: 694).

The reduction of adaptation (transposition) costs is associated here with larger margins of discretion. Interestingly, with regard to EU decision-making, a similar assumption was previously made: it was shown that discretion can be an option to reduce the incompatibility between a directive and national legal arrangements and therefore minimise costs resulting from the alignment of national legislation with EU law. Finally, even though national transposition takes centre stage in the dissertation, it is worth noting that discretion apparently also facilitates the application of EU rules at later post-transposition stages as has been demonstrated in the area of animal welfare (Carroll, 2014).

And yet, alongside the positive effects that have been ascribed to discretion and regarding both legal correctness and timeliness, it has also been argued that discretion upsets transposition especially in respect to timeliness. Opinions on the relationship between discretion and transposition timeliness can roughly be distinguished into two camps: there are those who think that discretion facilitates transposition and contributes to the timely finalisation of the process (Héritier, 1996; Knill, 2001; Thomson, 2010). And then there are others who consider discretion to impede transposition since it is expected to contribute to delay (Kaeding, 2007a; 2007b; 2008; Steunenberg and Toshkov, 2009; Thomson et al., 2009). Steunenberg and Toshkov provide insights into the pros and cons that have been used in assessing how discretion affects the national transposition of directives:

> On the one hand, it can be argued that more discretion makes transposing a directive easier since the domestic policy actor can adapt the European requirements to national or regional differences. In addition, discretion is expected to speed up the decision-making process since national policy-makers are able to tackle possible national or local concerns […] On the other hand, discretion can also be expected to complicate matters according to a more political approach. If a requirement does not provide any leeway to the national policy actors, these actors cannot quarrel over the way in which this requirement should be interpreted. However, if member states have leeway, national policy-makers may disagree on how to transpose and implement a policy (2009: 954-955).

It should be born in mind that differing outcomes with a view to the effects of discretion on transposition may result from differences in research designs as has been concluded from the review of various transposition

studies (Steunenberg and Rhinard, 2010: 498).[1] These differences may have crucial implications for drawing inferences from empirical analysis (König, 2008: 158). But despite different evidence as to the effects of discretion, a number of implementation scholars believe that discretion matters for transposition. From the various implementation studies, discretion appears to impact transposition in basically two ways: it may affect transposition directly or in interaction with other factors (Thomson et al., 2007; Steunenberg and Toshkov, 2009; Zhelazykova and Torenvliet 2011).

4.2.1 Correctness and timeliness

Regarding the assumed direct relationship between discretion and transposition, it is argued that discretion positively affects transposition when granted to Member States by larger degrees. Thomson (2010) looks at the correctness of transposition with regard to a few labour market directives in a handful of Member States. His analysis takes into account features from both EU-decision-making and national transposition processes, actors' preferences in particular, as well as discretion as main characteristic of directives. He arrives at the conclusion that discretionary provisions which leave Member States some flexibility for the formal implementation of directives are less likely to be transposed incorrectly than non-discretionary provisions (ibid: 590). He attributes this to the fact that in having available discretion, implementers get a range of policy alternatives that all can be used because they lay within the legal limits set by the directive (ibid: 583). Zhelazykova (2013) voices a similar view on the link between discretion and legal correctness of transposition. Based on her empirical results from the analysis of four directives addressing different policy areas she concludes that discretion contributes to correct transposition and therefore facilitates compliance (Zhelazykova, 2013: 718).

More has been written about the effects of discretion on the timeliness of transposition such as by Thomson (2007) in another study on labour market directives,[2] According to him European directives with larger margins of discretion make timely compliance more likely because they leave Member States with wider ranges of policy performances that can be compatible with the directive's requirements (ibid: 995). Said differently, swift transposition is likely because Member States can adequately fit the directive into their national legislation. Acting on these findings, the *individual discretion effect or discretion-in-national-law expectation* is proposed. 'Better transposition' is understood as timely and legally correct transposition.

---

1 These differences pertain, for instance, to the selection of the (directive) sample, period under study, explanatory variables, statistical methods applied, and the operationalisation and measurement of variables such as discretion, amongst others.

2 Thomson's 2007 and 2010 studies are extensions – in terms of research design and scope – of the qualitative implementation analysis of labour market directives provided by Falkner et al. (2005).

Discretion-in-National-Law
The more discretion is available to transposition actors, the better the directive is incorporated into national law.

In fact, emerging from the discussion about the positive effects of discretion for transposition is the potential of discretion to allow for the incorporation of EU rules without fundamentally disturbing the structure of national legal orders. As previously shown, this is a strength that has been ascribed to discretion by legal scholars who identify discretion as an instance of conceptual divergence (see section 2.3.3) but it has also been emphasised in the presentation of discretion as a normative choice of the EU legislature (section 3.3.2).

Even though it is at the heart of the dissertation to highlight the potentials of discretion for the national transposition process, its purported negative effects shall not be disregarded. Kaeding (2007b; 2008) and Thomson et al. (2007) provide evidence that illustrates the negative effects of discretion on transposition. In examining the role of discretion in Member States' transposition of the EU's transport acquis,[3] Kaeding (2007b: 106) shows that discretion has a retarding effect on transposition, leading on average to short-term delays. Interestingly, his a priori reading of discretion as a 'problem', illustrated by the hypothesis that '[t]he higher the amount of discretion, ceteris paribus,[4] the more difficult to settle an agreement on time' (ibid: 78), appears to be reminiscent of the earlier-mentioned legal viewpoints that stress the downsides of discretion. The empirical findings of Thomson et al.'s (2007: 706) additionally corroborate the view that discretion impedes rather than that it facilitates Member State transposition. Basing their results on an analysis of transposition in various Member States and policy sectors,[5] the authors draw the conclusion that discretion slows down the pace of transposition and leads to delay.

Discretion can also be seen in a negative light from yet another angle. Falkner et al. (2005: 286-289) consider problems of misinterpretation and misapplication as resulting from the poor legislative quality of directives. Their case study analysis of Member States' compliance with social policy directives, offers empirical evidence for the argument that transposition is obstructed by directives that are vaguely formulated, unclear and inconsis-

3 The sample of Member States includes the Netherlands alongside Greece, Italy, Ireland, Spain, Sweden, and the United Kingdom.

4 The ceteris paribus assumption is a particular assumption in research methodology and shall be explained together with the case study methodology in chapter 8.

5 In concrete numbers: transposition processes of twenty-four directives in fifteen Member States. Their directive sample spans various policy sectors: internal market (nine directives), economic and financial affairs (five directives), agriculture (three directives), transport (three directives), justice and home affairs (one directive), employment (one directive), energy (one directive), and health (one directive). Cf. Thomson et al. (2007).

tent (ibid: 286). The same observation has been made for the implementation of environmental directives (Backes et al., 2006; Beijen, 2010). Backes et al. rightly point to the compromise character of directives being a result of EU decision-making processes in which different national and inter-institutional (Council vis-à-vis European Parliament) positions have to be reconciled and which may lead to sometimes broad formulations inviting different interpretations (2006: 77). It may be true that these findings point to the relevance of the margin of discretion that a directive implies. But even though discretion can be expressed by vagueness and ambiguity, implementation research does not, to my knowledge, provide a clear and immediate link between discretion and poor legislative quality of a directive. It is interesting to note in this regard that the German implementation of the EU Water Framework Directive was rendered difficult due to legal inconsistencies in the Directive text. While implementation problems were, thus, caused by deficient legislative quality, the Directive's margin of discretion was found to be small (Knill and Lenschow, 1998: 604). In other words, only little discretion was granted and yet, the directive was of deficient legislative quality. It should finally be recalled from the analysis of the legal debates, that discretion, precisely because it offers ambiguity, has been regarded as helpful in processes of law formulation and implementation (section 2.3.3).

4.2.2 Discretion in interaction with other factors

Discretion can affect national transposition not only individually but also in connection with other factors. In this context, Member States' preferences come again into play. The position that a Member State takes on the content of a directive during the Council negotiations has been linked to the subsequent transposition of the directive (Thomson, 2007; Thomson et al., 2007; Thomson 2010). In the already mentioned study by Thomson et al. a Member State's disagreement with a directive's requirement together with little discretion being available for transposing it are identified as predictors of non-compliance with EU law (Thomson et al., 2007: 700). Discretion is, hence, considered relevant, as it is expected to reinforce the relationship between disagreement and non-compliance. In the dissertation, non-compliance is referred to as 'deficient transposition' meaning that the incorporation of requirements from a directive is not achieved in a timely and / or legally correct fashion. Summarising the previous considerations leads to the *disagreement interaction expectation* which connects the negotiation and transposition stages:

Discretion and Disagreement
Member State disagreement with a directive's requirement raises the likelihood of deficient transposition, and this effect increases as the degree of discretion decreases.

Next to Member States' preferences, also the issue of compatibility which was already addressed in the context of EU negotiations becomes relevant again, this time in theorising about its effects on the national implementation of EU law. In this regard, Carroll's study (2014) provides interesting insights, even though it does not address the transposition but the post-transposition of directives in Member States. Carroll takes a closer look at another implementation stage, namely the national post-transposition application of EU animal welfare legislation including EU directives and regulations in twenty-seven Member States. In doing so, he links discretion and the notion of compatibility between EU and national legal arrangements. Carroll conceptualises incompatibility in terms of adaptation pressure and degrees. Adaptation pressure denotes the necessity for Member States to create, modify, and / or replace existing national legislation and that depending on the extent of efforts that this brings with it, pressure is regarded as being low, medium or high (ibid: 48-53). His long-term study, covering a period of ten years (2000-2010), shows that regarding the post-transposition application of EU directives discretion is helpful for Member States that face high adaptation pressures in implementing directives: 'Member states can adjust to the demands of difficult and evolving policies when they have greater flexibility to do so' (ibid: 213). If adaptation pressure is low discretion appears to have impeding or no effects on implementation. Hence, discretion is considered to intervene in the relationship between adaptation pressure and transposition outcome thereby exerting different effects depending on the level of adaptation pressure.

Interaction effects of incompatibility and discretion, have, however, also been studied with regard to the transposition of EU directives. In addressing the legal correctness of Member States' transposition of the Framework Equality Directive, in the area of EU employment policy, Zhelazykova and Torenvliet (2011), studied the effects of discretion in the presence of different degrees of 'technical compatibility', or as the authors put it 'technical fit'. Technical fit refers to the above-mentioned considerations about the compatibility between directives and national legal frameworks and is defined by the authors as 'the legal-administrative costs for public authorities to design laws that are both compliant with the EU directive and do not disrupt related domestic structures' (ibid: 693). Their results show that discretion facilitates transposition if technical fit is at a medium or high level. In case of medium fit or high fit discretion is found to unfold positive effects on transposition. Thus, if some national policy or practices already exist that correspond to the directive (medium fit), or in case that hardly any changes have to be made to national legislation (high fit), discretion facilitates achieving legal correctness of transposition legislation. Like in the case of expectation 5 (*discretion-in-national-law*), more discretion is also associated with timeliness.

The above considerations about the link of compatibility and transposition outcome being reinforced by discretion are reflected in the *compatibility interaction expectation*. It should be noted that 'proper transposition' is understood in the dissertation as timely and legally correct transposition.

Discretion and Compatibility
Compatibility between the EU directive and national rules raises the likelihood of proper transposition, and this effect increases as the degree of discretion increases.

Going back to the study of Zhelazykova and Torenvliet the situation of low technical fit has not yet been addressed. In the presence of low technical fit, meaning that national equivalents in terms of policies and practices are lacking, discretion is, however, found to negatively affect transposition. It apparently creates ambiguity in transposition, which if actors lack sufficient knowledge – the theoretical and practical understanding of how to carry out the task including the necessary skills to do so – likely obstructs transposition (Zhelazykova and Torenvliet, 2011: 703). Hence, the results of the study show that discretion's facilitating effects apply in cases of medium or high, i.e. in case of technical and legal compatibility, but not when compatibility is low. The authors provide the following reasonable explanation for this result:

> [V]ery low levels of technical and legal compatibility are associated with lack of vital knowledge about the consequences of implementing a particular provision. Granting discretion implies that member states have different transposition alternatives at their disposal and some knowledge is necessary for national authorities to be able to select an appropriate transposition measure (ibid: 703).

Hence, where lacking compatibility between the EU and national legal order cannot be compensated for by knowing how to level out existing incompatibilities, discretion may disturb transposition further. If knowledge on transposition is poor, room for interpretation and action is likely to lead to misinterpretation and misapplication of a directive's requirements (Zhelazykova and Torenvlied, 2011: 702-703). After all, discretionary leeway brings with it not only options to act but, above all, the task to decide which of the options available is the most suitable to incorporate a directive into national law.

In the dissertation, transposition knowledge is understood as one dimension of administrative capacity which is linked to the main actor in transposing directives, usually one or more national ministries. This dimension relates to information about the content of the directive and expertise within the ministry on the subject matter of the directive. Another dimension, also referring to a particular feature of the ministry transposing EU directives, is 'intra-ministerial coordination'. It concerns the administrative coordination capacity between units within one ministry, in which several units might be involved in the preparation as well as the implementation of the directive. Typically these are the policy and legal units within ministries, but it may include more, depending on the ministry's organisation structure as well as working practices. Regarding the implementation of directives, administrative capacity may be weak where working ties between

the preparation and transposition stages, and among the relevant ministerial units, in particular, are insufficient. Lacking administrative capacity lies then in the fact that collaboration and information sharing between the units involved in the negotiations at the EU stage and those involved in the formal implementation of the directive at the national stage is insufficient. This may contribute to interpretation problems once the directive has to be incorporated into national law, rendering transposition more labour and time intensive (Mastenbroek, 2007: 38).

Bringing the foregoing findings together leads, thus, to the *capacity interaction expectation* which implies that discretion intervenes in the relationship between administrative capacity and transposition outcome in the following way:

Discretion and Administrative Capacity
Administrative capacity raises the likelihood of proper transposition, but this effect decreases as the degree of discretion increases.

It is worth noting that both the studies by Zhelazykova and Torenvlied (2011) and Carroll (2014), addressed above, confirm, as previously noted, that discretion can affect implementation processes differently. While the former analysis shows that discretion in interaction with lacking administrative capacity can affect transposition negatively, the latter study by Carroll provides evidence that discretion may be positive for the post-transposition application of EU directives by Member States in case that adaptation pressure is high.

Last but not least there is another national-level factor which has been posited to affect transposition in interaction with discretion. This brings me back to the study by Thomson et al. (2007). In trying to explain why larger margins of discretion result in transposition delay, the authors argue that if national politics play a decisive role during transposition, the choice of policy alternatives offered by discretion may increase controversy instead of easing the incorporation of the directive into national legislation. They conclude that '[i]t seems plausible that highly discretionary directives precede more complex and time-consuming national transposition processes' (ibid: 708). Also Steunenberg and Rhinard establish a causal link between the negotiation and transposition stages in opining that delicate compromises may be struck at the EU level but that these compromises have to be carried through the implementation phase at the domestic level where earlier conflicts can re-emerge (2010: 500). The idea of national controversy with regard to transposition has been picked up and related to the participation of more actors in transposition. The corresponding claim is that the more actors are involved in transposition, the more likely it will be delayed (Kaeding, 2007b; Mastenbroek, 2007; Kaeding and Steunenberg, 2009; Haverland et al., 2011). In the Netherlands, transposition is carried out by national ministries

in the first place but may also involve Parliament. Involvement of both can be problematic for timely transposition, for instance, if common agreement on how to transpose a directive is lacking among actors (Haverland and Romeijn, 2007; Mastenbroek, 2003; 2007: 39; König and Luetgert, 2008). At ministerial level, this last aspect is described as inter-ministerial coordination problem. The subject matter of a directive may concern the purview of more than one ministry but transposition may be hampered (slowed down) by lacking communication and possibly conflicts of interests and competences between ministries. In this context, it is conceivable that with more discretion granted by a directive, problems resulting from miscommunication and collisions of interest may be aggravated: each ministry involved may seek to claim for itself a certain interpretation of the directive to be implemented and insist on certain uses of discretion.

The foregoing discussion allows deducing the *actor interaction expectation*:

Discretion and Transposition Actors
More actors involved in transposition increases the likelihood of deficient transposition, and this effect increases as the degree of discretion increases.

The number of transposition actors was a relevant factor in selecting cases for the empirical analysis and is therefore taken up again further down.

In summary, the foregoing discussion provides a number of valuable insights which have been used to formulate sets of expectations for the subsequent empirical analysis of six EU negotiation and transposition processes that have been carried out in the Netherlands. These expectations take into consideration that discretion may affect transposition differently in bringing out positive as well as negative effects. In the dissertation, discretion, if observed individually, is assumed to facilitate transposition. When interacting with other factors stemming mostly from the national level, discretion may however, not only facilitate but also impede the formal implementation of directives. In these cases, discretion is considered to be an 'intervening' factor or variable: it mediates the effects of the presumed cause (referred to in quantitative analysis as 'independent variable') on the presumed outcome (referred to in quantitative analysis as 'dependent variable'). Said differently, discretion strengthens the link between a cause and an outcome (Creswell, 2009: 50).

The following overview sums up the expectations that have been derived from the previous discussion. These expectations are used in the empirical analysis to shed light on the role of discretion in the EU negotiation and national (Dutch) transposition processes regarding directives:

E1. (*DISCRETION and POLICY AREA*): The less a policy area is influenced by the EU in institutional and legal terms, the more discretion is granted to Member States.

E2. (*DISCRETION and POLITICAL SENSITIVITY*): The more politically sensitive the directive's policy issue is, the more discretion is incorporated into the directive.

E3. (*DISCRETION and COMPATIBILITY*): The less compatible the EU directive and already existing national legislation are, the more likely that discretion is incorporated into the directive.

E4. (*DISCRETION and EUROPEAN PARLIAMENT*): The greater the role of the European Parliament in the legislative process, the less discretion is granted to Member States.

E5. (*DISCRETION-IN-NATIONAL-LAW*): The more discretion is available to transposition actors, the better the directive is incorporated into national law.

E6. (*DISCRETION and DISAGREEMENT*): Member State disagreement with a directive's requirement raises the likelihood of deficient transposition, and this effect increases as the degree of discretion decreases.

E7. (*DISCRETION and COMPATIBILITY*): Compatibility between the EU directive and national rules raises the likelihood of proper transposition, and this effect increases as the degree of discretion increases.

E8. (*DISCRETION and ADMINISTRATIVE CAPACITY*): Administrative capacity raises the likelihood of proper transposition, but this effect decreases as the degree of discretion increases.

E9. (*DISCRETION and TRANSPOSITION ACTORS*): More actors involved in transposition increases the likelihood of deficient transposition, and this effect increases as the degree of discretion increases.

Up to now the potential effects of discretion on transposition have been dealt with. But it should be pointed out that discretion unfolds its effects not necessarily through the mere fact that it is present in the context of transposition. Discretion is a form of decision-making power which is exercised by national actors. Thus, I expect that discretion's effects on transposition are influenced by the way discretion is used in translating a directive into national legislation. Taking a closer look at the actual use of discretion may therefore provide additional insights that should be taken into account in the case study analyses to come.

4.3 Conclusion

In this chapter a review of a number of relevant implementation studies was provided with the aim of taking stock of the different effects that discretion may have on the national transposition of EU directives. Discretion is found to impede and facilitate transposition. The discussion provided insights into national transposition contexts. These insights were translated into a set of expectations making up the analytical framework applied in this study to further examine the role of discretion in transposition. Empirical evidence shows that discretion can affect both timeliness and the legal correctness of transposition. In addition, discretion comes into play either individu-

ally or by interacting with other factors which represent characteristics of the national transposition setting such as the administrative capacity and total number of transposition authorities. Additionally, discretion can affect transposition if it interacts with the factor of compatibility, referring to the legal fit between the directive and the national legal order into which the directive shall be incorporated. Since discretion is expected to interact with other factors, it is characterised as an intervening factor which provides a causal link between factors stemming from the national level and the final transposition outcome: proper or deficient transposition, or in other words, national compliance or non-compliance with EU law.

5 Uses of discretion

5.1 Introduction

So far it has become clear that discretion is the core feature of EU directives and that it provides Member States with a more or less limited range of policy options from which national actors can choose when transposing a directive into national law. This is enshrined in Article 288 TFEU and reflected by the content and wording of a directive. It was furthermore discussed how discretion can come into play in national transposition contexts, thereby taking into account other, national-level characteristics that are deemed relevant, and therefore as having an impact on how the directive is converted into national law. What still remains unclear is how discretion is used in transposition and with what implications. In this regard, a relevant question is how discretion can be used with the result that it has positive effects: facilitating timely and legally correct transposition. In order to look into this question, the attempt is made to move the discussion on discretion in national transposition from a rather abstract to a more concrete level. To this end, the discussion zooms in on a few empirical examples from studies that have looked into the impact of discretion on (formal) implementation. Doing so, may yield valuable insights into how discretion is used by implementing actors in converting EU rules into national law.

5.2 Insights from (formal) implementation cases

To begin with, while there are a number of transposition studies that consider discretion as one relevant factor amongst others when analysing national transposition, only very few of them take a closer look at the actual use of discretion in this process. Three examples are discussed in brief.

Kaeding (2007b) analyses transposition delay in several Member States. His quantitative analysis of the national transposition of transport directives is complemented by a qualitative approach which addresses four transposition cases to shed more light on the impact of various factors such as, amongst others, transposition time, the number of transposition actors and discretion. The Spanish transposition of a European railway directive is particularly interesting for it involves a directive with a 'relatively high level of discretion' (Kaeding, 2007b: 125).[1] The case study findings confirm

1 This refers to the second case which Kaeding discusses: the Spanish transposition of Directive 2001/14/EC of the European Parliament and the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ L 75, 15 March 2001, pp. 29-46.

the results of the quantitative analysis, and thus, Kaeding's assumption that discretion slows down transposition. But how was discretion used by the implementing authorities? According to Kaeding, the Spanish authorities took a rather inactive approach to transposition. Although the Spanish transport ministry, in collaboration with a railway body, watched and consulted other Member States to see how transposition was carried out there, it did not 'get down to business' right away but adopted a 'wait-and-see attitude' (Kaeding, 2007b: 180). Interestingly, Kaeding sees the reason for this attitude to lie above all in the directive's higher level of discretion:

> In the end, the Spanish authorities notified the European Commission of six legal instruments that would be used to transpose the first railway package, including Directive 2001/14/EC. The preconditions for a swift transposition process were already null because of the high degree of discretion given to the member states. This flexibility resulted in a time-consuming 'wait and see' situation right after the EU Ministers of Transport had adopted Directive 2001/14/EC (2007b: 130-131).

Kaeding may be right and his thorough transposition analysis seems to justify his reading of discretion as a factor that impedes the process. And yet, with a view to the preceding discussion on discretion effects, including other factors that may affect transposition, another possible explanation arises: delay may have been caused by administrative shortcomings and discretion, both operating and affecting transposition through interacting with each other. After all and as noted above, where implementing actors lack transposition knowledge but have a broad range of alternative actions available (through discretion), swift decision-making may be obstructed rather than facilitated. Given the fact that the Spanish transport ministry could not get the process off the ground but 'watched and consulted' other Member States in order to get transposition running, it does not seem so far-fetched to assume that shortage of expertise in combination with high levels of discretion caused transposition to fail. While it cannot be said that Kaeding's example provides many concrete insights into the use of discretion in transposition, in my view it does illustrate that it is very relevant to open up the black box of discretion and transposition if the aim pursued is to find out more about uses of discretion and effects resulting therefrom for the formal implementation of EU directives.

Another example offers more insights into the actual use of discretion. Veltkamp (1998) provides a case study analysis of the implementation of ten environmental directives dealing with air, waste and water. It is a legal analysis of the overall implementation process as carried out in the Netherlands, covering, hence, all three stages: transposition, actual implementation and enforcement of EU environmental law. Veltkamp bases her findings on the analysis of the texts of directives and the corresponding implementing measures created for the purposes of incorporating, applying and supervising EU rules. The wider political and institutional context within which implementation is carried out is not taken into account (Veltkamp, 1998: 6). In this regard, Veltkamp's approach differs from the one chosen in this disserta-

tion which combines insights from both legal and political analyses. Nevertheless, her findings are noteworthy as they reveal that Dutch implementing legislation, on average, grants high levels of discretion, which in some cases extends the levels envisaged by the corresponding directive. This is all the more interesting, as Veltkamp arrives at the conclusion that the Dutch implementation of the environmental directives analysed did not result in deficient implementation or even non-compliance noted by the Commission – as the use of additional discretion going beyond the parameters of the directive might suggest. On the contrary, Veltkamp argues that discretion made it possible to implement directives in line with the traditional national approach and perspective adopted in environmental matters. For instance, according to 'one of the pillars of Dutch environmental law' central and local levels collaborate on environment topics; local actors are built into decision-making processes related to implementation and have some flexibility in the application of environmental rules (1998: 360). When implementing EU rules, these national and local patterns were maintained owing to the discretion available for carrying out this task:

> During the implementation phase it is made sure that these directives fit in with existing or new national legislation while national wishes and principles, systematics, set up, angle, concepts, set of instruments and system of enforcement are preserved (ibid: 360).

Even despite little inaccuracies of Dutch implementing legislation, the bottom-line of Veltkamp's study is that the Netherlands have achieved an overall good implementation record:

> It is precisely the use and the preservation of the national system and points of view that has enabled Dutch legislation to convert directives that greatly vary in contents, character and quality […] The Dutch approach agrees with the aim of the directive instrument: harmonization of legislation parallel to the national system and by means of using the national system's specific nature and characteristics (ibid: 364; 365).

Discretion is the central characteristic of directives, and it is the potential of discretion to fit in EU rules into the national legal framework by retaining existing national law, perspectives and approaches, which is identified here. What has been expected so far, regarding the role of discretion, shows in the transposition cases that Veltkamp presents in her study: discretion is found to be, as I refer to it, a 'facilitating-fit-factor' that mediates between EU and national law.

Finally, while differing in scope and research design from Veltkamp's study, the more recent legal analysis of De Boer et al. (2010) also addresses the Dutch implementation of environmental directives. More concrete, the authors examine how three environmental directives, the Water Framework Directive, the Birds- and Habitat Directive, and the Nitrate Directive – which all differ as to their discretion degrees (large, medium and small respectively) – were implemented in England, two German federal states and the Nether-

lands.[2] Comparable to Veltkamp's study, the role of discretion is addressed with regard to the overall implementation process but no in-depth analysis of the transposition stages is provided. Nevertheless, the results of this study are relevant because they confirm Veltkamp's view that by having discretion available and using it, a 'national' translation of EU directives into the domestic legal systems was achieved. According to the authors, implementers sought to use discretion mainly in the first phase of implementation (hence transposition) with the aim of adopting a country-specific approach to environmental issues. It appears that this approach was maintained in the implementation of EU rules showing in the choice of particular legal-administrative instruments (De Boer et al., 2010: 17). Suffice it to mention that (formal) implementation in the Netherlands was characterised by consultation between implementing actors and stakeholders, while in Germany federal rules were formulated along the lines of a descriptive and detailed approach. Finally, in England implementing legislation foresaw the conferral of practical application upon non-governmental organisations (De Boer et al., 2010: 16; 160). While Veltkamp concludes that Dutch implementing legislation exceeded the margin of discretion originally granted by the EU directive, De Boer et al. put it more bluntly in claiming that implementers sought additional discretion – independent of whether or not the relevant directive implied larger or smaller margins of discretion. In contrast to Veltkamp's empirical examples, making use of illicit discretion let in largely all cases to non-compliance with EU law and sanctions imposed by the European Commission as a result (De Boer et al., 2010: 159). Searching for more discretion resulted from the fact that it was realised only once implementation was under way, that less discretion was available to implementers than previously expected. This latter aspect seems to allude to the fact that, as previously noted, legislative and administrative discretion are expected to differ in terms of amount. Legislative discretion may be further constrained at the national level by factors stemming from the legal-administrative context or already existing case law prescribing specific interpretations of a directive's provisions.

To sum up the previous discussion, it follows that discretion was used differently in the national implementation of European directives, with the result that it had impeding or facilitating effects. The cases presented here show that discretion was used, not used or not properly used (misused) for the purpose of implementation. Discretion was not used, even if granted by larger degrees, as Kaeding's Spanish transposition case shows. This case also illustrates well the complexity of transposition which requires taking

2 In fact, De Boer et al. address two types of discretion: alongside formal discretion, they take a closer look at what they refer to as 'informal discretion', meaning discretion flowing from the interaction between Member States and the European Union, by means of, for instance, bilateral consultations. Cf. De Boer et al., 2010, pp. 21-22. Since the major concern of this dissertation is with what the authors consider as 'formal discretion', i.e. discretion granted by the text of the directive, their 'informal discretion type' is not further discussed here.

other factors into account that next to (the use of) discretion or in interaction with it, may impact the process. Discretion was used with regard to the implementation of environmental directives as the studies by Veltkamp and De Boer et al. show – however, with both compliance and non-compliance as outcomes of implementation. These studies furthermore show that discretion was not properly used because national actors sought discretion beyond the limits of the directives they had to implement. Nevertheless, it is important to note that both studies have also brought out the positive aspects ascribed to discretion. These positive aspects have been identified in the dissertation as one of the reasons for why discretion is used by the EU legislature: discretion can facilitate the incorporation of EU rules into national law in that it mediates between these different (EU and national) frameworks of legislation. This observation supports the central thesis of this study that discretion can play a valuable role for decision-making processes regarding directives at both the law formulation and law incorporation stages.

Next to the transposition examples just discussed, I deem it useful to have another, closer look at the Dutch transposition context and the use of discretion therein. While it cannot be claimed that uses of discretion by administrative actors have entirely slipped from scholars' attention, the research contexts that political scientists and public administration scholars address are quite distinct from the present one. Hupe (2013), for instance, deals with discretion within the context of policy implementation by focusing, from a theoretical perspective, on discretionary decision-making of street-level bureaucrats (public administration employees). More interesting in the present context is Ringeling's study (1978) which includes both a theoretical and empirical analysis and focuses on the Dutch policy implementation context. More concrete, Ringeling looks into administrative discretion of state officials in the context of the Dutch policy towards 'option regretters'[3] (in Dutch: spijtoptanten') in the period 1956 to 1968, and addresses the question which circumstances within public administration favour or limit the discretion available to officials. While his study and the present one share a few characteristics such as the interest in uses and circumstances of discretion, the belief in its relevance for the application of law and the necessity to study discretion by taking into account the political and institutional context in which discretion comes into play, their parameters are very different due to their respective subject matters. Whereas Ringeling deals with an entirely national setting – a policy adopted and applied in the Netherlands, the present study, however, deals with discretion in the making of EU law (directives) and their application in a national (Dutch) setting. In addition to that, discretion is a key characteristic of the policy (EU directive)

3 Inhabitants of Indonesia of mixed decent who, after initially having opted for the Indonesian nationality during the period that Indonesia became independent, eventually turned to the Dutch Government with the request to be admitted to citizenship in the Netherlands. Cf. Ringeling, 1978, p. 234.

itself which already implies terms and conditions that differ from the Dutch policy Ringeling looks into. Due to these differences, the approach and findings of Ringeling's study have not further been used to shape the way the present study deals with discretion.

In the last sections of this chapter, the attention is once again turned to the Dutch transposition of EU directives, and the exercise of discretionary powers to incorporate EU rules into the national legal framework. This is done with the aim to achieve a still more comprehensive understanding of possible uses of discretion by the actors primarily addressed in this study: civil servants working within Dutch ministries.

5.2.1 Discretion in the Dutch transposition context

Summarising what is known so far about discretion within the context of transposition, the following can be noted. Discretion is granted by EU primary legislation, and additionally, by the content and wording of a directive which implies that national actors can choose those forms and methods they consider the most appropriate for translating directive requirements into national legislation. The granting of discretion has in the foregoing also been described as offering Member States a range of policy options which, when being used, all imply compliance with the directive's objective to be realised at the national level. Moreover, it was noted that Member States seek discretion to ensure that the incorporation of EU rules into national law will leave national legal structures largely untouched. All things considered, it can thus be noted that the transposition of directives implies that national actors take decisions and make choices which are based on certain considerations and motivations. Or, as aptly noted by Steunenberg, after adoption, directives are not just implemented but further shaped by the member states when they are put into national rules (2007: 42).

The Dutch transposition of EU directives bears out this point. First of all, it should be noted that in the Netherlands, a special procedure for the implementation of EU directives does not exist. Hence, transposition legislation is devised along the same lines than national legislation and regulation (Bovens and Yesilkagit, 2010: 59). Decisions and choices pertain here, as in other national transposition contexts, to the forms and methods by means of which directives are formally implemented. More concrete, national transposition actors, hence ministerial units, determine the level and sort of instrument – administrative or parliamentary act / statute – as well as the transposition technique (Steunenberg and Voermans, 2006). Their decisions are not totally free, however. As noted earlier, discretion is subject to constraints at the national level. In transposing directives, Dutch ministerial units have to take account of the national legal-administrative framework: provisions of the constitutions, existing legislation and regulation / legal and regulatory requirements as well as other ministerial instructions (*Parliamentary Papers II* 2007/08, 31498, no. 1-2, p. 49). This point notwithstanding, research conducted on the Dutch implementation of directives suggests

that, national ministries follow certain paths in transposing directives (*Parliamentary Papers II* 2007/08, 31498, no. 1-2; Bovens and Yesilkagit, 2010).

Regarding the three ministries that are addressed in the case studies presented in this dissertation, meaning the Ministry of Environment and Spatial Planning, the Ministry of Health, Welfare and Sport as well as the Ministry of Security and Justice, the following relevant observations can be made.[4] For instance, while the Ministry of Security and Justice is known to transpose directives mostly by means of parliamentary acts, the Ministry of Health, Welfare and Sport usually uses administrative acts such as government decrees to incorporate a directive related to its portfolio, into national legislation. Also the Ministry of the Environment and Spatial Planning tends to give preference to lower-level regulation (government decrees / orders in council and ministerial decisions) (*Parliamentary Papers II* 2007/08, 31498, no. 1-2, p. 50; Bovens and Yesilkagit, 2010: 65). Furthermore, as to the transposition technique used, the Ministry of Health, Welfare and Sport, prefers applying the method of dynamic referencing[5] which appears to be the most suitable instrument for transposing amendments that merely update technical details of previous directives (*Parliamentary Papers II* 2007/08, 31498, no. 1-2, p. 50-51). While from these general observations, conclusions as to compliance in individual transposition case cannot be drawn, it is nevertheless interesting to note that the Ministry of Health, Welfare and Sport has one of the best compliance records. Apparently, preferences for specific approaches in transposition are motivated by the awareness that they 'pay off'. In this respect it is noteworthy that exercising discretionary competences over time can lead to specific routines and styles in the application of rules by administrations (Bakker and Van Waarden, 1999). It may, thus, not be far-fetched to conclude that using discretion can make a contribution to the proper formal implementation of directives into Dutch law since thereby routines and styles can be developed which lead to the desired objective: compliance with EU law.

What does the foregoing imply for the study of uses of discretion in transposition and therefore for the subsequent case study analyses? The previous observations illustrate that uses of discretion can be derived from the way by which transposition is further shaped at the national level. This includes decisions on implementation forms and methods that are reflected in the transposition activities of ministerial units. These activities may pertain to instruments and techniques but they may also reveal additional measures which are relevant from the viewpoint of legitimacy. While transposition activities may be targeted at effectively fitting in the directive into the national legal order, from the viewpoint of input participation and therefore

4 Throughout the dissertation the ministries are referred to by their current names.

5 Dynamic referencing denotes a specific way of transposing rules of a directive into national law: corresponding transposition legislation consists of a national measure which makes reference to the relevant directive provision including its future amendments.

input and throughput legitimacy, it will, for instance, be interesting to see in the empirical analysis if discretion has been used to involve other national actors in transposition.

It has been established that using discretion can shape the domestic responses to directives. Next to the analysis of the political and institutional context in which transposition is carried out, the case study analyses seek to provide insights into the choices of Dutch transposition actors including the considerations that underlie these choices. Such an approach may provide me with findings that explain how and why discretion was used. This way, I wish to shed further light on the role of discretion in Dutch transposition processes.

5.3 Functions of discretion

It is now time to briefly summarise the insights from the previous three chapters in which the analytical framework for the empirical analysis was developed. To study the role of discretion in decision-making processes regarding directives (law-making and law-transposition processes), sets of expectations were derived from the relevant literature. Additionally, it was found that the study of discretion for the purposes of the present analysis requires looking into how discretion is used by actors that transpose EU directives into national law. Hence, analysing transposition through an institutional lens taking into account contextual, i.e. national-level factors needs to be complemented by an approach that also looks into the decisions and considerations of transposition actors. This may provide illuminating insights as was shown by means of a brief digression to the Dutch transposition context. It has been established that discretion can be used, not used and also misused in transposition. Overlooking the whole discussion, distinct functions can be derived that discretion seems to fulfil at both the EU and national levels and that reflect its potential for legal systems that it is considered to have according to the central thesis of the dissertation. Table 2 illustrates these functions.

Table 2: Functions of discretion

	Discretion	
EU level	Unites different interests	Faciliates decision-making & compromise (directive)
National level	Irons out incompatibility between EU and national law Preserves national legislation	Faciliating-fit-function: Timely and legally correct transposition (compliance) Facilitates incorporation of EU rules by leaving intact the national legal framework

First of all, the potential of discretion at both EU and national levels is that it facilitates decision-making processes. Inherent to directives is the discretionary choice of forms and method of implementation. While this already provides Member States with leeway as to the question of how to incorporate EU rules into the national legal framework, additional discretion granted by directive provisions gives them a still wider choice, i.e. a wider range of options for transposition that are all compatible with the directive. Against this background, discretion, at the EU level, is a solution to different national interests that have to be reconciled to find a common approach, while at the national level it mediates between distinct bodies of legislation and helps to iron out legal disparities between EU and national rules. The facilitating effects of discretion show in the fact that in negotiations on directive proposals discretion contributes to striking compromises in the Council of Ministers where different interests and preferences of Member States have to be reconciled, especially with regard to politically sensitive issues that more readily lead to controversy or where Member States seek to achieve a better match between EU rules and own legislation. At the national level, discretion provides a range of options from which the most suitable one – in legal terms (transposition instrument and technique) and as regards costs[6] – is chosen. Both, freedom in choosing forms and methods as well as discretionary leeway flowing from the content and wording of the directive furthermore help to embed EU rules into the national legal order by keeping the latter largely intact. In other words, discretion mediates here between (levels of) incompatibility of EU and national law. This potential of discretion can be captured by the term 'facilitating-fit-function' and is reflected by EU treaty considerations on the preservation of national legal identities.[7] The empirical findings of implementation scholars seem to suggest that the 'facilitating-fit-function' of discretion unfolds its effect on transposition when discretion comes into play autonomously and, in particular, when it is granted by larger degrees. The national context in which discretion comes into play is, however, more complex as follows from the above review of implementation studies. Having said this, discretion is assumed to take on the role of an intervening factor which interacts with other factors stemming mostly from the national level. In case that discretion is available and interacts with lacking administrative capacity or more actors being involved in transposition, it is expected to impede transposition. This leads to delay and possibly legal incorrectness. When interacting with increasing compatibility between EU directive and relevant national law, by contrast, discretion is claimed to contribute to proper transposition.

6 As previously mentioned, a better legal fit is assumed to preclude high adaptation costs.

7 This is for instance reflected by the above-mentioned Article 4(2) TEU. See section 3.3.2.1.

5.4 Conclusion

To conclude, discretion may have facilitating effects on both the EU negotiations and the national transposition of directives. At the national level, discretion can, in conjunction with other national-level factors, become an intervening factor which facilitates or impedes transposition. It is furthermore assumed that the way discretion is used by national implementing actors may additionally impact how discretion affects the national transposition of EU directives into national law. Alongside the set of expectations formulated in the previous two chapters, the functions of discretion identified in the previous discussion are later on used in the empirical part of the dissertation to deal with the findings of the case study as well comparative analyses.

Part 2

Methodological aspects – content analysis and (comparative) case study approach

6 Discretion in European directives

6.1 Introduction

This chapter marks the transition from the conceptualisation to the operationalisation of legislative discretion. Alongside the subsequent chapters its main concern is with discretion in European directives. Where does discretion become evident in directives and how can it be operationalised and measured? Answering these questions requires having a closer look at the structure of directives as well as the structure and types of legal norms. The insights gained from this discussion prepare the ground for the subsequent presentation of content analysis and the application of the codebook developed for the purpose of assessing discretion in European directives.

6.2 Legislative discretion

As previously defined, legislative discretion is used in the dissertation to denote the 'latitude based on both EU primary and secondary legislation (Article 288 TFEU and the directive text) granted by the EU legislature to Member States for transposing a directive' (see section 2.2.1.2). Whereas the directive's objective(s) are fixed, Member States have discretion in choosing implementation forms and methods. Hence, in having to achieve a certain result that the directive prescribes, they can follow their preferences regarding the use of transposition techniques and instruments (Steunenberg and Voermans, 2006). What constitutes a directive's 'result' is not exactly specified by the Treaty but can be described as a 'general legal, economic, or social situation or a legal or factual situation which does justice to the Community interest which, under the Treaty, the directive is to ensure' (Prechal, 2005: 40; see also Kapteyn and VerLoren van Themaat, 2003: 238-239).

Alongside EU primary legislation as one source of discretion, the focus of this study is on legislative discretion granted by the directive text. It is argued that discretion can be derived from a directive's content and wording. In studies on legislative decision-making and implementation, a directive provision is considered to be discretionary if its wording indicates room for alternatives or choice (e.g. Dimitrova and Steunenberg, 2000; Thomson, 2007; Zhelyazkova and Torenvlied, 2011). It is identified as non-discretionary if it is prescriptive (Franchino 2004; Kaeding, 2007b; Thomson, 2007; Steunenberg and Toshkov, 2009). In the legal literature discretion is linked to specific legal concepts reflected in the directive text (e.g. harmonisation, derogation) but it is also considered to be implied by broad wording allowing for own interpretation and application (Prechal, 2005: 43-44; see also De

Boer et al., 2010). Be it as it may, both approaches taken together represent valuable sources from which manifestations of discretion are derived. To understand how discretion manifests itself in directives requires taking a closer look at their structure and content. Therefore attention is dedicated in the following sections to those parts of a directive that are relevant for measuring legislative discretion, and for the sake of clarity and completeness, to those that are not. In a further step, the structure of a legal norm is addressed as it serves to illustrate how discretion manifestations are detected in the directive text.

6.3 Structure of directives

To begin with, not all parts of a directive are equally important when it comes to detecting discretion in directives. A directive's preamble, for instance, which is not legally binding for the Member States, is composed of a number of recitals that state the purpose and describe the main provisions of a directive. In doing so, recitals can give some clue as to the discretion margin that the directive grants, but more explicit forms of discretion can be detected in the directive's main part which is composed of a number of articles. Articles are, in turn, sub-divided into one or more provisions. This main part of directives contains the 'hard core substantive rules' (Prechal, 2005: 41), also referred to as 'enacting terms' (Joint Practical Guide, 2013: 15).[1] It represents the legally binding part of a directive. These are the substantive rules that establish the framework for implementation, describe the legal and / or factual situation which Member States have to achieve and how they have to achieve it. In other words, it is here where those legal norms are established that Member States are supposed to realise in implementing a directive (Prechal, 2005: 41-44). Preceding this part is the preamble to the directive which includes a number of recitals.

6.3.1 Preamble and recitals

As a rule, a directive starts with an introduction, called 'preamble' which contains several numbered recitals reflecting the considerations at the beginning of the text of a directive. Recitals usually refer to the legal foundation on which the directive is based and reflect the reasons for adopting

1 Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation (2013), Brussels: Office for Official Publications of the European Communities. The Guide is a follow-up measure to the Interinstitutional Agreement of 22 December 1998 between the European Parliament, the Council and the Commission. It establishes common guidelines for the improvement of the quality of drafting of Community legislation. Being drawn up by the Legal Services of the three main EU institutions, the Guide's aim is to make accessible and understandable the content of the guidelines to those drafting EU legislation by means of comments and examples.

the directive, setting out also its objectives (Joint Practical Guide, 2013: 19). By way of illustration, box 2 presents the preamble of the European directive on common standards and procedures in Member States for returning illegally staying third-country nationals (in short the EU's Return Directive).

Box 2: Extract of the preamble of the Return Directive (2008/115/EC)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty (1),

Whereas:

(1) The Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.

(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

(3) On 4 May 2005 the Committee of Ministers of the Council of Europe adopted 'Twenty guidelines on forced return'.

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.

(5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

[…]

HAVE ADOPTED THIS DIRECTIVE

Formally speaking, recitals are no components of the legally binding part of a directive, and hence do not require to be transposed by the Member States. And yet, with regard to discretion, recitals are indirectly relevant. The European Court of Justice makes use of them in its interpretation of EU law.[2] In offering a preview of the content of the directive, they can give hints as to the margin of discretion that can be expected from it. Kaeding

2 This is exemplified by various examples of established case law. See Craig and G. de Burca (2015), EU law: text, cases, and materials, Oxford: Oxford University Press.

takes the number of recitals as an indicator of the directive's level of detail which in turn he considers to affect a directive's discretion margin (Kaeding, 2006; 2007a; 2007b). The more recitals, the higher the directive's level of detail but the smaller the amount of discretion granted to Member States (2007a: 29; 2007b: 106). To establish what may be considered a high number of recitals, Kaeding takes as a benchmark, the median number of recitals of the directive sample he analyses which is 8 recitals. Measured against this benchmark, a directive with 22 recitals is considered as indicating a higher level of detail. Hence, it is regarded as implying a smaller margin of discretion (2007b: 106; 134). Furthermore, Kaeding associates a high number of recitals with delay in transposition by pointing out that in the presence of many recitals the interpretation and application of a directive is rendered more complex (2007a: 29).

The high number of recitals has been explained differently. It is seen as reflecting the attempts by both Member States and European Commission to insert preferences they have failed to get into the main, legally binding part of the directive during the negotiations (Kaeding, 2007a: 29). In this connection, many recitals are considered to hint at the level of controversy to which the directive was exposed during the negotiations (Steunenberg and Kaeding, 2009: 435). Many recitals are also interpreted as a result of the principle of subsidiarity which necessitates the EU legislature to explain in more detail why action needs to be taken at the EU instead of the national or sub-national levels (Mastenbroek, 2007: 22).

In the dissertation, the number of recitals is only indirectly taken into account in describing the margins of discretion of individual directives. It does not serve as an indicator of smaller or larger discretion amounts. Clear dimensions, sub-categories and indicators can, in my view, at best be derived from the directive's legally binding part of which the legally non-binding recitals only provide a preview.

6.3.2 Enacting terms

The so-called 'enacting terms' follow after the preamble and represent the main part of the directive. They cover the substantive rules and are usually divided into articles and provisions and, as complexity increases, into chapters and sections (Joint Practical Guide, 2013: 26). From a content perspective, the enacting terms cover different provision types: the general provisions address the directive's subject matter or purpose and its scope. Then there are provisions which provide definitions of relevant terms that are used in the directive. Subsequent provisions contain rights and obligations for Member States. There may also be provisions that confer implementing powers on the European Commission, other procedural provisions, provisions on implementing measures as well as transitional and final provisions (Joint Practical Guide, 2013: 26; see also Prechal, 2005: 41-49).

The enacting terms can be further divided into two groups, the 'hard core rules' or substantive provisions (Prechal, 2005: 41-44) on the one hand and, on the other hand, the ancillary provisions (ibid: 44-47). The substantive provisions set out the content of the result, i.e. the legal and factual situation which Member States shall achieve by implementing the directive. Hence, they address at the same time how the content of national transposition legislation which translates directive requirements into national law should look like in terms of both substantive national law and procedures (Prechal, 2005: 41-44; Mastenbroek, 2007: 22).[3] It is especially within the substantive provisions setting out the directive's requirements or guidelines that different discretion manifestations become apparent. The ancillary provisions complement the hard core rules and address some basic obligations. They include requirements which are a standard part of directives. Some of the ancillary provisions are elements of the final provisions and relate to the transposition deadline, the necessary measures that Member States have to take to achieve compliance, the obligation to notify transposition legislation to the European Commission, and in some cases, the obligation to submit the text of the corresponding national legislation to the European Commission (Prechal, 2005: 45). Still other ancillary provisions may oblige Member States to consult third parties on the content of the implementing legislation or to send reports to the European Commission. In a next step, the Commission is expected to review the implementation of the directive in question (ibid: 47).

The enacting terms are mentioned in the main part of the directive text. Hence, both substantive provisions and ancillary provisions are legally binding. They cover the rights and obligations for Member States and / or third parties (citizens and economic operators) as well as the procedural provisions. They therefore constitute the normative part of the directive (Joint Practical Guide, 2013: 26). The connection between the structure of a directive and the structure of legal norms is a crucial one. As shown below, by taking a closer look on specific types as well as the individual elements of a legal norm, relevant knowledge can be obtained and used for assessing the scope of discretion of individual directives. This knowledge serves two objectives: first, to identify discretion manifestations in directives and distinguish between those directives that imply larger and those that imply smaller amounts of discretion. Second, it offers a clear picture of the structure of directive provisions on the basis of which the discretion margin of individual directives is determined. For this latter purpose also a third group of provisions is considered, namely those addressed to the EU institutions, more specifically, the European Commission. Alongside the Member States, the Commission may have to fulfil obligations which can include

3 Mastenbroek notes in this regard that the distinction made on the basis of Article 288 TFEU can be blurred: not only the directive's objective is prescribed by the EU legislature. To some extent also the choice of implementation forms and methods may be. Cf. Mastenbroek, 2007, p. 22.

implementing tasks. It may for instance be required to elaborate upon directive provisions, especially on technical requirements, or be obliged, as just noted, to draw up implementation reports using information obtained from the Member States (Prechal, 2005: 47-49). Box 3 presents the different types of provisions. It shows a few examples of the enacting terms of the EU's Return Directive which was adopted with the aim of controlling and regulating irregular migration.[4]

Box 3: Provision types in the Return Directive

General provisions
Article 2 **Scope** 1. This Directive applies to third-country nationals staying illegally on the territory of a Member State. 2. Member States may decide not to apply this Directive to third-country nationals who […]
Substantive provision
Article 13 **Remedies** 4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.
Provision addressed to EU institution
Article 19 **Reporting** The Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.
Ancillary provision
Article 20 **Transposition** 1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2010. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011. They shall forthwith communicate to the Commission the text of those measures.

4 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24 December 2008, pp. 98-107.

The structure of European directives has been explained. But what about discretion itself – how is it identified in directive provisions? Answering this question requires, first of all, taking a closer look at types and structure of legal norms.

6.4 Legal norms

As stated in the foregoing, Member States are bound by the directive's objective which requires from them to realise a legal and factual situation which is determined by the substantive and ancillary provisions. The situation envisaged by the directive is described in terms of legal norms. Legal norms are understood in legal theory as regulating the diverse legal relationships between legal entities, meaning natural persons (human beings) or legal persons (e.g. associations, companies, government institutions) (Eijlander and Voermans, 2000: 129). Eijlander and Voermans, who address legal norms from the perspective of Dutch legal doctrine,[5] note that law is composed of a system of interrelated legal norms (2000: 129).

6.4.1 Types of legal norms

These norms can be divided into different types, amongst others: norms of conduct, norms of competence, and procedural norms (Eijlander and Voermans, 2000: 132-143). If connected in a logical, systematic way these norms ensure that the purpose of the relevant law is expressed in a clear manner and made accessible and understandable to those it addresses. Of special importance for legal systems are norms of conduct and norms of competence (see table 3).[6] While by means of the former the legislature intends to bring about behavioural change, by using the latter institutional change is sought. Being the backbone of legal systems norms of conduct and norms of competence ensure legal certainty as well as the efficient functioning of legal systems, also under dynamic circumstances (Eijlander and Voermans, 2000: 133).

5 In their discussion Eijlander and Voermans make use of, amongst others, contributions by D. W. P. Ruiter who has substantially contributed to the study of legal norms in legislative texts. See for instance: D. W. P. Ruiter (1987) Bestuursrechtelijke wetgevingsleer, Assen: Van Gorcum.

6 In Dutch referred to as 'gedragsnormen' and 'bevoegdheidsnormen' respectively. Cf. Eijlander and Voermans, 2000, p. 133. Since the two types of legal norms that are mainly addressed in this section - norms of conduct and norms of competence - are basic types of norms that exist also in other legal systems (ibid, p. 132) the insights provided here are considered to have more general applicability.

Table 3: Types of legal norms

Norms of conduct (norms on actual behaviour)
Under which circumstances an actual conduct becomes legal or illegal.
Norms of competence (norms on institutional behaviour)
Whether or not and under which circumstances the subject of the norm is legally entitled to act. There are discretionary and non-discretionary norms of competence.

The distinction between the two types of legal norms is inspired by the concept of law as introduced by H.L.A. Hart (1907-1992), the well-known English legal philosopher (Eijlander and Voermans, 2000: 132-133).[7] He distinguishes between two types of rules: primary and secondary rules. The first type of rules – in Hart's concept the primary legal rules – refers to norms of conduct which determine under which circumstances *an actual conduct becomes legal or illegal*. Hart's secondary rules refer to norms of competence which address standards of decision-making. These standards determine whether or not and under which circumstances *the subject of the norm is legally entitled to act*.

6.4.1.1 Sub-types

Still finer distinctions have been made regarding the two types of norms (Eijlander and Voermans, 2000: 134-143). Two points should be mentioned with a view to the context of legal norms and European directives. First, norms of conduct can be further divided into four types of norms that seek to establish an obligation, prohibition, permission or exemption. As is further shown below, directive provisions frequently entail these modes of conduct (Eijlander and Voermans, 2000: 134). The second point refers to norms of competence which are conferred upon public authorities. They can be further specified in different types: administrative, advisory, judicial, and rule-making competences (Eijlander and Voermans, 2000: 138-140). In addition to that, norms of competence can be described in two ways: as 'bound' or non-discretionary decision-making competence and 'discretionary' decision-making competence (Eijlander and Voermans, 2000: 140-141; Hofmann et al., 2011: 499-500).[8] This distinction plays a pivotal role regarding legal norms in European directives. It addresses the question of how – meaning under what conditions – a legal entity such as an implementing authority,

7 H. L. A. Hart (1994). Concept of Law, 2nd ed. Oxford: Clarendon Press.

8 The equivalent Dutch terms for 'bound / non-discretionary decision-making competence' and 'discretionary decision-making competence' are: 'gebonden bevoegdheid' en 'discretionaire bevoegdheid'.

shall or may exercise the rule-making competence that has been conferred upon it by the directive to be implemented.[9]

The description of law as being composed of a system of interrelated legal norms certainly fits EU legislative acts such as directives. Prechal notes in this regard that '[t]he ultimate purpose of the rules laid down in a directive is, just like the purpose of any legal rule, to influence the behaviour of legal subjects (natural and legal persons)' (2005: 52). For the latter purpose, decision-making or rule-making competences are conferred upon Member States, in particular their national administrations (ministries) that have to transpose directive requirements into national law. As just noted, between these decision-making competences two types can be distinguished: 'discretionary' and 'non-discretionary' decision-making competences. A discretionary decision-making competence is delegated to Member States by a statement such as: 'Member States may consider waste as non-hazardous waste in accordance with the list of waste referred to in paragraph 1.'[10] A statement, like 'Member States shall not prohibit, restrict or hinder the placing on the market of pyrotechnic articles which satisfy the requirements of this Directive',[11] on the contrary, is prescriptive in nature. It indicates that hardly any discretion is left for the national implementation of a directive requirement. Hence, it points to a non-discretionary decision-making competence.

Put in a nutshell, discretionary directive provisions are those that leave Member States the option to choose between alternatives when it comes to transposing a directive into national legislation. Non-discretionary provisions, by contrast, lack these alternatives. Instead, they rather include prescriptive requirements which have to be rigorously followed by the Member States. Consequently, they reflect that little discretion is available for transposition.

---

9 For the sake of completeness, it should be added that next to discretionary and non-discretionary rule-making competences, there are also facultative or imperative rule-making competences. These latter competences do not address the way a competence is exercised. They rather deal with the question whether or not it is necessary or desirable, from the viewpoint of the legislature, that a competence is exercised. Cf. Eijlander and Voermans, 2000, pp. 139-140. With a view to discretion in European directives, it should furthermore be noted that discretionary and facultative provisions are understood here as provisions that leave discretion to Member States whereas non-discretionary and imperative directive provisions are understood as leaving no or hardly any discretion for national transposition.

10 Cf. Article 7(6) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22 November 2008, pp. 3-30.

11 Cf. Article 6(1) of Directive 2007/23/EC of the European Parliament and of the Council of 23 May 2007 on the placing on the market of pyrotechnic articles, OJ L 154, 14 June 2007, pp. 1-21.

6.4.2 Norm structure

On a first level, a legal norm is composed of two parts, the legal fact and legal consequence (Eijlander and Voermans, 2000: 130-131). A legal fact refers to a specific situation which is characterised by certain conditions under which a legal consequence shall take effect – provided that the situation occurs. On a second level, the legal consequence can be subdivided into three elements: the addressee, object and mode of conduct (see box 4).

Box 4: Structure of legal norm

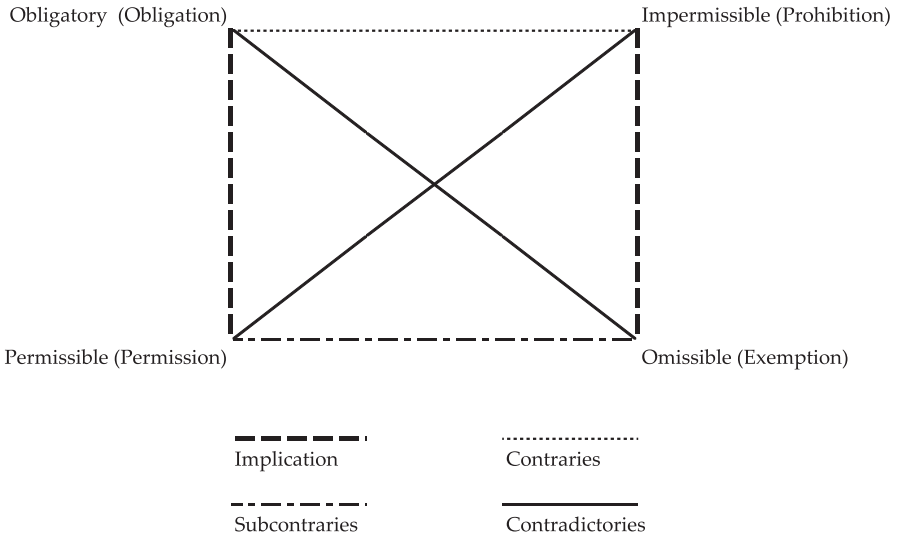
Legal fact + Legal consequence
• Norm addressee or subject • Norm object • Mode of conduct: may (not) and shall (not)

The addressee is also referred to as subject of the norm. The object of the norm comes second and represents an action or conduct that is either permitted or required: what may be done and what must be done. Finally, there is the mode of conduct, referring to whether the addressee of the norm is allowed / not allowed, able / not able or must / must not do something. It is this third element of a legal norm which is of specific importance for the context at hand. Regarding directive provisions, the mode of conduct can serve to identify whether or not a directive provision is discretionary. As illustrated by the examples above, may and shall, can be identified in the directive text.

It is furthermore important to have a closer look at the mode of conduct. How is it worded? Is it worded in the affirmative or in the negative? Regarding directives, Prechal points out that Member States' obligations 'can be formulated in a negative way, as prohibitions of particular activities, or – more often – in a positive way, prescribing certain conduct' (2005: 42). The sort of conduct which is desired and the way it is worded – either in the affirmative or in the negative – indicates whether the norm implies an obligation, prohibition, permission or exemption (Eijlander and Voermans, 2000: 135). The four types of modes of conduct and how they are mutually linked are presented by means of the logical square presented in figure 3.[12]

12 This figure is a slightly adapted version of the logical square as provided by Eijlander and Voermans, 2000, p. 135.

Figure 3: Modes of conduct



In considering the above, it should be noted, however, that there is hardly any one-to-one relationship between the structure of a legal norm as it is presented here, and a legal provision within a legislative text. As Eijlander and Voermans note with specific regard to Dutch law, not all elements of a legal norm (addressee, object and mode of conduct) show in one and the same piece of legislation (2000: 131). To properly interpret and apply legislation and therefore to get a grasp of the legal norms applicable in a particular case, often other regulations have to be consulted that are related to the law which has to be implemented. Eijlander and Voermans illustrate this aspect by means of the Dutch Environmental Management Act which is composed of several implementing regulations (2000: 131).

Also European directives are no legislative acts that entirely stand on their own. How they are linked with other related legislative acts usually becomes apparent from their recitals. In addition, and as exemplified, for instance, by the aforementioned Return Directive, links with other directives are referred to more explicitly within the substantive provisions including Member State obligations. What's more important, as shown in the example of Article 13(4) of the Return Directive (see above box 3), subdivisions of an article (i.e. provisions) can be composed of long sentences, including clauses and phrases, which comprise more than one mode of conduct at the same time (shall and may in the example). This already indicates the complexity that some directives display. This complexity becomes all the more marked if there is no consistent structure that allows for better accessibility and understanding of the directive provisions and legal norms contained therein. It also points to the challenges entailed by the attempt to assess the margin of discretion of individual directives by means of a codebook, which is addressed further below.

From the foregoing aspects two are of particular relevance in the present context: the distinction between discretionary and non-discretionary decision-making competences appears to be a suitable means to identify directive provisions that grant more discretion as opposed to others which grant hardly any of it. Furthermore, the presentation of the structure of a legal norm, has served to highlight the mode of conduct as a convenient instrument that can be used to detect discretionary and non-discretionary provisions in the text of a directive.

6.4.2.1 Shall- and may-statements

The mode of conduct is thus taken in the analysis of directives as an indicator of more or less discretion being granted to Member States. In directives, the mode of conduct is mainly expressed by means of shall- and may-statements. They describe two categories by means of which directive texts are analysed: the obligatory language and permissive language categories. Obligatory language and permissive language are terms used by Gil Ibáñez (1999) in his study of the European Commission's discretion in enforcing EU law under Article 169 EEC (now Article 258 TFEU). As previously noted, directives grant discretion by design but (additional) discretion can be derived from their wording. Obligatory language is expressed by shall-statements implying that hardly any discretion is granted to Member States. Permissive language is expressed by may-statements which indicate that discretion is made available for the implementation of a directive. More concrete examples are offered below.

The idea to distinguish between statements that leave national authorities with a wider or smaller or no choice of options to choose from when implementing directives, draws on the distinction between open and closed statements that Steunenberg and Toshkov (2009) have introduced in their approach to measuring discretion. It should be noted that open and closed statements are not necessarily the equivalent to shall- and may-clauses. To put it differently, the distinction between shall-clauses and may-clauses is not always as clear-cut as it seems and it does not neatly correspond to the distinction of open and closed statements. For instance, 'shall'-clauses may not only be indicative of closed statements. They may also express open statements as shown in this example: '[i]t shall be for the Member States to set a minimum sale price from which the sales shall be subject to resale right'[13] (Steunenberg and Toshkov, 2009: 958-959). It is furthermore worth noting in this context how Gil Ibáñez (1999) interprets shall-statements. Analysing the European Commission's exercise of discretion with respect to instituting infringement proceedings, Gil Ibáñez discusses case law of the European Court of Justice and shows that shall-statements are not always understood by the Court as expressing obligations for the European Commission. Permissive language on the other hand, indicated by may-state-

13 See Article 3(1) of Directive 2001/84/EC on the resale right for the benefit of the author, OJ L 272, 13 October 2001, pp. 32-36.

ments, does not always automatically reflect the granting of discretion but has to be understood by taking into consideration the presence of other conditions which may constrain the Commission's discretionary action (Gil Ibáñez, 1999: 230-231).

Dwelling a bit more on the aspect of conditions, a last point has to be mentioned which leads the discussion back to Eijlander and Voermans (2000). They note that the difference between discretionary and non-discretionary decision-making competences shows in the number as well as formulation of conditions under which competences are granted. The more precise conditions are specified, the more discretion entailed by the relevant competence is reduced. Discretion increases, on the other hand, if conditions are less precise and limited in number (2000: 140-143).

Regarding the analysis of directives, it becomes evident that the use of shall- and may-clauses as indicators of obligatory and permissive language requires a careful reading of the directive analysed in order to properly identify discretionary and non-discretionary provisions. Moreover, a thorough reading of directives is expected to make it possible to identify further indicators of discretionary and non-discretionary provisions. Finally, paying close attention to the conditions under which competences are granted may allow for capturing finer details in directive provisions. This way, further sub-categories within the two categories of obligatory and permissive language may be defined.

In spite of the fact that shall- and may-clauses are not always 'what they seem to be', to distinguish between these two sorts of clauses is considered a useful starting point for developing a more fine-grained approach to discretion. In addition, when interviewed, civil servants from the Dutch ministries and the European Commission as well as legal scholars with expertise in EU law mostly agreed with the distinction of shall- and may- clauses as indicators of obligatory language on the one hand (i.e. non-discretionary provisions), and permissive language (i.e. discretionary provisions) on the other hand.

6.5 Summary

In this chapter the structure of directives was explained to provide a good understanding of the directive as one of the most frequently used EU legislative instruments. This was done specifically to show which parts of a directive are more and which are less relevant for the analysis of legislative discretion. Legislative discretion shows in the legally binding or operative part of a directive which comprises the enacting terms (substantive and ancillary provisions). Discretionary or non-discretionary directive provisions can be identified by means of the mode of conduct which is a basic element of legal norms. The mode of conduct can be identified by means of may- and shall-clauses in directive provisions. It is here where the link between the structure of a legal norm and discretion in EU directives becomes evident.

7 Operationalising and measuring discretion

7.1 Introduction

In this chapter it is explained how legislative discretion is operationalised and assessed by means of content analysis, involving the coding of directives for which a codebook was prepared. The following sections present the steps taken in content analysis and codebook preparations, including a sketch of the coding and calculation procedures applied to assess margins of discretion of individual directives. While the codebook is presented in detail in the Appendix to the dissertation, at this stage an outline is provided of its content and application to directives.

7.2 Content analysis

Classical content analysis has been defined as a research technique 'for the objective, systematic, and quantitative description of the manifest content of communication' (Berelson, 1952: 18; Neuendorf, 2002: 10).[1] In this study, a qualitative twist is given to this approach for the description of legislative discretion cannot be fully objective but involves some interpretation and own decision-making in creating categories with which legislative discretion is detected in directives and assessed (see Mayring, 2000).

Discretion is expected to affect the national legal implementation (transposition) of European directives. In the dissertation the attempt is made to further examine this link. At the same time, it is assumed that the link between discretion and transposition is inextricably connected with the relationship between discretion and the legitimacy of directives in national law. These relationships are further examined at a later stage. Suffice it to point out that one way to understand the link between discretion, transposition and legitimacy is to think of discretion as contributing to a specific transposition performance. Discretion either contributes to compliance or non-compliance, and this can, depending on the final transposition result, be conceived as enhancing or reducing the legitimacy of directives in national

1 For the presentation of content analysis, I largely draw on literature from the fields of communication research and media analysis where content analysis is rooted. For both the starting point and development of content analysis the works of scholars from the United States are important, in particular the contributions of Neuendorf (2002) and Krippendorf (2004). Further relevant contributions are provided in the German literature on the subject, from the fields of Communcation Science but also Educational Psychology. See for instance Mayring (2000), Bonfadelli (2002), and Kromrey (2009).

law. The literature review of the previous chapters shows that the effects of discretion on transposition, both facilitating and impeding ones, have mostly been ascribed to discretionary directives, meaning directives with larger margins of discretion. But also little discretion – in combination with Member State disagreement – is expected to affect (negatively) the incorporation of EU requirements into national law. Thus, for a study that focuses on the link between discretion and national transposition and the question of how the former affects the latter, it is of vital importance to know whether individual directives grant smaller or larger margins of discretion to Member States. This presupposes an analysis of directives to assess their margins of discretion. To this end, and for case selection purposes, content analysis is applied. Content analysis implies that directives are subjected to a textual analysis and coding exercise. The latter is a technique to facilitate the analysis of the directive text by structuring and describing it by means of categories (see Neuendorf, 2002; Krippendorff, 2004).

A better understanding of what forms discretion takes in directives, it is necessary to identify whether more or less discretion is conferred upon Member States. Hence, with this aspect in mind, I conducted a literature and document study as well as an exploratory study of directives. The literature and document study involved a close reading of implementation studies, legal literature and manuals regarding the drafting of European legislation as well as manuals assisting Dutch ministry civil servants in the legal implementation of EU directives. For the exploratory study, I randomly chose directives from different policy areas.[2] The analysis was exploratory in the sense that I looked at these directives from a somewhat different perspective than arguably adopted so far, namely by taking into account more details of the legislative texts. The exploratory study generally served to get more familiar with the structure, wording and content of directives. At the same time it was used to detect and understand those discretion manifestations previously derived from the literature study. Moreover, additional forms of discretion were inductively uncovered, serving to specify the basic definitions of discretion so far provided in the literature. All in all, the outcomes of the exploratory study provided me with valuable input for the codebook which I drew up to assess legislative discretion. More concrete, it served to revise and refine the initial coding scheme developed on the basis of the previous literature and document study. Interviews with experts in EU law offered relevant insights which further enhanced my understanding of the various discretion manifestations.

2 This study included around 100 directives from the following, randomly chosen policy areas: agriculture, consumer protection, environmental policy, health, industrial policy, internal market, justice and home affairs, social policy as well as transport policy.

7.3 Legal concepts

Some of the discretion manifestations give expression to particular legal concepts. These legal concepts are mapped out here because they provide useful insights into discretionary but also non-discretionary directive provisions, in particular regarding their legal implications for Member States' laws. The presentation refers in turn to different EU harmonisation methods as well as the concepts of delegation, derogation and exemption.

7.3.1 Harmonisation

The amount of discretion offered by directives is closely linked to the concept of harmonisation (Kapteyn and VerLoren van Themaat, 2003: 489-492; 724-725). In seeking to achieve uniformity in laws of Member States and to minimise trade distortions, harmonisation has been an important tool to create and maintain the internal market (Majone, 2005). At the same time, European harmonising measures can imply discretion which enables Member States to take into account national peculiarities (Prechal, 2005: 44). Harmonisation comes in different forms, and more precisely, there are harmonisation levels and types (Handleiding Wetgeving en Europa, 2010: 73-79).[3] The two levels of harmonisation are minimum harmonisation and maximum harmonisation (also referred to as 'full' or 'total' harmonisation). The former can be considred as an instance of a discretionary provision, the latter as an instance of a non-discretionary provision.

7.3.1.1 Maximum harmonisation

With maximum harmonisation the European lawmaker intends to introduce a European standard from which Member States are not allowed to deviate. This entails that Member States are neither allowed to establish less strict nor stricter provisions. An example hereof is the EU's Consumer Credit Directive which states that: 'Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.'[4]

---

3 Handleiding Wetgeving en Europa (which literally translates to 'Manual Law-making and Europe'), is the predecessor of the '101 Practical Questions on the Implementation of EC Decisions' which had been reviewed against the background of persistent transposition deficits in the Netherlands. Being published by the European Center of Expertise in EU law which was founded on the initiative of the Ministry of Foreign Affairs, the Manual addresses those involved in the preparation, formulation and implementation of EU law. The knowledge it provides shall guarantee consistent treatment of matters of EU law by government authorities. Cf. Handleiding Wetgeving en Europa (2010). De voorbereiding, totstandkoming en nationale implementatie van Europese regelgeving. Expertisecentrum Europees Recht, Ministerie van Veiligheid en Justitie: Den Haag; available at: http://www.minbuza.nl/ecer/icer/handleidingen.html (accessed 20 November 2015).

4 Cf. Article 22(1) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22 May 2008, pp. 66-92.

Hence, if this level of harmonisation applies, corresponding EU requirements leave no discretion to Member States.

7.3.1.2 Minimum harmonisation

Minimum harmonisation requirements, by contrast, offer Member States larger margins of discretion. Migration directives are cases in point, as exemplified by the Return Directive: 'This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.'[5] Member States are, thus, allowed to go beyond what is prescribed by the directive requirement as long as implementation activities stay within the limits of the Directive.

7.3.1.3 Optional harmonisation

Optional harmonisation is, like mutual recognition, considered to be a specific type of harmonisation. Both harmonisation types are usually related to EU rules regarding products but not confined to these. Optional harmonisation is addressed at economic operators (producers of goods) who may choose between the application of EU harmonised standards or national standards. Alternatively, optional harmonisation is addressed at the Member States who are then allowed to decide whether or not to implement certain directive provisions. The EU's Stage II Vapour Recovery Directive entails this harmonisation type. Article 4 establishes a uniform minimum level of petrol vapour recovery at service stations:

> Member States shall ensure, with effect from the date on which Stage II petrol vapour recovery systems become mandatory pursuant to Article 3, that the petrol vapour capture efficiency of such systems is equal to or greater than 85 % as certified by the manufacturer in accordance with relevant European technical standards or type approval procedures referred to in Article 8 or, if there are no such standards or procedures, with any relevant national standard.[6]

It seems that optional harmonisation grants larger amounts of discretion to Member States due to the element of choice.[7]

---

5 Cf. Article 4(3) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

6 Cf. Article 4 of Directive 2009/126/EC of the European Parliament and of the Council of 21 October 2009 on Stage II petrol vapour recovery during refuelling of motor vehicles at service stations, OJ L 285, 31 October 2009, pp. 36-39.

7 And yet, it should be noted that in the long run the relevant EU requirements could have more harmonising effect than expected at first sight. Producers of goods are usually not keen on risking losses and could therefore be rather inclined to apply EU standards which are applicable throughout the EU. Moreover, following EU standards may reduce the risk of implementation failure.

7.3.1.4 *Mutual recognition*

Mutual recognition obliges Member States to recognise other Member States' rules and requirements for products and services with the aim of contributing to the free movement of goods: 'Member States shall not prohibit, restrict or hinder the placing on the market of pyrotechnic articles which satisfy the requirements of this Directive' as laid down by the EU's Directives on Pyrotechnic Articles.[8] This type of harmonisation does not imply that European standards have to be implemented. However, approximation of national laws is nevertheless a result of mutual recognition. This is due to the fact that it requires the harmonisation of national legal or administrative rules regarding market access of products and services, including professional and trade activities of individuals and undertakings. Mutual recognition is the core principal of the EU's new approach to harmonisation that the EU started to apply by the end of the 1980s, especially with respect to technical standardisation of products (Handleiding Wetgeving en Europa, 2009: 75). It was established in Articles 28 and 30 TEC (now Articles 34 and 36 TFEU). Directives implying the principle of mutual recognition usually include the delegation of competences to technical standardisation bodies that are attached to the European Commission's Directorate General for Enterprise and Industry. These bodies have the task to further elaborate the technical requirements (harmonised standards) which can be applied by manufacturers on a voluntary basis.

It appears that mutual recognition and optional harmonisation imply more discretion than full harmonisation but less than minimum harmonisation. In general, however, further specifying the amounts of discretion requires a detailed look into each and every directive which was beyond both the scope and purpose of this study. For the sake of clarity, it should be noted here that the purpose of content analysis and coding process, was not to provide an exact measurement but instead to indicate a tendency towards more or less discretion granted by a directive.

7.3.2 Delegation

Two different forms of delegation in the context of implementation of EU directives are distinguished. First, based on EU primary legislation, Member States are largely in charge of implementation (Article 4(3) TEU) but the European Commission or bodies attached to it may be involved (Article 202 TEC, now Articles 290 and 291 TFEU). The conferral of these implementing powers to the Commission is considered here to reduce Member States' discretion in implementation. Second, having the discretionary choice of forms and methods, Member States have the possibility to delegate decision-

8 Cf. Article 6(1) of Directive 2007/23/EC of the European Parliament and of the Council of 23 May 2007 on the placing on the market of pyrotechnic articles.

making competences for the purpose of implementation to national bodies. Delegation rests on the principal of institutional autonomy. Institutional autonomy or 'organisational autonomy' (Gil Ibáñez, 1999: 211-213) provides Member States with the discretion to decide on organisational and procedural issues related to the implementation of directives. With regard to transposition, Member States are, for instance, free to choose the legal techniques (e.g. 'gold-plating' or translation) and instruments (in the Dutch transposition context: parliamentary acts, orders in council, ministerial decisions etc.) they deem to fit best with their domestic legal orders and practices (Handleiding Wetgeving en Europa, 2009: 107). Member States can, thus, choose the national bodies they consider to be the most suitable to carry out the implementation of directives. Member States are, however, not entirely free in this regard. Some directives may include procedural specifications that have to be taken into account by the national bodies that are in charge of implementation. Additionally, directives can include further specifications, such as determining the implementing bodies that shall apply the directive on the ground (Gil Ibáñez, 1999: 212-13; Van der Burg and Voermans, 2015: 72-73). Notwithstanding these limitations, institutional autonomy is associated with the delegation of discretion to Member States and therefore considered to be a manifestation of discretion.

7.3.3 Derogation and exemption

Member states are allowed to deviate from EU requirements. This permission can be related to specific flexible arrangements referred to as derogations and exemptions.[9] As a rule, both are measures that apply under certain conditions and may be applicable for only a limited period of time. Nevertheless, they provide Member States with flexibility. Regarding derogation, while EU requirements have to be applied, Member States are released from the obligation to apply them in the way prescribed by the directive. The EU Directive on the minimum health and safety requirements, for instance, stipulates that: 'In compliance with the general principles of health and safety protection for workers, Member States may, in the case of sea and air transport, derogate from Article 5(3) in duly justified circumstances (…).'[10] Furthermore, Member States can claim exemptions from larger parts of a directive, or under justified circumstances, from the directive as a whole, meaning that they do not have to apply the relevant EU requirements:

9 Without wanting to ignore that corresponding arrangements are established by EU primary legislation, for instance, in the area of the internal market (e.g. derogations within Art. 114 TFEU and exemptions related to Art. 101 TFEU), the focus here is limited to derogations and exemptions in EU secondary legislation (directives).

10 Cf. Article 10(1) of Directive 2002/44/EC of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration) (sixteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) – Joint Statement by the European Parliament and the Council, OJ L 177, 6 July 2002, pp. 13-20.

'Without prejudice to any more stringent requirements in other Community legislation, Member States may exempt from the measures required by paragraph 1 inputs of pollutants that are:…'.[11]

Having outlined some discretion manifestations in more detail, the focus now shifts to how these manifestations are identified and dealt with in content analysis.

7.4 Coding process

Content analysis entails that the group of directives that is examined in more detail (defined further below as 'directive sample') is subjected to an analytical process which is referred to as coding. The overall aim of the coding process is to assess whether a directive grants larger or smaller margins of discretion. Determining the margin of discretion is based, in turn, on the analysis of individual directive provisions that are examined to detect discretion manifestations by means of previously defined indicators. To facilitate the analysis, codes (in the form of numbers) are used to describe provisions. According to the underlying logic of coding rules (Kromrey, 2009: 314), each code is used for one sub-category representing a specific discretion manifestation. Hence, each discretionary provision manifestation gets a code and the same applies to each non-discretionary provision manifestation.

These discretionary or non-discretionary provisions characterise the permissive and obligatory language categories, respectively. The coding process is geared towards facilitating assessing discretion and calculating it in a subsequent step. Table 4 serves to illustrate the steps of the envisaged approach which is now addressed in more detail.

Table 4: Assessing discretion in European directives

1	Identifying provisions in directive articles
2	Identifying sort of provisions: discretionary (may-clause) or non-discretionary (shall-clause)
3	Ascribing relevant codes to directive provisions
4	Calculating discretion
5	Reaching an outcome: directive with larger or smaller margin of discretion

11 Cf. Article 6(3) of Directive 2006/118/EC on the protection of groundwater against pollution and deterioration, OJ L 372, 27 December 2006, pp. 19-31. An exemption from the entire directive is, for instance, provided by Directive 2014/89/EU establishing a framework for maritime spatial planning, OJ L 257, 28 August 2014, pp. 135-145. See recital (27).

7.4.1 Coding scheme

The coding scheme is the central component of the codebook which is a key instrument in content analysis. The codebook, together with the coding scheme, lies down the coding rules, and hence specifies which elements of the content of a text – usually described in main categories (or dimensions) and sub-categories – are coded and how.

Drawing up the codebook required some preparatory work, starting with the aforementioned study of literature, manuals and directives. This preparatory analysis involved the following steps. First, legislative discretion was identified by means of obligatory and permissive language which is used to give expression to discretionary and non-discretionary directive provisions – corresponding indicators being shall- and may-clauses. In this regard, using the mode of conduct of legal norms to detect discretion manifestations proved useful. Second, further discretion manifestations were identified, classified as discretionary or non-discretionary provisions, and used as sub-categories to describe in more detail the permissive or obligatory language dimensions. Third, for each sub-category, indicators and examples were derived from the texts of directives. In a fourth step, for the proper application of the coding scheme, the level of analysis and unit of analysis were determined (see Bonfadelli, 2002: 89). Coding is applied at two levels: at the syntax and semantic levels. At the syntax level, sentences or parts of sentences are coded as explained and illustrated in the codebook. At the semantic level themes are captured: permissions (discretionary provisions) and obligations (non-discretionary provisions). The unit of analysis is a sentence or clause, or even a sub-point, depending on the structure of the directive provision. In implementation studies discretion margins of directives have been assessed taking into account the directive as a whole or applying a more detailed approach, by taking a closer look at the directive article or sub-divisions of an article (provision) (see e.g. Knill and Lenschow, 1998; Steunenberg and Toshkov, 2009; Thomson, 2010). This latter approach is also adopted in the present study. But provisions as established in the codebook do not necessarily correspond with the common understanding of a provision as sub-division of an article (Joint Practical Guide, 2013: 35). A provision can be a simple sentence but, based on the fine-grained approach applied in this dissertation, comprise less textual information and cover smaller parts like clauses within sentences. By introducing a more detailed definition of a directive provision I was able to consider both obligations ('shall be issued') and permissions ('may be limited') in the coding process despite the fact that they belong to the same provision which usually is considered to include one discretion manifestation (see box 5). In my view such an approach better takes into account the complex wording and structure of directives.

Box 5: Defining directive provision

Article 12
Form

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies. ‖
The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

To sum up, main categories, sub-categories, indicators and examples make up the coding scheme of the codebook which lays down rules and steps of the coding process. The coding scheme makes it possible to describe legislative discretion in more detail, especially in terms of amount but also in terms of its implications for Member State laws. The latter aspect refers to the fact that discretion manifestations may be related to specific legal concepts that imply in what way EU law intends to align national law. Some of these concepts were described above.

In the present study, a combination of the previous approaches is applied, alongside a more fine-grained analysis, in which a number of discretion manifestations are identified and explained – arguably more than so far mentioned in other studies. In doing so, I seek to cover more comprehensively the various discretion manifestations that a directive can entail. In my view, such an approach does more justice to the complex nature of directives as binding legal instruments among EU secondary legislation.

7.4.1.1 Relevant and standard provisions

Before setting out the coding process in more detail, it is necessary to make some preliminary remarks for greater clarity and ease of understanding in the approach taken to analyse discretion in directives. To start with, not only the distinction between discretionary and non-discretionary provisions is an important one in coding directives. Given the focus on discretion granted to Member States for the (legal) implementation of directives, it is furthermore pertinent to distinguish between what I refer to as 'standard' provision, on the one hand, and 'relevant' provision, on the other hand (examples of both are provided in the codebook). To start with the latter, these relevant provisions address the Member States or national authorities acting on their behalf when implementing directives. But also a few provisions addressing the European Commission are treated as relevant for reasons explained below. The relevant provisions fall into the main categories of obligatory language or permissive language, meaning that they include either a shall- or may-clause. Relevant provisions are used in calculating discretion margins in contrast to standard provisions. Standard provisions make part of nearly every directive and are, from a content perspective, negligible since

they do not imply relevant additional discretion (see also Steunenberg and Toshkov, 2009: 958). This is not to say that standard provisions are completely disregarded. After all, coding involves the entire legally binding part of a directive (except for the Annexes, see below). However, they are not used for calculation purposes. Examples of standard provisions pertain to the general and final provisions of a directive: for instance, they describe the subject matter and key terms of the directive. They can also include provisions referring to EU procedures (e.g. comitology procedures) or concern the applicability of specific parts of directives, stating the transposition deadline, notification requirements, the date of entry into force, and the addresses of the directive (usually the Member States). For the most part these provisions do not contain any legal norms in their own right but, instead, include so-called 'meta-norms' understood as mere descriptions of legal norms (Eijlander and Voermans, 2000: 143). To give an example: 'This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.'[12] These meta-norms are, formally speaking, not legally binding which constitutes another reason to exclude them from the analysis.

Provisions setting out the directive's scope are among the general provisions. And yet, unlike the other provisions just mentioned they are considered relevant in calculating discretion, since they address the content of the legislative act, describing its area of applicability. In addition, they can imply discretion as illustrated by the EU's Blue Card Directive which stipulates that '[t]his Directive *shall be without prejudice to the right of the Member States to issue* [italics added] residence permits other than an EU Blue Card for any purpose of employment. Such residence permits shall not confer the right of residence in the other Member States as provided for in this Directive.'[13]

Other provisions that are next to standard provisions disregarded from calculating discretion are those directed at EU-level institutions or third parties – besides some exceptions referring to the European Commission. An example of a disregarded provision is the following one: '[t]he relevant economic operator shall ensure that appropriate corrective action is taken in respect of toys which that operator has made available on the Community market.'[14] At the same time, provisions concerning implementing powers are taken into account in measuring discretion because, as earlier mentioned, the conferral of these (discretionary) powers upon the European Commission is considered as affecting (reducing) the scope of discretion granted to Member States. The same applies to the provisions which

12 This is a standard provision which is usually the penultimate provision of a directive. The example is taken from Directive 2009/126/EC of the European Parliament and of the Council of 21 October 2009 on Stage II Petrol Vapour Recovery.

13 See Article 3(4) of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18 June 2009, pp. 17-29.

14 See Article 43(3) of Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ L 170, 30 June 2009, pp. 1-37.

contain obligations for both Member States and the European Commission requiring, for instance, mutual exchange and consultation.

The exploratory study of directives brought into view that provisions are not always worded unambiguously (see also Cutts, 2001). Hence, even though one of the major principles the European Union institutions have themselves committed to, is drafting EU legal acts in a way that is 'clear, easy to understand and unambiguous' (Joint Practical Guide, 2013: 6), it is not always possible to identify provisions clearly as discretionary or non-discretionary. This shows in the fact that provisions were found to contain both may- and shall clauses as illustrated above (box 5), or as in the following example: 'When a market surveillance authority requests the technical documentation or a translation of parts thereof from a manufacturer, it *may* fix a deadline for receipt of such file or translation, which *shall* be 30 days (…)'.[15] This fact was taken into account by establishing a further group of 'relevant' provisions, referred to as 'hybrid' provisions.

Last but not least, it has to be noted that, strictly speaking, not the entirely legally binding part of directives is coded, since the Annex to directives was excluded from content analysis. Annexes are no fixed components of directives.[16] An Annex is usually provided if directive requirements have to be specified and, hence, details of the directive have to be filled in, often technical ones. To this end implementing powers are conferred upon the European Commission (Prechal, 2005: 48; Joint Practical Guide, 2013: 45). The technical details can be quite complex. Due to this reason, the view is taken here that the Annex does not lend itself to be used in calculating a directive's discretion margin. However, the very fact that an implementing task, such as the addition of technical details, is delegated to the Commission and its committees (comitology procedure) is taken into account as previously mentioned.

7.4.2 Coding and calculating margin of discretion

Coding, in the present context, denotes an analytical process in which textual data embodied by the directive is translated into values and codes. Values refer to the categories – permissive and obligatory language indicated by discretionary and non-discretionary provisions – which are described by codes. In other words, the textual information which a provision comprises is quantified by ascribing one code to that provision. Thus, each category and sub-category has its own code. While one code has to be used to describe one discretion manifestation, another code was used to document the addressee of the relevant provision. From Article 288 TFEU which

15 See Article 21(3) of Directive 2009/48/EC.

16 This fact is well reflected by the group of directives that was subjected to content analysis. From a total of seventeen directives, eight environmental directives and three consumer protection directives had an Annex. None of the asylum and migration directives included an Annex.

defines the legislative instruments that are available to the EU to realise its policy objectives, it can be derived that directives are addressed to the Member States. This does, however, not remove the fact, that directive provisions can be addressed at other actors, such as national authorities (administrative bodies, courts), the European Commission or other EU bodies as well as third parties (economic operators, amongst others). National authorities which have a role to play in the implementation of the directive in question act on behalf of the Member States – and are therefore ascribed to the same category (and code). Directives are only binding on the Member States and not on individuals (Prechal, 2005: 55). To make this difference clear, it is shown in the codebook that a separate code is applied to third party actors which are referred to as 'intermediate addressees' in contrast to Member States which are treated as 'immediate addressees' of directives.

Coding directive provisions facilitated measuring discretion which was carried out in a subsequent step. Coding each directive was documented in a separate coding sheet (excel spreadsheet) in which further directive-related information was included, considered to be valuable context information: the policy and issue area the directive addresses, the total number of articles and recitals and whether or not the directive contains an Annex. Also the transposition deadline was written down. The complete directive text was coded. This means that in each case the numbers of all directive articles and sub-articles were documented in the sheet, followed by the number of provisions that were identified in a first round using the definitions laid down in the codebook. In a second round, the relevant codes were ascribed to each provision. In line with the coding rules established in the codebook, I coded every provision according to whether it makes some sort of discretion available to Member States for transposition or, due to some sort of constraint, it does not grant any or very limited discretion.

Calculating the margin of discretion of each directive represented the last step in the coding process. More than one way to calculate discretion margins has been suggested in the literature (e.g. Franchino, 2004; Thomson, 2007; Thomson et al., 2007; Kaeding, 2008; Steunenberg and Toshkov, 2009; Zhelazykova, 2013). Franchino (2004) is one of the very few scholars who include measures of constraints in the calculation of discretion margins.[17] Most of the other authors take the total number of major provisions identified as discretionary and divide these by the total number of (major) provisions of the directive. Distinction is thereby made between provisions that grant discretion to Member States (coded as 1) and those that do not (coded as 0) (see Thomson, 2007: 995; Kaeding, 2008: 129; Zhelazykova, 2013: 711). However, this method of calculating discretion focuses on discretionary provisions in relation to the total number of directive provisions and does not explicitly include non-discretionary provisions. For this reason, it

17 Franchino identifies different categories of procedural constraints imposed by the Council on discretion delegated to the Commission or the Member States for the purpose of implementation. See Franchino, 2004, p. 283.

was not used in the present study. Instead, use was made of the calculation method suggested by Steunenberg and Toshkov (2009). The authors base their measurement of discretion on an index which describes the ratio between the total numbers of open statements and the sum of the total numbers of open and closed statements (Steunenberg and Toshkov, 2009: 959). I slightly adapted this index in taking the numbers of discretionary and non-discretionary provisions to define the discretion ratio and calculate the margins of discretion in each case. More concrete, for calculating discretion margins of individual directives, I used the frequency of discretionary and non-discretionary provisions which indicate permissive (P) and obligatory (O) language categories, respectively. Hence, the index used boils down to the ratio between the total number of discretionary provisions and the sum of the total numbers of discretionary and non-discretionary provisions as shown in box 6:

Box 6: Index for calculating legislative discretion

Di = Pi / Pi + Oi

Legislative discretion of a directive, Di, based on the total number of permissions (discretionary provisions), Pi, divided by the sum of the total numbers of permissions and obligations (non-discretionary provisions), Pi + Oi.

It was eventually decided not to further specify the margin of discretion granted by each and every discretion instance. First of all and as noted earlier, the primary aim of the codebook is not to offer exact measurements but to indicate a tendency towards larger or smaller margins of discretion granted by individual directives. Another aim is to show that discretion can take more forms than identified so far. What's more, specification of the discretion margins of each sub-category would have required a still more detailed analysis of directive texts, including other sources to be taken into consideration (e.g. case law). This, however, is neither the aim of the codebook of this dissertation nor feasible within the scope of this study.

7.5 Codebook criteria

The remaining sections set out a number of criteria which are considered to improve the presentation and robustness of the results of both content analysis and codebook application (see Bonfadelli, 2002: 81; Neuendorf, 2002: 11-13; Kromrey, 2009: 300-304).

7.5.1 Intersubjectivity

Objectivity in the description or explanation of a research phenomenon is an ideal to which the researcher seeks to live up in order to prevent perception bias. Knowing that objectivity can never be fully achieved and subjectivity not entirely avoided, intersubjectivity is suggested by way of compromise. In the present context intersubjectivity relates to a shared understanding of the components of the codebook, above all the dimensions, sub-categories and indicators used to capture legislative discretion in directives. While this is certainly desirable it is also a very ambitious target. To stay within the boundaries of what was practically feasible, a more modest approach was chosen. The different discretion manifestations were presented to people with expertise in EU law (civil servants from national ministries, European Commission, and academics) who exchanged their views with me on this particular matter. They largely agreed with the basic distinction made between permissive and obligatory language (may- and shall-clauses).[18]

7.5.2 Validity

Validity refers in the present context to the major elements of the coding scheme, the main categories and particularly sub-categories that were established to identify and describe discretion in directives. It was thus important to find out whether the two categories of obligatory and permissive language can be considered as an appropriate means to capture discretion – larger and smaller margins of it conferred upon Member States. In other words, the key issue was whether these categories operationalise discretion in a way that matches its theoretical conceptualisation. Thus, the central questions arising in this context were: does the codebook function as a proper measurement instrument to assess directives' margins of discretion? And does it measure, what it is supposed to measure, namely larger and limited margins of discretion? To obtain certainty regarding these issues the aforementioned interviews proved valuable.

7.5.3 Suitability, mutual exclusiveness and completeness

Some criteria are closely related to each other, especially those that pertain to the way categories were defined. The definitions of categories were based on a number of considerations. First of all, it seemed important to clearly explain the various categories in order to facilitate the task of identifying them in the legislative text. In other words, I had to ensure that the catego-

18 While the input of the interviewees provided further useful insights, also regarding the legal concepts discretion is linked with (see section 7.3) all choices concerning the coding scheme were made by me - but in agreement with the managers of this dissertation project. They have a profound knowledge of EU law and politics, being themselves legal and political science scholars.

ries can be derived from the manifest content of the directive. Second, categories were chosen that could be applied to all directives. For this reason as mentioned above, the Annexes to directives were disregarded in the coding process. Third, exclusion of discretionary concepts such as 'public order' or 'public policy' was motivated by the consideration that too small sub-categories should be avoided to prevent overlap of categories; otherwise small categories would fall within bigger ones). For the same reason, seemingly discretionary expressions like 'if appropriate' or 'appropriate measures' (e.g. 'Member States shall take appropriate measures…') were not considered as categories in their own rights. In this regard, the aim was furthermore to ensure the independence of categories. Otherwise the conventional rule of using one code for one category to describe one provision regarding its (non-)discretionary nature would have been violated and therefore the criterion of strict differentiation (see Bonfadelli, 2002: 90).[19] At the same time, I sought to ensure that sub-categories were exhaustive in describing the relevant aspects of the permissive and obligatory language categories. In other words, the ambition was to capture as comprehensive as possible the different discretion manifestations.

7.5.4 Reliability

Finally, I sought to ensure the reliability of the codebook. Reliability is closely connected to the criterion of intersubjectivity initially mentioned and refers to the fact that the measuring procedure – as established in the codebook – delivers the same results if trials are repeated (Neuendorf, 2002: 12; see also Kromrey, 2009: 239-242). At the same time it also implies some level of agreement among coders regarding the application of the coding scheme to the matter under investigation (directive). While the latter refers to inter-coder reliability that involves two or more coders, in this study, intra-coder reliability was applied.[20] Hence, I repeated coding on a random choice of already coded directives to establish the overall consistency of the coding instrument (codebook and coding scheme) and the results obtained. Repeated trials were carried out at different intervals though, to avoid effects from memorising results from previous trials. This was done with due care but given the intricate design of directives and the final complexity of the codebook, slight differences of results – with however no bigger impact on the selection of directives – could not be avoided. Finally, to add to the consistency of the approach, I sought to apply the codebook to the various directives in a systematic and uniform way.

---

19 This criterion is referred to in the German literature as 'Trennschärfe' meaning the 'strict differentiation between items'.

20 The decision to code the sample directives by myself was taken due especially to pragmatic reasons. The codebook turned out to be quite complex in the end which would have made involving a group of coders too time-consuming. In addition, coding a sample of seventeen directives was considered as feasible for one person to manage.

This list of codebook criteria does not claim to be exhaustive but addresses relevant aspects that were considered in drawing up and applying a codebook for the analysis of European directives (see Appendix).

7.6 Summary

This chapter dealt with the application of content analysis which is used in the present study to analyse directives regarding the margins of discretion they grant. Content analysis includes that directives are subjected to coding which is used to identify manifestations of discretion in directive provisions. These discretion manifestations are described by a codebook and coding scheme, laying down rules which guide the analysis of directives. While the codebook is presented in the Appendix to the dissertation, in the previous sections a rough sketch of it was provided as well as the criteria explained that were taken into account in developing it. Based on the coding process, discretionary and non-discretionary provisions are distinguished and those provisions which are considered relevant are used for assessing the scope of discretion granted to Member States. This way it is established whether a directive makes a rather larger or smaller margin of discretion available to Member States for the purpose of implementing directives.

8 Case study approach

8.1 Introduction

The theory of this study needs to be connected with the empirical analysis. The empirical analysis seeks to assess the expectations concerning the role of discretion in the negotiation and transposition of European directives and includes the case studies presented later in the book. The first steps in connecting the theoretical and empirical parts of this book were taken by operationalising discretion which resulted in the introduction of content analysis and the codebook instrument. The second major element of the methodological approach adopted in this study is the case study method which shall be addressed in the subsequent sections. In this context several questions arise. How is the analytical framework applied to the empirical examples, how are these examples or cases selected, and in what way was the empirical research carried out, which methods and techniques were used to this end, what kind of data was applied, and how was this data generated? In short, in this chapter relevant questions of case study research methodology are addressed.

8.2 Case selection strategy

The first topic to be dealt with is the case selection process. The selection of cases for the empirical analysis was carried out in a step-wise manner, by means of a preliminary selection of directives, followed by the application of content analysis as well as the use of a specific case selection strategy. The case selection strategy applied required taking into consideration additional factors that next to discretion are expected to affect national transposition.

8.2.1 Directives for content analysis

A preliminary selection of directives was carried out to define the directive population of this study. The directive population refers, in other words, to a large group of directives that represent the main focus of the study. These directives share certain common characteristics on the basis of which they were chosen. In the present context these characteristics pertain to directive and EU-level features. Thus, the selection was made with an eye to the sort of directive, the adoption period and policy area. Consequently, the research population is a group of directives which represent new legislative acts (instead of amendments of already existing directives), were adopted in the period 1 January 2007 to 1 December 2009 and address the EU policy area of

consumer protection, environment, and justice and home affairs (see table 5). The corresponding directives were obtained by making the relevant queries, using the European Union's legal database EUR-Lex which provides free access to EU law.

Table 5: Selecting directives for content analysis

Policy Area	Adoption period	Sort of act
Consumer protection Environment Migration	1 January 2007 until 31 December 2009	New legislative acts

The distribution of directives by policy area yielded the following results: twenty-five environmental directives, nine consumer protection directives and five directives concerning migration. The prominent representation of environmental directives does not come as a surprise. In the area of environment the EU has been highly active for decades, and this has resulted in a vast amount of legislative output. The small number of directives in the field of justice and home affairs, on the other hand, reflects the power relationship between the EU and its Member States, which was for a long time in favour of the latter and EU decision-making competence therefore limited. In relation to these two policy areas, consumer protection seems to take a middle position. In any case, it is known as an area where the EU has a rather wide competence. The entire group of directives initially also comprised modifying or amending directives next to new directives. This was in line with the original idea to add to the analysis a further dimension in explaining transposition and therefore to have more variation concerning the sort of legal act. Modifying directives change already existing ones and are assumed to be faster transposed than new directives since they imply only little change to national law (Kaeding, 2006; 2007b; Mastenbroek, 2007). New directives, by contrast, entail new topics of legislation, and for this reason they are considered more likely to cause disagreement between domestic actors, resulting in delayed transposition (Haverland and Romeijn, 2007). The idea to include modifying directives was eventually dropped for reasons of feasibility related, in particular, to the application of the codebook to measure discretion margins of individual directives. It turned out that the codebook would be more suitably applied to the analysis of new directives which do not need to be analysed in conjunction with previous acts. Be it as it may, removing the modifications among the directives reduced the total

number of directives as did the exclusion of codifications and recasts.[1] As for these specific types of modifications, the corresponding directives did not require transposition into national legislation and were therefore disregarded. This was, in particular, due to two reasons: First, the directives introduced technical amendments to be addressed in comitology committees chaired by the European Commission in the so-called committee procedure. Second, codifying directives, in bringing together already existing legislation and all its amendments in a new single act, do not specify any new transposition deadline. The total number of directives finally boiled down to seventeen basic legislative acts: ten environmental directives, three consumer protection directives and four directives on migration (see the listing of directives in the Appendix).

8.2.2 Directives for case study analysis

In a next step, the seventeen directives were subjected to content analysis and the application of the codebook to determine individual discretion margins. Since directives with lower and, in particular, higher discretion margins are expected to affect transposition differently, I decided to select directives with varying discretion margins (small and large) for the case study analyses and subsequent comparison of directive pairs. Accordingly, the case study approach entails the analysis of six individual cases which include three directives that grant more and three directives that grant less discretion. These directives make up the directive sample of this study: cases that represent the directive population, in other words the 'immediate subject' of the case studies (Gerring, 2007: 21).[2] The individual analyses are followed by a paired comparison to highlight and discuss the effects of larger and smaller margins of discretion on the negotiation and transposition of European directives.

---

1 Modifying directives or modifications is used here as a general denominator for amendments, codifications and recasts. Amendments imply changes to an already existing directive. Unlike amendments, codifications as well as recasts entail that a new law is adopted which brings together the legislative act and all its amendments in one piece of legislation. Codifying directives replace the acts being codified. The acts subject to recasting are repealed. Both codification and recasting are techniques that result from the European Commission's Better Regulation strategy aiming to achieve better accessibility, comprehensibility and coherency of European legislation as well as the latter's smoother transposition and implementation. See the relevant definitions provided by the European Commission's legal service (2015) Available at: http://ec.europa.eu/dgs/legal_service/index_en.htm (accessed 7 August 2015). See also Voermans, W. (2009). Regelvermindering via codificeren en consolideren, *Regelmaat* 24(3): 179-182.

2 Next to the aim of having six cases for the case studies and comparison, another reason for drawing a directive sample from the population of directives is to ensure that carrying out the analysis is feasible. A population of cases is usually too large in size to be analysed by an exploratory case study approach like the one applied in this study. For this reason, some further systematic choices were made, resulting in the creation of a directive sample from which finally six directives were selected for further analysis.

The decision to compare cases had implications for the further case selection process. Comparative case study methodology offers different strategies to select cases depending on the exact purpose of the comparison (Lijphart 1971; 1975; Pennings et al., 1999; Blatter and Haverland, 2012). I decided to apply the 'most similar systems design' (Lijphart, 1971: 687-690; Seawright and Gerring, 2008: 304-305; Blatter and Haverland, 2012: 42-44),[3] because in my view, it most adequately addresses the purposes and goals of the present study. The starting point of the most similar systems design is to select two cases based on the assumption that while they are similar in respect of several aspects, I refer to as background factors, they differ regarding the factor(s) that are to the study's prime interest. The latter factors have been referred to as presumed cause and outcome or independent and dependent variables depending on the type of research and methodological approach that scholars apply. According to Pennings et al., the main concern of comparative case studies with a most similar systems design is the correspondence between the independent and dependent variables based on their variation across cases under review (see Pennings et al., 1999: 38). Translated to the present context of transposition, what is analysed is the link between a larger discretion margin – the independent variable or presumed cause – and the outcome which is proper or deficient transposition whereby 'proper' is understood as timely and legally correct transposition. More concrete, the more discretion a directive grants the more likely it is that transposition is proper or deficient.[4] Proper and deficient transposition are understood as compliance and non-compliance with EU law, respectively, and may, from the viewpoint of legitimacy, be considered as detrimental or beneficial for both the process and outcome of national decision-making for the purpose of formally implementing directives.

To focus on the correspondence between the amount of discretion and the corresponding transposition outcome across cases means that the focus is on the question whether or not variations of discretion lead to different transposition outcomes. In line with a positive reading of discretion, it is expected that more discretion leads to proper transposition in terms of timeliness and legal correctness. What has to be taken into consideration, however, is that the outcome of interest may be produced by a 'plurality of factors' (Blatter and Haverland, 2012: 24). In order to consider separately the impacts of individual factor(s) on the outcome, and, in particular, to focus on the particular relationship between the presumed cause (discretion) and outcome of interest (transposition result), these other factors must be held

3 Lijphart refers to it as 'comparative method' or 'comparable analysis on comparable cases'. Cf. Lijphart, 1971, p. 687.

4 This expectation is formulated in line with the objective of the study to highlight the potential of discretion in facilitating decision-making processes regarding directives. As previously shown in the theoretical part and reflected by the analytical framework, however, this study does not disregard evidence to the contrary and therefore the purported negative effects of discretion.

constant. In research methodology this is referred to as the ceteris paribus assumption[5] (see Lijphart, 1971; Gerring, 2007). Applied in the present context this means that more discretion leads to proper transposition as long as all other factors that might affect the transposition outcome remain constant. In this way, it is possible to zoom in on the relationship between discretion and transposition by screening out, to the greatest extent possible, the influence of other factors on transposition. For a better understanding, the underlying logic of the research design is visualised in table 6.

Table 6: The role of discretion according to the most similar systems design

	Type of directive	Number of transposition actors	Sort of transposition measures	Number of transposition measures	Directive's margin of discretion	Transposition outcome
Case 1	1	1	1	1	*1*	*1*
Case 2	1	1	1	1	*0*	*0*
Case 3	1	1	1	1	*1*	*1*
Case 4	1	1	1	1	*0*	*0*
Case 5	1	1	1	1	*1*	*1*
Case 6	1	1	1	1	*0*	*0*

The first transposition case shows that in the presence of five other factors, including discretion, timely and legally correct transposition is achieved. This, however, does not say anything particular about the link between discretion and transposition outcome. Only if other transposition scenarios are included, it becomes possible to detect a pattern. As shown in the figure, the transposition outcome changes, in case that the directive's margin of discretion changes, while all other factors remain the same. These factors are the background factors which are addressed below. The underlying expectation of the relationship between discretion and transposition is, as noted above, that in case that more discretion is available for transposition, compliance with the directive is achieved. Assuming that 1 indicates the presence of larger margins of discretion, its positive effect on transposition is illustrated in table 6 by the hypothetical cases 3 and 5 which show that with more discretion being available, proper transposition / compliance (indicated by 1) is achieved. Deficient transposition / non-compliance is the outcome in case that only little discretion is conferred upon Member States (indicated by 0 for both margin of discretion and transposition outcome) – as reflected in the transposition scenarios 2, 4 and 6. If the relationships between margins of discretion and transposition outcomes just described will show empirically remains to be seen. The case study analyses below are used to look further into the link between these two.

5 The literal meaning of ceteris paribus is 'other things being equal'.

Transposition is known to be a multifaceted phenomenon and, as a rule, has been analysed by taking into consideration a number of factors (Sverdrup, 2007). Therefore the most similar systems design comes in handy because it creates a research setting which allows for taking into account other alternative explanations for outcomes of transposition. On the other hand, this can be considered a weakness of the case study approach. In this regard, it can be argued that the case study approach suffers from the fact that there are more potentially relevant independent variables than cases examined which may deliver only tenuous findings. But it is exactly at this point where the most similar systems design shows its merit. In making the transposition cases 'comparable' by ensuring the similarity of their background factors, it helps to minimise the number of alternative explanations and enhances the plausibility of explanations that relate to the factor of prime interest (Gerring, 2007: 71). It is obvious that the key factor considered to influence the national transposition of EU directives is discretion. But what are the background factors in the present study?

Table 7: Selection criteria directives

1	Policy Area	differ
2	Margin of discretion	differ
3	Number of transposition actors	similar
4	Sort of transposition measures	similar
5	Number of transposition measures	similar
6	Time for transposition	similar

As shown in table 7, the background factors relate to national characteristics and include the sort of directive (new and adopted by the Council or the Council and European Parliament), the number of transposing actors as well as the number and sort of national transposition measures. Additionally, since more time available has been assumed to contribute to timely transposition (Kaeding, 2007b: 122), transposition time was added as an additional condition that should not differ between the two cases compared.[6] While the background factors should be as similar as possible, the two directives should differ as to their discretion margin and policy area. In other words, each of the three paired comparisons eventually included two directives that vary in their discretion margins (small vs. large) and policy area[7] they

6 This latter condition could be ensured by selecting directives with the same amount of time - usually 24 months as stated in the directives' final provisions.

7 The remaining directives in the area of justice and home affairs pertain mostly to migration policy, including those selected for the case studies, which is the reason that aspects of this particular sub-domain of the JHA area (legal and illegal migration) are addressed in the empirical analysis of the dissertation.

address but are both new legislative acts which have been adopted by the Council or the Council and the European Parliament. Furthermore, the cases to be compared had to meet three further conditions: their transposition required the same or a similar number of transposition actors, and the same or a similar number and sort of transposition measures. It was furthermore important to ensure that both directives allocated the same amount of time for transposition. These criteria were thus used to match six directives into three pairs for the empirical analysis (see box 7).

Box 7: Pairs for comparative case studies

Blue Card Directive 2009/50/EC & Pyrotechnic Articles 2007/23/EC
Waste Framework Directive 2008/98/EC & Toy Safety Directive 2009/48/EC
Return Directive 2008/115/EC & Stage II Petrol Vapour Recovery Directive 2009/126/EC

So far the background factors have merely been mentioned but still need to be addressed in more detail. Prior to that, however, two additional notes have to be made. First, similarity of background factors is an ideal condition but reality usually does not provide for ideal settings. Second, in making the final choice, the availability and commitment of interview partners was also taken into consideration.

8.3 Background factors

While there certainly is a plethora of factors that may affect the national transposition of European directives, it is important to bear in mind that not all of these factors are relevant in the context at hand. Considering that this book presents a single-country study and that transposition studies were carried out in the Netherlands helped in reducing the number of relevant factors. For instance, factors were excluded that seem to make more sense in a cross-country analysis such as, for instance, 'comparative economic powers'. Furthermore excluded were factors that are unlikely to apply to the Netherlands, taking into consideration that it is an EU founding member and an economically as well as democratically advanced country. From this it follows that, factors such as 'approval of democracy'or 'financial capabilities', to mention only a few examples, were deemed irrelevant.[8] Considering the transposi-

8 The examples are taken from the implementation of EU law database which provides more examples. See Toshkov, Dimiter (n.d.) Implementation of EU Law: An Online Database of Existing Research, in cooperation with the Institute for European Integration Research. See also footnote 47.

tion context also helped to identify factors that are of key importance for the purposes of this study. To give an example, in the Netherlands transposition is carried out first and foremost by ministerial units. Hence, in contrast to other stages of the implementation process which involve, for example, other public authorities or sectors of industry, transposition is carried out by state administration. This is why factors that relate to transposition, being conceived as a largely administrative process, were regarded as highly relevant. Nevertheless, transposition is also a political process. It can trigger political controversy between the domestic actors involved in the process of incorporating EU rules into national law. For instance, due to different political interests and preferences they pursue, the national Government and Parliament may hold different views on how transposition should be carried out.

The selection of background factors, which are further considered in this study and therefore included in the present research design, follows from the foregoing considerations. The background factors are now addressed in more detail, starting out with the sort of directive, followed by the number of implementing actors and number and sort of transposition measures.

8.3.1 Sort directive

The sort of directive is expected to affect national transposition. It has already been noted that modifying directives are believed to be faster transposed since they do not entail substantial changes for national law. The sort of directive can, however, also refer to the EU body by which the directive was enacted. Hence, the distinction is made between Commission directives, Council directives adopted by unanimity, and finally directives that are adopted by both the Council of Ministers and the European Parliament according to the former co-decision procedure (corresponding with the period considered in this study and preceding the entry into force of the Treaty of Lisbon). Commission Directives are found to be more swiftly transposed than Council directives or directives which are adopted by co-decision. The sort of EU decision-making processes, and the applicable formal decision-making rules in particular, apparently play a role (Mastenbroek, 2003). According to Mastenbroek, speedy transposition of Commission directives is due to the better quality of these directives which makes transposition easier and therefore faster. Directives that are adopted by the Council or by the Council and the European Parliament together are, by contrast, associated with political controversy and lower quality of legislation. Low quality stems from the fact that directives represent compromise texts that are vaguely worded. As a consequence, these directives are associated with difficulties in the interpretation and application by domestic actors and therefore with delayed transposition. It should be noted that Council directives and directives enacted by both the Council and the European Parliament are considered to require the same amount of time for being transposed into national legislation (Mastenbroek 2003: 375-376).

8.3.2 Number of transposition actors

To analyse national transposition and the role of discretion therein, specific attention has to be paid to actors and their preferences – as emphasised by the veto-player approach (Tsebelis, 2002) – and in the literature on implementation (see Kaeding, 2007b; Mastenbroek, 2007; Steunenberg, 2007; Thomson, 2007). Transposition may involve actors with different preferences as to the way the directive should be transposed. It may also entail problems of coordination between actors. For this reason, transposition delay is associated with more actors being in charge of converting EU rules into national law: 'the number of political and administrative actors involved is often related to a decrease in decision-making speed' (Steunenberg and Kaeding, 2009: 438). Put differently, the fewer actors involved, the more it is likely that transposition is timely (Kaeding, 2006: 239). The number of actors needed for transposition is thereby related to the directive's scope and policy issue which may fall within the remit of one or more ministries and consequently require intra- or inter-ministerial coordination (Haverland and Romeijn, 2007). If the policy issue at stake concerns a new topic of legislation, it may additionally require the involvement of Parliament.

Research focusing on the Dutch transposition context confirms that it is worth looking at the number of actors involved in analysing the transposition of European directives, and hence, to take into consideration the inter-ministerial and intra-ministerial coordination of this process (see section 4.2.2). A 2008 study of the Dutch Court of Audits has brought to light that lacking inter-ministerial coordination is an administrative shortcoming that impedes timely transposition. Having examined the Dutch transposition of European directives in the period from 2001 to 2006, the authors of the study conclude that involvement of more than one ministry led to delay in 80 percent of the cases (*Parliamentary Papers II* 2007/08, 31498, no. 1&2, p. 12). One explanation is that national ministries tend to remain attached to their individual autonomy rather than engaging in inter-ministerial collaboration for the purpose of transposition (*Parliamentary Papers II* 2007/08, 31498, no. 1&2, p. 56). Regarding intra-ministerial coordination, Mastenbroek has pointed to the so-called problem of 'chinese walls' which describes the fact that the political and legal units of a ministry involved in the negotiations and transposition of a directive work in isolation. This is expected to result in poor communication and coordination between these departments and to contribute to delay in transposition (Mastenbroek, 2007: 38-39).

In fact, both inter-ministerial and intra-ministerial coordination problems can be linked to difficulties that are associated with the number of transposition actors. But also other approaches are possible. In this study, intra-ministerial and inter-ministerial coordination are not discussed under the same heading. Intra-ministerial coordination problems and lacking transposition knowledge are used to describe the two dimensions of the

concept of the 'administrative capacity' of transposition actors, focusing on the ministerial level. Inter-ministerial coordination between national ministries, on the other hand, is linked to the concept of the 'number of transposition actors'. This concept is more broadly understood to include not only the transposition debates at the ministerial but also the political level and therefore refers to the involvement of other domestic actors such as national parliament.

8.3.3 Sort and number of transposition measures[9]

Both final background factors that the present study takes into account pertain to the national transposition measures created to incorporate EU directives into national law. In the Netherlands, transposition legislation is formulated and adopted by means of the same legislative procedure as national legislation (Steunenberg and Voermans, 2006). Transposition may, however, involve various legal instruments which differ as to the number of actors involved and therefore the time needed to create and adopt them. It is carried out by means of high and low order regulation, the former pertaining to parliamentary acts, the latter relating to administrative acts, including orders in council and ministerial orders (Van der Burg and Voermans, 2015: 144). Parliamentary acts require, alongside the ministerial department(s) responsible for transposition, also the involvement of the Council of State and Council of Ministers, as well as the active participation of the national Parliament which in the Dutch context includes the House of Representatives and the Senate.[10] Fewer domestic actors are involved in the creation of orders in council and ministerial orders. This difference is important to the study of transposition performance and there seems to be agreement that the higher the level of transposition, and thus the more actors involved not only at the ministerial but also political level, the more likely it is that a directive will be transposed with delay. This has been found to hold true for not only the transposition of directives in the Netherlands but also in other EU Member States (*Parliamentary II* 2007/08, 31498, no. 1&2, p. 12; König and Luetgert, 2008). With specific regard to the Dutch transposition context, faster transposition is expected from the use of orders in council and, in particular, from the use of ministerial decisions which, unlike other sorts of transposition measures, do not require any consultation or scrutiny procedures (Bovens and Yesilkagit, 2010: 61). Parliamentary acts, by contrast,

9 A note on terminology: 'transposition measures' and 'transposition legislation' are used interchangeably in the dissertation and correspond with 'implementing measures', a third term used in implementation studies.

10 The Netherlands have a bi-cameral system: the lower house (or House of Representatives) is known as 'Tweede Kamer', the upper house (or Senate) as 'Eerste Kamer'. Whereas the political debates take place in the former, it is the quality of a legislative proposal that is of primary importance to the upper house (Eerste Kamer). Cf. Breeman and Timmermans, 2012, pp. 153-154.

take the longest, requiring about a year until they are enacted (Breeman and Timmermans, 2012: 153). Alongside the level of transposition, the number of transposition measures required to incorporate a directive into national law has been found to cause delay. Mastenbroek (2003; 2007) as well as Steunenberg and Kaeding (2009) claim that the higher the number of implementing measures, the more time it takes to transpose a directive. According to Mastenbroek this is related to the fact that the likeliness for implementation problems to arise is higher if many implementing measures have to be introduced or changed (Mastenbroek, 2003: 377; 2007: 37).

How was the information on background factors obtained? To this end, the earlier-mentioned EU database EUR-Lex proved useful. First of all, it provides access to the text and sort of a directive – the latter being immediately revealed by the directive's heading. From the heading it becomes evident whether the directive is a new legislative act and by which EU bodies it was enacted. Furthermore, the database offers an overview of national transposition laws that Member States have adopted and notified to the European Commission to meet their transposition obligations. This provided me with the knowledge on the number and sort of legal acts of individual transposition measures taken by the Dutch transposition authorities. As for the number of transposition actors, information on this factor could be gathered from the governmental overviews on the status of transposition processes being underway. These overviews provide a timeline-view including all stages of the transposition process and actors involved.[11]

8.4 Summary

This chapter has so far set out the step-wise approach to the selection of cases for the purpose of arriving at six transposition processes which were carried out in the Netherlands. These processes shall be further examined by means of case study analyses and paired comparisons. To this end a population of cases was defined followed by the application of further systematic choices resulting in the creation of this study's directive sample, including six directives, two from each policy area addressed (consumer protection, environment and migration). Alternative explanations which are alongside discretion expected to affect national transposition were presented as background factors in line with the most similar systems design.

11 These overviews are provided by the so-called 'i-timer'. It offers information concerning the state of affairs regarding the implementation of EU directives and framework decisions into Dutch law and is published quarterly by the Ministry of Foreign Affairs and submitted to the Dutch Senate and House of Representatives. The i-timer was developed by the Ministry and is used by the Interdepartmental Commission for European Law (Interdepartementale Commissie Europees Recht, ICER) to monitor the progress made in the Dutch implementation of EU law. Cf. Mastenbroek, 2007, pp. 31-32.

This case study design allows for singling out the factor of discretion for explicit evaluation of its effects regarding the national transposition of EU directives.

8.5 Case study analysis

In addressing the case selection strategy and method of comparison, the preceding discussion anticipated two important elements of the case study approach. Other relevant aspects shall now be addressed in more detail. The discussion commences by stating the objectives of the case study analysis, including some methodological reflections on the approach. It then turns to the data gathering process and, in a last step, sets out the structure for the discussion of EU and national decision-making processes concerning directives. One concept that has been identified in the theoretical discussion as being linked with discretion is the compatibility of EU and national law. It is a concept which has seen different interpretations and applications in implementation studies. The last section therefore concludes by addressing the concept of compatibility in the context of national transposition as it is used and operationalised in the present study.

8.5.1 Objectives

The overall objective of the case study approach is to throw light on the role of discretion in the negotiation and transposition of European directives in accordance with the research questions of this study. Drawing on the analytical framework the relevance of discretion is assessed under particular circumstances – i.e. in relation to other contextual factors considered relevant in the decision-making processes under study. The EU negotiation process is analysed with the aim of understanding under what circumstances more or less discretion is incorporated into directives and how discretion affects legislative decision-making. The transposition of directives in the Netherlands is examined with a view to the questions of how discretion was used to convert the directive into national law and how discretion affected the process; did it facilitate or impede it? The insights gained from the analysis of the six case studies inform the subsequent comparative investigation. Finally, the findings from both analyses are used to illustrate aspects of the relationship between discretion and legitimacy within the context of national transposition.

8.5.2 Approach

To reach the study's objectives I decided to apply the case study method. It allows for an in-depth investigation of an event or process (George and Bennett, 2005; Creswell, 2009), such as EU and national decision-making concerning directives addressed in this book. Its merits regarding the analysis

of national transposition have been acknowledged by a number of implementation scholars, including those that apply quantitative and statistical methods to analyse transposition (Falkner et al., 2005; Kaeding, 2007b; Mastenbroek, 2007; Steunenberg, 2007).

A case study approach is deemed appropriate because it matches the explorative purposes of this study which seeks to further develop the concept of legislative discretion. The decisive advantages of the case study approach lays furthermore in the fact that it allows for a close analysis of the negotiations and transposition of directives. It helps to uncover the corresponding decision-making processes at both the EU and national-levels. In so doing, the case study approach is used to trace the sequences of events, to identify actors, and preferences concerning the content as well as transposition of the directives analysed. In short, the case study research opens up rich sources of information that are used to assess the sets of expectations about the role of discretion in the relevant EU and national decision-making processes. Such an in-depth analysis implies that case study research addresses a limited number of cases (Gerring, 2007: 50) which is useful when it comes to identifying characteristics and idiosyncrasies of cases. What's more, it is considered important, since one of the main objectives of the present study is to specify the circumstances under which discretion unfolds its facilitating or impeding effects. This requires attention to detail. For instance, the approach adopted here may help to explain cases with similar transposition outcomes but which are different regarding the way discretion affected the process. Especially in these cases it makes sense to have a closer look at the context of transposition by looking beyond the mere existence of the expected relationship between the two factors of discretion and transposition outcome. Hence, it is considered useful to shed light on causal paths and mechanisms which constitute the different ways in which entities (e.g. transposition actors) and their activities (e.g. measures taken to transpose a directive) shape the link between discretion and transposition (George and Bennett, 2005; Gerring, 2007; Beach and Pedersen, 2013). In other words, the detailed examination of cases serves to open the black box between discretion and transposition; it can be used to describe their relationship in more detail and identify factors that influence it.

Notwithstanding this intense investigation, the underlying idea of the case study method is that findings from the analysis of a few cases (directive sample) shall be generalised to the entire group of cases (directive population). This, however, has been considered as a weak point of the case study method by some who argue that an analysis of merely a small number of cases precludes the generalisation of outcomes to a larger number of cases (Gerring, 2007; Creswell 2009; Toshkov et al., 2010: 7). Put differently, case studies suffer from a lack of external validity. This is due to the specificities and small number of cases as well as the fact that the book presents a single-country study which makes it impossible to generalise its outcomes to transposition in other Member States. Apparently, decisions concerning the research design come with trade-offs. It is then necessary, as sought

here, not to turn a blind eye to the downsides of one's approach but to mention them. The decision to apply the case study method despite the downsides just mentioned was based on the consideration that its advantages justify possible disadvantages. These advantages pertain first of all to the consistency of the present approach, in other words, its reliability in analysing transposition. In this regard, a single-country study has the merit that analysing transposition across cases is possible without having to account for differences imposed by country-specific, legal-administrative contexts. Moreover, conducting a small-n study can also be an advantage for the reason that it is deemed easier to ascertain the veracity of a specific relationship for a small number of cases compared to a larger number of cases (Gerring, 2007: 42). Hence, even if inferences about discretion may 'merely' allow for making modest generalisations due to the small scope of the analysis, applying the case study approach may nevertheless serve to deliver findings that are conclusive and sound. This is not least because both the case selection strategy and overall research design are applied in a manner that aims to achieve great explanatory power concerning the role of a factor such as discretion. In addition, the case study research is not confined to one but extends to six transposition cases and therefore allows for the investigation of the link between discretion and transposition across cases (see also Lieberman, 2005; Seawright and Gerring, 2008). Finally, the issue of generalisation can also be tackled by comparing the results of the case studies to the findings of previous research (Ringeling, 1978: 37). Arguably, in the context of the study at hand this is only be possible to a certain extent owing to the fact that how discretion has been used by implementing actors in the national transposition of European directives has hitherto scarcely been dealt with. And yet, all things considered, the small-n approach and cross-case evidence thereby provided do not preclude drawing modest and tentative conclusions. Besides, one could reflect about the wider relevance of research findings for transposition contexts that are similar to the Dutch one. These findings could, after all, be used to indicate pathways for future research.

Having outlined the case study approach and explained the reasons for its application, it is now time to address other more practical issues including the data gathering process.

8.5.2.1 Data gathering process

How was the case study research carried out? Relevant data was gathered for the analysis by using three key methods and techniques: an extensive literature study, document research as well as expert interviews. The interviews were held with Dutch civil servants from relevant ministerial departments. In most of the six cases analysed, this included actors involved in both the negotiation and transposition of EU directives.[12] Where it was

12 The interviews were conducted in Dutch and then I translated them into English.

deemed necessary, interviews were conducted with other relevant actors. Moreover, in one case, dossier research was carried out at the relevant national ministry. For me, the guiding principle in conducting the case study research was to gain and provide a sound understanding of the processes addressed. The triangulation method was additionally used for this purpose: literature study, document review and expert interviews represent three different sources by means of which the information gathered could be cross-checked and the validity of the negotiation and transposition accounts ensured (Adcock and Collier, 2001: 540). The interviews with experts involved in the negotiation and transposition processes were semi-structured and recorded.[13] The semi-structured approach allowed for flexibility in addressing the issues raised by the questionnaire and stimulated a two-way communication at eye-level which made it possible for me to gain an in-depth understanding of the processes discussed (Pfadenhauer, 2009). Furthermore the individual and face-to-face interviews were taped with the prior agreement of the interview partners (listed in Appendix). Without intending to deny that recording interviews may inhibit interviewees in revealing sensitive information (Mastenbroek, 2007: 93), my experience is that it enabled me to gather comprehensive information without loss of detail. Each case study chapter was sent to the relevant interview partners for the purpose of checking the accuracy of the information provided. The case study descriptions were informed by the results of a close examination of the relevant literature, and official publications giving insights into the EU preparations and negotiations as well as the Dutch transposition of the directives.

Regarding the EU-level process, the key documents assessed included, alongside directives and the corresponding Commission proposals, also the minutes of the Council meetings and other negotiation-related documents, such as the legislative resolutions of the European Parliament.[14] The Commission proposals enabled me to gain knowledge on the reasons underlying the submission of the draft directive and its content. The EU's legal database EUR-Lex was used to study the length of negotiations and the way a directive proposal was treated at Council level in order to establish whether or not reaching an agreement on a directive was cumbersome and lengthy. In this regard, information about the treatment of a directive proposal by the Council of Ministers proved useful. After all, if a legislative proposal is dealt with as 'B-item' on the Council agenda and examined at both lower and higher Council levels it can be considered as having caused difficulties in the negotiations on a directive. Proposals scheduled as B-items usually pertain to controversial issues which are in any case subjected to meetings at the level of Ministers as they require further debate (see for instance Sherrington, 2000: 61). A-items, by contrast, refer to proposals on which agree-

13 Except for one case where I took notes of the interview.

14 The analysis thus takes into account the main decision-making players, leaving out third parties such as business or interest groups.

ment is reached at the lower Council level and therefore they only need to be formally adopted by the Council.[15] Especially the minutes of the meetings of the Council working parties as well as information taken from the minutes of the Committee of Permanent Representatives (Coreper) and the Council's General Secretariat offered insights into the issues at stake during the negotiations, revealing the views and preferences of Member States in the Council but also those of the European Parliament. The Dutch position within the EU negotiations was of immediate interest to this study and examined by making use of the Dutch Government's Position Paper, better known as BNC-fiche. The BNC-fiche is named after its author, the Working Group Assessment New Commission Proposals, (Werkgroep Beoordeling Nieuwe Commissievoorstellen)[16] which draws up the fiche to inform the Dutch Parliament about new EU legislative initiatives. The BNC-fiche consists of a short summary and assessment of the Commission proposal, including key issues the Government wishes to amend. Since it represents a snapshot of the Government's initial view and considering that preferences can change over time, the study of negotiation documents as well as interviews with national civil servants involved in the negotiations on the respective directive were used to account for possible changes of the Government's position and strategy.

The Dutch transposition of the directives addressed in the case study analyses was mainly reconstructed by studying the transposition measures, including the explanatory memoranda and correspondence tables setting out in detail how individual directive provisions were incorporated into Dutch law. Examining these sources carefully, proved useful since they offered illuminating insights into the considerations made by the actors in charge in choosing particular transposition techniques and instruments. At the same time, it also shed light on the key question of how legislative discretion was used in transposing directives. Again, expert interviews proved valuable since they provided me with an additional possibility to trace the reasons for particular choices in transposition and by asking more detailed questions to check my own comprehension of sometimes complex processes. To gain a deeper understanding of the transposition debate between the leading ministry and Parliament and additional views held by other relevant domestic actors such as the Council of State and stakeholders, studying further legal and policy documents was crucial. Most of these documents were accessed through the database overheid.nl, commissioned by the Ministry of the Interior and Kingdom Relations, providing access to information about government organisations of the Netherlands. Finally,

15 Council preparatory bodies refer to institutions such as Council working parties, the Committee of Permanent Representatives (Coreper: stands for 'Committee of the Permanent Representatives of the Governments of the Member States to the European Union'.) or senior committees. Cf. Wallace, 2010, pp. 75-82.

16 The Working Group is composed of representatives of the ministries and local government representatives. Cf. Steunenberg and Voermans, 2006, pp. 18-19.

information concerning the timeliness of transposition was gathered from closely examining the timeline of the process – as outlined by the national transposition monitoring instrument 'i-timer'-[17] and the overviews of notified transposition measures stating the dates from which these measures took effect. As to timeliness as well as legal correctness, examining the European Commission's implementation reports and further communication on transposition performances, (e.g. Commission press releases), was used to establish whether or not Dutch transposition was in compliance with the directive concerned.

8.5.2.2 Structure

From the previous sections, it may have become obvious that the case study analyses include complex accounts of the relevant EU and national decision-making processes regarding the six directives analysed. That is why, before diving into the cases, the structure of the analyses is set out more clearly in order to provide for better guidance in reading and to avoid redundancy.

Each of the six case studies comprises an analysis of the EU negotiation and an analysis of the national transposition process. The structure of the two analyses is roughly the same. Both EU and national decision-making processes are presented by means of a descriptive analysis, followed by an explanatory analysis. The descriptive analyses are organised with the aim in mind to provide comprehensive and relevant information on both the negotiation and transposition processes regarding each directive. Hence, in a first step, the purpose, background as well as content of the directive analysed are described, including an outline of the policy area the directive's subject matter addresses. This is also done with a view to the idea that, as mentioned before, discretion margins vary among directives from different policy areas. In a next step, detailed insights are provided into the negotiations on the directive, especially the position of the Dutch delegation, as well as into the Dutch transposition processes including all relevant stages and actors.

The information presented informs the subsequent explanatory analyses which aim to illuminate the role of especially discretion but also other factors expected to affect EU and national-level processes by assessing the expectations constituting the analytical framework of the dissertation.[18] Despite the interrelatedness of EU and national levels in a directive's life cycle, the actors, dynamics and issues at stake are certainly different and expectations were developed accordingly. One important concept addressed in both the EU and national decision-making analyses is the compatibility between the EU directive and national law which can not only serve to explain why discretion is granted to Member States for implementation but also in what ways it contributes to a certain outcome of transposition.

17 See footnote 11.

18 The expectations are not always discussed chronologically but rather according to context.

8.6 Compatibility concept

A last point which requires elaboration makes part of the analysis of the transposition process and concerns the compatibility concept, also known as (mis)fit or goodness-of-fit concept (Risse et al., 2001; Börzel, 2005) which I chose to apply in the present study. As already noted, implementation studies deal with more than one type of misfit (institutional, legal, policy etc.) resulting from different conceptualisations with varying explanatory power. Carroll takes an in-depth look at the concept and its treatment in implementation studies and notes that 'the wide variety of approaches identifying themselves with this kind of explanation has led in part to a stretching and thus weakening of its theoretical usefulness' (Carroll, 2014: 48). In addition, empirically, the misfit hypothesis is not always successful in explaining Member States' implementation of EU law, as it was illustrated with regard to social policy directives (Falkner et al., 2005: 298-291). While the latter finding is not irrelevant it relates to one specific policy sector and caution should therefore be exercised with a view to generalisation, especially in light of the fact that policy sectors matter for explaining transposition deficits. Both the duration and delay of transposition have been found to differ among sectors (Haverland et al., 2010). Interestingly, also the relevance of different types of misfit appears to vary among policy domains (Carroll, 2014: 49).

Without intending to negate the importance of other sorts of misfit, due to the book's major concern with the legal or formal implementation (transposition) of European directives, the case study analysis will focus on legal misfit. With regard to the negotiation process, the size of the legal misfit or incompatibility between EU directive and Dutch law can only be roughly indicated based on the position of the Dutch Government on the directive proposal. The actual lack of compatibility can be more precisely determined by taking a closer look at the implications of transposition at the national level, and in particular by considering the characteristics of transposition measures taken to convert directive requirements into national legislation. This can give an idea about the scope of misfit present in a particular case. Steunenberg and Toshkov offer a categorisation of misfit which I deem useful and apply in this study to assess the lack of compatibility between the directives analysed and Dutch law (2009: 959-960). The authors conceive of misfit as showing in four degrees: high, moderate, limited, and small misfit. The different extents of misfit are derived from the consideration of three criteria that relate to national transposition legislation: the number of transposition measures, the level of legislation (parliamentary vs. administrative act) and legislative novelty. Put in their words:

> High misfit is registered when a directive requires the adoption of many (more than two) legislative acts, when these acts are of a higher order (laws and regulations) and when the transposition measures are mostly extensive amendments rather than new acts. A moderate degree of misfit is observed when many, high order acts are adopted but the acts

> are new and do not replace existing legislation. A limited misfit is present when no more than two transposing acts of second or third order (regulations and ordinances) have been adopted and when these acts are amending existing norms. If two or fewer transposition acts have been adopted which are new and are not primary legislation, we have a small legal misfit (2009: 960).

In attempting to assess the scope of misfit in the six transposition cases by means of this categorisation, experts who were involved in transposition were additionally questioned for verification purposes. They were asked to assess the legal implications of the directive concerned for Dutch legislation. Even though the concept of misfit or incompatibility is used in the present study to explain specific transposition outcomes, it should nevertheless be born in mind that the factor of compatibility has not been found to be a sufficient explanation for transposition deficits. Mediating factors such as a consensus-oriented decision-making culture (Börzel, 2005) – exhibited for instance by decision-making processes in the Netherlands – may ease compliance even in cases where lacking compatibility results into high pressure to adjust national legislation to EU law (Risse et al., 2001).

Under what circumstances discretion facilitates or impedes decision-making on EU directives and their subsequent transposition shall be addressed in the next chapters which comprise the empirical analysis carried out in the Netherlands. The presentation of the six individual case studies is organised with a view to the subsequent paired comparison, starting out with the EU Blue Card Directive, followed by the Pyrotechnic Articles Directive, Waste Framework Directive, Toy Safety Directive, Return Directive and, last but not least, the Stage II Petrol Vapour Recovery Directive.

8.7 Summary

The six transposition cases are analysed using the case study method. The benefit of the case study method for the purposes of this book is that it allows for the detailed reconstruction of negotiation and transposition processes as well as an in-depth study of the role and effects of discretion therein. In each case study, this approach translates into the structure of a descriptive and explanatory analysis of both EU- and national-level processes. Case study research combining literature study, document review and expert interviews offer comprehensive data on which the analyses are based. This includes indicators to describe the concept and scope of the compatibility between EU directive and national (Dutch) law, a factor which is considered relevant in explaining reasons for the granting of discretion to Member States and its effects on the national transposition of directives.

Part 3

Empirical aspects – negotiation and transposition analyses

9 Blue Card Directive

9.1 Introduction

In this chapter the first of six transposition cases is presented. It focuses on the transposition of the EU Blue Card Directive[1] in the Netherlands. This Directive relates to the area of justice and home affairs, and in laying down conditions and rights of residence in the issuing and other Member States, it addresses legal migration in particular. This chapter commences by introducing the background to and preparations of the Directive as well as the development of the justice and home affairs policy area. It subsequently addresses the EU negotiations and national transposition process regarding the Directive, paying specific attention to the role of discretion.

9.2 The directive

Labour migration is one of the subjects addressed in the field of Member State cooperation in the area of justice and home affairs. Alongside immigration for the purpose of family reunification and admission for humanitarian reasons, it represents the third channel of legal migration (Bia, 2004: 8).[2] The Blue Card Directive addresses a subject matter that relates to this area. The Directive is divided into six chapters. While chapter one and six present the general and final provisions which include standard rules pertaining to the Directive's objective, scope and application conditions (e.g. transposition deadline) the other chapters cover the substantive provisions establishing Member States' obligations. Chapter two addresses the criteria for admission (Articles 5 and 6), followed by chapter three which comprises some basic rules regarding the Blue Card, and includes procedural rules that determine the conditions for granting it (Articles 7-11). Chapter four (Articles 12-17) centres on 'rights'; it lays down rules regarding the access to employment. Additionally, it deals with the treatment of third-country nationals having received a Blue Card in case of unemployment as well as their equal treatment with nationals. Chapter five (Articles 18-19) establishes the conditions under which Blue Card holders and their family members may reside in another Member State.

---

1 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18 June 2009, pp. 17-29.

2 The terms migration and immigration are used interchangeably.

The Blue Card Directive is no pioneer legislation in the area of legal migration. It was preceded by other initiatives. Nevertheless, it represents the Commission's first initiative in the area of legal / labour migration, which was negotiated in the Council of Ministers. Hence, once adopted, it became the first regulatory instrument in the area of labour migration (Wiesbrock, 2010: 284). At the same time, the negotiations and adoption of the Directive underlined a shift of competences: with the incorporation into the EU legal framework, subject matters such as economic migration and the entry of third-country nationals, ceased to be regulated at the national level. In providing for common rules on the entry and residence of non-EU citizens including the group of migrant workers, the Blue Card regulates legal migration for the purpose of enhancing the EU's economic competitiveness. The underlying idea of the Commission's proposal for this Directive was to attract highly-skilled third-country nationals including their family members, while at the same time high-level migration of human capital from less developed regions, the so-called 'brain drain', should be avoided.[3] Albeit introducing a fast-track procedure for the admission of highly-qualified third-country workers based on common entry criteria, as well as, under certain conditions, residence and mobility rights to these workers and their family members in a second Member State, the Directive, however, precluded the creation of an immediate right to admission (Wiesbrock, 2010: 286). The latter tied in well with Member States' wishes to achieve a flexible and demand-driven labour migration policy (Eisele, 2013: 22). Moreover, the Directive took account of Member States' preferences for a sectoral approach to labour migration. Previously, the Commission had aimed for a horizontal approach – implying common measures applicable to all third-country nationals. But this idea had been rejected by the Member States: They were against the far-reaching harmonisation of national rules (Hailbronner and Schmidt, 2010: 705; Eisele, 2013).

The Blue Card seemed to imply a number of advantages for Member States. It should facilitate meeting labour needs and the better handling of circular and temporary labour migration, without obliging Member States to confer a permanent resident status on migrants. And yet, the negotiations on the Directive were 'no piece of cake'; the path up to its adoption in May 2009 was quite rocky. Given the development and characteristics of the justice and home affairs area, and labour migration in particular, this may not be surprising.

3 Recital (24) of the Directive states: 'Specific reporting provisions should be provided for to monitor the implementation of this Directive, with a view to identifying and possibly counteracting its possible impacts in terms of "brain drain" in developing countries and in order to avoid "brain waste."'

9.2.1 Justice and home affairs

At present the JHA area is in full development. Since the pre-Lisbon period increasingly more matters have been dealt with under co-decision (Council of the European Union, 2009). But before that time, the JHA area did not represent more than a number of ad-hoc initiatives taken by Member States. The founding Treaties of the European Communities did not provide for any rules on which supranational action in the area could have been based (Bia, 2004: 6). Early cooperation in the area of justice and home affairs was characterised by loose forms of Member State interaction which were mostly established through pragmatic arrangements outside the EU treaty framework[4] (Hailbronner, 2010). Following from a European Council initiative of ministers of interior affairs, pre-JHA collaboration started to take institutional shape in the mid-1970s, with the foundation of the Trevi Group aiming at combatting counterterrorism. EU institutions were not involved but senior officials and civil servants from national ministries made Trevi a highly intergovernmental project at ministerial level. Intergovernmental cooperation at ministerial level continued to be the typical working form in the area in subsequent years (Kostakopoulou, 2007: 156-157). Alongside terrorism and drug trafficking, implications of immigration ranked high on the political agenda: the issue of illegal influx of migrants was addressed first, followed by legal (labour) migration which became a matter of great concern (Lavenex and Wallace, 2005). Economic integration and the EU's major objective of establishing an internal common market resulted in various cross-border activities intensifying administrative cooperation in the JHA area. This is exemplified, for instance, by the setting up of a central data base, the Schengen Information System (SIS) which provides information on non-EU citizens to Member States' authorities. All in all, the Schengen arrangements, Schengen Agreement (1985) and Schengen Convention (1990), acted as a catalyst to collaboration on both asylum and migration. The removal of internal frontiers while creating a single external border, made both cross-border crime and (illegal) immigration pressing questions. Closer cooperation on asylum and migration issues was reflected in the increasing number of working group formations with the 'ad hoc working group on immigration' standing out this in respect. Founded in 1986 by the ministers of interior affairs, the aim of this working group was to advance collaboration on external and internal border controls, visa policy, asylum matters but also admission, including questions concerning the entry

4 This means outside the framework of the Treaty on the European Economic Communities.

of third country nationals and their rights to move and reside in the EU (Kostakopoulou, 2007: 159).[5]

The removal of internal borders agreed in Schengen and the achievement of a common market, the primary objective of the EU along the lines of the Single European Agreement (1986), bringing about the free movement of goods, capitals, services, and persons entailed benefits for the domestic markets of the Member States. At the same time, however, the open border policy following from the Schengen and Dublin agreements, raised concerns among the Member States over internal security levels. Moreover, it fuelled the demand among them for more inter-state cooperation in areas such as organised crime, terrorism, and immigration (Lavenex, 2010: 459). Apparently, the dismantling of borders to remove hurdles hampering trade was taking its toll: the abolition of internal borders did not only contribute to the increase of intra-EU trade. Growing migration from outside into the EU also resulted in the increase of migration rates. What's more, this increase seemed to be causally connected to the growth of crime (Kostakopoulou, 2007: 158). Hence, advantages from economic integration and disadvantages related to security issues became two sides of the same coin: the single market. The lack of internal borders had to be compensated by reinforcing security at the Union's external frontiers. This made external security a major issue for Western politicians (Bia, 2004, Kostakopoulou, 2007). Hence, closer cooperation on asylum and migration issue became a corollary of both the single market and the abolition of internal borders (Favell, 1998; Guiraudon, 2000; Kostakopoulou 2007). The role of economic integration has been viewed critically by some observers. They argue that, for fears of social-economic and ethno-political effects, Member States have sought to limit migration from third countries which had increased since the mid-1960s: 'The single market became the pretext and the justification for restrictive measures of migration control and internal surveillance' characterising Member States' policies in subsequent years (Bias, 2004: 5; Kostakopoulou, 2007: 158-159). With the Schengen project the notion of the free movement of persons emerged and crystallised as a fundamental right, being enshrined in the EU Treaties and realised with the creation of an Area of Freedom, Security and Justice.[6]

5 These concerted efforts eventually led to the 1990 Schengen and Dublin conventions - the latter being replaced by the Dublin Regulation in 2003 (Commission Regulation (EC) No 43/2003 of 23 December 2002 laying down detailed rules for applying Council Regulations (EC) No 1452/2001, (EC) No 1453/2001 and (EC) No 1454/2001 as regards aid for the local production of crop products in the outermost regions of the European Union, OJ L 7, 11 January 2003, pp. 25-57). It is also referred to as Dublin II Regulation.

6 Since 2004 EU citizens are provided with mobility rights under the Free Movement of Persons Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30 April 2004, pp. 77-123).

However, it was a right conferred upon EU nationals. Migration from outside the EU borders, on the contrary, was put under restrictive control (Kostakopoulou, 2007: 172).

Despite advanced intergovernmental cooperation, integration in the field of JHA proceeded in a piecemeal fashion in subsequent years. Arguably due to the double-edged consequences of economic advantages on the one hand, and on the other hand security issues, Member States were reluctant to give up further decision-making power in exchange for more supranational coordination. Since it had been a domain of national sovereignty, Member States sought to avoid an explicit linkage of economic integration with the 'association of the concept of freedom with security and justice' expressing the EU's objective of further advancing asylum and migration policies (Guiraudon, 2000: 255; Kostakopoulou, 2007: 171).

Member States' hesitation to deepen integration in the area of asylum and migration was reflected in the institutional and legal arrangements. More supranational coordination and therefore full integration of the JHA area into the EU framework seemed to be out of question. This shows in Member States' rejection of the idea to bringing together common foreign and security policy (CFSP) and justice and home affairs into a single integrated structure as envisaged by the initiative of the Dutch presidency forwarded during the 1991 intergovernmental conference on political union (Lavenex and Wallace, 2005: 461).[7] Keeping the two areas separate and subject to intergovernmental decision-making was confirmed by the Treaty of Maastricht (1993). Hence, alongside judicial and policy cooperation in civil and criminal matters and border controls as established by the provisions of Title VI of the Treaty (third pillar), Title IV of the EC encompassed, amongst others, migration and asylum policies, thereby combining supranational and intergovernmental elements. In Maastricht-Europe power over migration-related issues largely remained reserved for the Member States.

Especially the Treaty of Amsterdam (1999) but also the Treaty of Nice (2003) brought significant changes. Member States had realised the necessity for common action at the EU level not least because of their own economic and demographic situations. Accordingly, the EU objectives of creating an Area of Freedom, Security and Justice, and alongside with it the free movement of persons as an exclusive right of EU citizens were supported by the Member State. Impetus to these developments was given through the incorporation of the Schengen agreement into the legal framework of the EU.[8] Furthermore, parts of the JHA area were integrated into the Community (first) pillar and therefore subjected to the Community method which replaced the intergovernmental institutional framework. Corresponding

7 The idea of integrating these two was based on a proposal put forward by the Dutch Council presidency during the Intergovernmental Conference in 1991. The proposal lacked support from the British Government who disapproved of these plans.

8 The Schengen Acquis was integrated by means of protocol B (Protocols annexed to the Treaty on European Union and to the Treaty establishing the European Community).

provisions were laid down under the newly introduced Title IV (Articles 61-69 TEC).[9] Articles 62 and 63 provided the EU with a constitutional basis including the possibility for legislative initiative in the area of legal migration. In fact, this was the precondition for the adoption of the EU Blue Card Directive which became the first 'successful' legislative initiative tabled by the Commission and adopted by unanimity by the EU Member States (Cerna, 2013: 186). However, Member States were not willing to surrender too readily considerable decision-making powers, showing in the fact that they insisted on the application of transitional arrangements in respect of 'new' issues (JHA matters) under the first pillar.[10] Only at the end of this five year transition period, unanimity in the Council of Ministers should be replaced by qualified majority voting and consultation followed by the co-decision procedure making the European Parliament co-legislator in JHA matters (Peers, 2008: 220).[11] With the entry into force of the Treaty of Lisbon on 1 December 2009 the shifting of migration and asylum issues to the first pillar was eventually completed (Hailbronner, 2010: 3).

However, the political reality led to a paradoxical situation being expressed by intergovernmental arrangements such as opt-outs clauses, variable geometry or enhanced cooperation which followed from the treaty changes in Amsterdam and Nice (Lavenex and Wallace, 2005: 464; Kostakopoulou, 2007: 164-170): on the one hand, some of these intergovernmental arrangements reflected the manifest and persistent unwillingness of several Member States to participate in supranational collaboration whereas, on the other hand, other arrangements show that some Member States were willing to participate in further integration, under the precondition that they could decide on what terms. The European Pact on Immigration and Asylum represents a case in point in this regard. It was adopted at the Brussels European Council meeting in October 2008 and included the idea to organise legal immigration within the EU legal framework. At the same time,

9 Cooperation in police and judicial cooperation in criminal matters (PJCCM) continued to be subjects of the third, intergovernmental, pillar under Title VI TEU.

10 As established in Articles 64, 67-68 TEC.

11 The transitional arrangements agreed upon in Amsterdam are complex but clearly explained and summarised by Kostakopoulou: 'Title IV EC (…) set out a five-year transitional period from the entry into force of the Treaty during which the Council would take decisions by unanimity (with the exception of visa matters under Article 100c EC) on an initiative put forward by either the Commission or a MS [Member State] after consultation with the EP. Following the end of the five-year transitional period (1 May 2004), the Community method replaced the intergovernmental institutional framework: the Commission assumed its exclusive right of initiative, but had an obligation to consider any request by a MS for a legislative proposal, and the Council would decide by unanimous vote to switch to co-decision and qualified majority voting. The Treaty of Nice inserted a fifth paragraph in Article 67 EC which allowed for measures relating to civil judicial cooperation and asylum to be adopted by using the co-decision procedure, under certain conditions. In December 2004, co-decision and qualified majority voting were extended to all Title IV measures, applicable as of 1 January 2005 with the exception of legal migration.' Cf. Kostakopoulou, 2007, pp. 165-166.

the Pact put emphasis on the relevance of considering national priorities, needs and ability to receive migrants. It established that Member States should decide on the admission conditions for legal migrants and determine the number of those entering their territories (Hailbronner, 2010: 7). Against this background, it therefore does not come as a surprise that, more generally speaking, in the area of migration and asylum law discretion is made available for national implementation: corresponding EU directives include minimum harmonisation provisions which offer Member States the possibility to adopt or maintain more favourable, national provisions (Hailbronner, 2010: 24). Be it as it may, by the end of the decade the JHA area had become the 'most active field for meetings convened under the Council of Ministers' (Lavenex, 2010: 460). Growing EU-level involvement was additionally reflected in the institutional development of the European Commission with its Directorate-General for Migration and Home Affairs (DG HOME) being founded in 2010 (Strik, 2011: 44-45). Regarding legal migration integration was given further impetus through the adoption of the Directive on EU long-term residency of third-country nationals and the Directive on the right to family reunification (Lavenex, 2010: 470-471).[12] It seems that integration in the JHA area, labour migration in particular, had become an essential objective which was also addressed in various European Council programmes[13] in which the accomplishment of the Area of Freedom, Security and Justice was presented as a long-term goal (Hailbronner and Schmidt, 2010; Eisele, 2013). In fact, the proposal for the EU Blue Card Directive bears further witness to the increasing relevance of legal migration on the EU agenda. The adoption of the Directive coincided with Member States' agreement on the 2009 Stockholm Programme (2010-14), which alongside the EU 2020 goals, made legal migration a priority (Council of the European Union, 2009; European Commission, 2010).

9.2.2 Purpose and background to the directive

Within the EU legislative procedure, the European Commission has the quasi-exclusive right of legislative initiative (Ponzano et al., 2012). In exercising this role, it tabled a proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment in 2007 (European Commission, 2007a). The proposal made part of the EU's 'roadmap for legal migration', presented two years earlier (Hailbronner and Schmidt, 2010: 705). This roadmap involved

12 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23 January 2004, pp. 44-53 and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3 October 2003, pp. 12-18.

13 The Tampere conclusions (1999-2004) followed by The Hague (2004-2009) and Stockholm (2010-2014) Programmes all shed light on the EU's plans for common policies in the area of justice and home affairs.

a number of legislative initiatives on immigration for labour purposes targeted at different migration groups (European Commission, 2005b).

At first blush, the Commission' s interests and motivation underlying the proposal for the Blue Card Directive seemed to be highly compatible with the preferences and wishes of the Member States. Motivations were largely economically driven. First, the Commission wished to respond to demographic and economic developments in the Member States which gave reason for concern (European Commission, 2007a). Many Member States were facing low fertility rates and higher life expectancy which, in combination with each other, put a serious risk to the well-functioning of national pension schemes and the maintenance of the welfare state in general. Alongside population decreases, major challenges were presented by domestic labour shortages, and, in particular, a lack of highly-skilled workforce (Cerna, 2013: 180-181). Attracting highly-skilled non-EU nationals by introducing a European Blue Card should alleviate these problems (European Commission, 2007b). In realising the need for common action to tackle future challenges, the Member States agreed upon advancing the approximation of national rules on legal migration during the first European Council in JHA held in Tampere (1999) (Council of the European Union, 1999; Carrera et al., 2011: 1-2).[14]

Besides tackling Member States' pressing concerns, the proposal was clearly motivated by a purely supra-national interest. It should give new impetus to the EU's 2000 Lisbon Strategy and its objective of turning the EU within a decade into a competitive, dynamic, knowledge-based economy,[15] thereby sharpening its competitive edge vis-à-vis the United States, Canada or Australia (European Commission, 2007b). Legal migration was seen as playing a key role in reaching that goal. At the same time, it was presented as a means to promote and stimulate Member State cooperation in the Area of Freedom, Security and Justice (European Commission, 2005a).

By 2007 the European Union was, however, clearly lagging behind its ambitious goal.[16] The EU's poor performance was considered as a result of the different admission systems applied in the Member States making application for third-country nationals too complex and unattractive. The pro-

14 'The European Council acknowledges the need for approximation of national legislations on the conditions for admission and residence of third-country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. It requests to this end rapid decisions by the Council, on the basis of proposals by the Commission.' See Council conclusions – Tampere (1999).

15 See Council conclusions - Lisbon (2000).

16 The figures speak for themselves. According to the EU Commissioner for Justice, Freedom, and Security Franco Frattini and the Commission's president Manuel Barroso, comparing the EU to the USA as to their shares in worldwide labour migration gave the following picture: regarding low-skilled labour immigration the EU had an 85 percent share compared to the USA with a 5 percent share. As for skilled labour immigration, the EU's share was merely 5 percent whereas the USA's share amounted to 85 percent. See COM(2007a).

posal for the EU Blue Card should make an end to that situation. According to the Commission's 'best-case scenario', the envisaged Blue Card scheme should replace the various national admission schemes and become applicable throughout the Union. This objective, in particular, was to become one of the most controversial issues during the negotiations on the Directive.

9.3 Negotiations

The Directive proposal seemed to be based on overlapping EU and national interests but negotiations in the Council Working Party nevertheless revealed tensions and conflicting interests. While the negotiations were not necessarily lengthy the adoption of the Directive was reached within two years forging ahead under four presidencies (see table 8) – they turned out to be cumbersome (Hailbronner and Schmidt, 2010; Cerna, 2013; Eisele, 2013). Falling under the 'old' decision-making regime, the legislative process in the Council of Ministers required unanimity and consultation of the European Parliament.[17]

Table 8: Timeline for negotiations on the Blue Card Directive

23 Oct 07	Adoption by Commission proposal
18 Jun 08	Committee of Regions opinion
09 July 08	European Economic and Social Committee opinion
20 Nov 08	Adoption of the directive at first reading by European Parliament
Nov 07 - May 09	Discussions within the Council of Ministers
25 May 09	Formal adoption by Council

The requirement to achieve unanimity certainly did not make it any easier for the Member States to struck compromises in reaching a final agreement on the draft Directive. Various provisions of the Directive were the subject of controversial debates within the Council (Hailbronner and Schmidt, 2010).

The subsequent approach to the negotiations is selective in that it focuses on a limited number of issues which, however, are believed to give sufficient insight into the Commission's proposal and the final agreements reached whereby the focus comes to lie on the position of the Netherlands. Especially some key definitions, the admission criteria, amongst other issues, raised high controversy among national delegations, including the

17 The opinion of the European Parliament was mainly substantiated by the Committee on Civil Liberties, Justice and Home Affairs but also drew on arguments presented in the opinions of the Committee on Employment and Social Affairs and the Committee on Development.

Dutch one (Eisele, 2013: 4). These controversial issues are addressed in more detail in the subsequent paragraphs alongside other aspects that were of concern to especially the Dutch delegation.

The Commission proposal envisaged introducing a work- and residence permit along the model of the American Green Card for labour migrants (European Commission, 2007a). It covered three main aspects regarding legal immigration of highly-skilled third-country nationals.[18] The first two aspects pertained to the admission of non-EU migrants, including substantive and procedural aspects: admission criteria and conditions as well reasons for refusal, withdrawal and non-renewal. The third aspect concerned rights to be granted to highly-skilled third-country nationals and their family members, including residency in other Member States under certain conditions.

From the Commission proposal it was not entirely clear whether the EU Blue Card was intended to become the only admission scheme EU-wide and whether it should replace national admission schemes already in place (Guild, 2004: 4). According to the wording of Article 4(2) the Directive should not affect the right of Member States to adopt or retain more favourable provisions concerning conditions of entry and residence for persons to whom it applies, *except for entry into the first Member State* (italics added). Especially this wording at the end of the provision suggested the exclusive applicability of the EU admission scheme. Having already own admission schemes in place, it caused disapproval among various Member States, including the Netherlands.

The Dutch Government was not opposed to the general idea of the Commission proposal to attract highly skilled migrants from third countries and to stimulate mobility of workers within the European Union. As a matter of fact, the Netherlands was in good company with other Member States, such as Germany, in that it faced future shortage of highly-skilled workers in particular sectors as illustrate by a 2003 study of the CPB Netherlands Bureau for Economic Policy Analysis (Roodenburg et al., 2003). Up to that point, immigration to the Netherlands had mainly been driven by family reunion, family formation and asylum. Economic-driven immigration was only considered to be an option if it turned out to be truly beneficial for the Netherlands: immigrants should proof to be an economically valuable source of labour. This demand-driven approach coincided with what the Directive set out to achieve, including its sectoral approach that met with approval from the Dutch side. And even though labour migration was not considered to be a long-term solution to demographic challenges (Roodenburg et al., 2003: 10), the purpose and sectoral approach of the Directive made it an appealing measure to alleviate imminent bottlenecks in the national labour market, productivity and competitiveness of the Dutch economy. Alongside this EU initiative, action had also been

18 'Legal immigration' and 'legal migration' are used interchangeably. 'Economic migration' is also used to denote the same type of migration.

taken at the national level. The Dutch Government itself had not remained inactive but as other Member States like Germany or Italy (Bia, 2004),[19]it searched for solutions, resulting in the adoption of the 2004 Knowledge Migrant Regulation (in Dutch: Kennismigrantenregeling)[20] to match the needs of the corporate sector (Hertoc, 2008: 19). Under the framework of the Knowledge Migrant Regulation and its so-called 'Knowledge Migration Scheme', highly-skilled third-country nationals were considered eligible for a combined residence and work permit if they met the salary criteria set out in the Regulation.

Unlike the Commission proposal, the national scheme did not oblige domestic employers to check whether vacancies could be filled by Dutch nationals or citizens of another EU Member State before offering them to non-EU / EEA foreign nationals. More in general, the rules under the Knowledge Migration Scheme appeared to be less complex compared to those of the envisaged Blue Card scheme and were in some respects more favourable to the specific group of migrants the proposal was targeted at (*Parliamentary Papers II* 2008/09, 23490, no. 518, p. 5). The Dutch scheme did not require a work permit and, once admission had been granted, residence was permitted for a maximum of five years – a longer period than implied by the Blue Card (Hertoc, 2008: 21). Furthermore, and in contrast to the proposed EU admission system, the Knowledge Migrant Scheme was based on the principle of authoritative representation of the migrant (referred to in Dutch as 'referentenstelsel') which had proven its worth.[21] Plans for new national legislation to be established by the Modern Migration Policy Act, should therefore maintain this approach to employment-based immigration (Groen and De Lange, 2011: 340).

All in all, the Dutch admission scheme was considered to work 'very satisfactorily' as pointed out by the interviewee from the Ministry of Security and Justice. The national approach to highly-skilled migrants was generally seen as one of the most progressive within the EU (Ministry of Security and Justice, 2008a, p. 5).[22] Nevertheless, since 2006, reform plans were under way, geared towards improving the Knowledge Migrant Scheme and Dutch Migration policy in general (European Migration Network, 2007). Hence, the preparation and negotiations of the Blue Card Directive coincided with Dutch efforts to review and amend national legislation already in place.

---

19 Germany adopted a national Immigration Act in 2003, whereas Italy had laws on managing immigration already in place.

20 Meanwhile, the Regulation has undergone some changes due to the introduction of new legislation (the Modern Migration Policy Act, in Dutch: Wet Modern Migratiebeleid, MoMi) which entered into force in June 2013, revising the Dutch immigration policy.

21 The 'referent' is a natural or legal person, or an organisation (university, company), that is entitled to act on behalf of the non-EU national that wishes to apply for admission and residence in the Netherlands.

22 Letter Immigration Policy Department, Ministry of Justice to European Affairs Committee, Dutch Senate, 5565180/DVB, 19 September 2008.

9.3.1 Exclusiveness of EU admission scheme

The Dutch Government decided early in the negotiation process that the guiding principle for the Dutch delegation should be to support the introduction of the Blue Card while ensuring, however, that it would be complementary to but not substituting the already existing national scheme (*Parliamentary Papers II* 2007/08, 22 112, no. 595, p. 12). Hence this should be the Government's priority in the Council negotiations and corresponding plans were supported by domestic actors. The Immigration and Naturalisation Service (Immigratie- en Naturalisatiedienst, IND), the authority in charge of implementing the Dutch admission policy, took the view that the proper practical application of the EU Blue Card system was only guaranteed if it existed alongside the national one (Ministry of Security and Justice, 2008a, p. 2). In this context, the Ministry of Justice underlined that replacing a well-functioning admission scheme such as the Knowledge Migration Scheme by a European counterpart would put at stake the Netherlands' international competitiveness (ibid, p. 2). Also the Dutch House of Representatives stressed the importance of the national admission scheme and the principle of complementarity regarding the introduction of the Blue Card scheme.[23] Members of both Government and Opposition parties questioned the additional value of the Blue Card Scheme for Dutch migration policy and underlined that, if a common EU policy was to be adopted in the area of labour migration, the national demand-driven approach should be preserved (*Parliamentary Papers II* 2007/08, 22 112, no. 663).[24] The Government acknowledged that there were still points for discussion and the Minister's intention was it therefore to improve the Commission proposal on a number of points during the negotiations (Ministry of Security and Justice, 2008b, p. 24; *Parliamentary Papers II* 2007/08, 22 112, no. 595, p. 12).[25]

Having already own rules in place explains why the Netherlands, backed by other Member States like Germany and Finland, rejected the exclusiveness of the EU Blue Card. Together they took the view that Member States should be allowed to keep in force their national schemes (Council of the European Union, 2008b, p. 3). Facing strong resistance from the Member States, the Commission could not adhere to its plans for far-reaching harmonisation in this matter. Consequently, it was forced to give up on one of its major objectives: making the Blue Card scheme the only applicable admission scheme throughout the European Union. The formulation finally reflected the ideas of a Dutch proposal. Article 3(4) of the final Blue

23 During the negotiations the Dutch Government, publicly known as 'fourth Balkenende cabinet' (2007-2010), was formed by a coalition of Christen Democratic Appeal (CDA), the social democratic Dutch labour Party (PvdA) and the Christen Union (ChristenUnie).

24 A parliamentary motion had been issued to underline this point. Cf. *Parliamentary Papers II* 2007/08, 29861, nr. 28.

25 Letter Immigration Policy Department, Ministry of Justice to European Affairs Committee, Dutch Senate, 5525214/08/DEIA, 11 January 2008.

Card Directive, safeguards the right of Member States to issue, for the purpose of employment, residence permits other than the EU Blue Card. From this it followed that already existing or future national schemes[26] should coexist with the European scheme (Council of the European Union, 2008b, p. 3). In addition to that, the scope of the minimum harmonisation clause enshrined in Article 4(2) was broadened, allowing those Member States which represent the first country of admission to keep in force more favourable provisions regarding a number of issues. In concrete, more favourable provisions could be established regarding the minimum salary threshold, one of the admission criteria applicants for the Blue Card were to meet, provisions on procedural safeguards, labour market access rights, temporary unemployment, equal treatment, and rights for the family members of Blue Card holders as well as provisions addressing the possible EC long-term resident status flowing from the status as Blue Card holder (Hailbronner and Schmidt, 2010: 731).[27] Giving Member States the possibility to depart from EU rules, made the increase of legal diversity in the application of the EU Blue card scheme a likely corollary. What's more, it made clear yet again that the Commission's major objective of establishing common rules to attract highly-skilled migrants and facilitate their admission was definitely off the table (Wiesbrock, 2010: 220).

While efforts of the Dutch delegation contributed to prevent that national admission schemes were substituted by the EU admission system, the wishes and preferences of the Dutch delegation were not accommodated in all respects or only to a limited extent. For instance, Dutch attempts to broaden the overall scope of the Directive to include workers in frontier regions failed. The idea of the Dutch delegation was to allow Blue Card holders to reside in one Member State while working in another arguably in order to better respond to regional and local labour market needs (Council of the European Union, 2008f, p. 4). This proposal was, however, rejected by the French Council presidency which argued that these rules would fall beyond the envisaged scope of the Directive and should be addressed by negotiations on another Commission proposal (Groen and De Lange, 2011: 341).

9.3.2 Key terms

Member States held diverging views on some of the Directive's key terms. In particular the question of what should be understood as 'highly qualified employment' and 'higher professional qualifications', as defined in Articles 2(b) and 2 (g) of the proposal was subject to intensive debates. A

26 National schemes were still introduced in a number of Member States after the adoption of the Blue Card Directive. In its 2014 report on Member States' performances regarding the implementation of the Blue Card, fifteen Member States appear to have national rules in place - hence, if compared to 2008, seven Member States more. See COM(2014) 287 final, p. 2.

27 See Article 4(2) (a) and (b) of the Blue Card Directive.

group of Member States including Hungary, Estonia, and Greece wished to define 'highly qualified employment' solely on the basis of higher education performance, excluding any qualifications through professional experience. Others like Italy or Slovakia questioned the minimum number of years of professional experience which the proposal set at three, while for fears of intentional misstatement or misrepresentation of information, Germany suggested a strict approach requiring both education and professional qualifications (Council of the European Union, 2008a). Likewise, Poland wanted to adopt a stricter approach to professional qualifications by increasing the number of years from three to five – a suggestion that eventually made it into the final directive. But this suggestion, did not match the ideas of the Dutch and Swedish delegations (Council of the European Union, 2008d, p. 4). With a view to the labour needs of certain sectors and to avoid decreasing the attractiveness of the Blue Card Directive, the option of professional qualification as an equivalent to higher education qualification was maintained (Eisele, 2013: 6). In contrast to the proposal's original wording, the resulting definitions, as laid down in Articles 2 (b) and (g), emphasise national legal approaches. Accordingly, 'highly qualified employment' is understood as 'employment of a person who in the Member State concerned, is protected as an employee *under national employment law and / or in accordance with national practice*' (italics added). In addition, derogation from the requirement to attest 'higher professional qualifications' by higher education qualifications was made conditional on the existence of national law provisions and hence tailored on the basis of already existing national legal practice.[28] This does not remove the fact that the preferences of both the Dutch and Swedish delegations were not entirely met. They preferred derogation to allow for the alternative of attesting higher professional qualifications by three instead of five years of professional experience. Their wishes to further relax the proposed EU rules in this way, however, were not taken into account.

9.3.3 Admission criteria

Eligibility for the EU Blue Card is based on a number of criteria that are set out in Article 5. It is interesting to note in this regard, that the final version of the Article, in particular its first provision, takes national legal frameworks as a point of departure, leaving Member States with more discretion than initially included by the Commission proposal (Eisele, 2013: 6-8). This

28 See Articles 2 (h) and (g) of the Blue Card Directive. To recall, in the codebook these manifestations of discretion are identified as permissions or obligations referring to the national legal order. According to the codebook definitions of relevant terms related to the directive's subject matter and usually mentioned in one of the first articles, these were not coded as relevant directive provisions and therefore not considered in calculating discretion margins. In the present case of the Blue Card Directive, however, it shows that provisions concerning definitions of key terms can be of relevance when it comes to determining a directive's scope of discretion.

is evidenced by various references to national legal orders and practices ('as / if provided for in national law'; 'as determined by national law', 'under national law'). This follows from the fact that Member States were dissatisfied with the Commission's admission criteria and consequently sought to amend them (Eisele, 2013: 7-9). While some Member States such as Slovakia, Hungary, and Austria advocated extending the list of requirements, others emphasised the lack of incompatibility between EU rules and their legal systems. National law in Greece and Poland, for instance, did not require from third-country nationals to have a 'binding job offer' which should make part of their applications for admission. This legal disparity between EU and national law resulted in the amendment of the Directive proposal. The amendment implied that the EU requirement concerning the binding job offer would become applicable in case that national law provided for the same requirement (Council of the European Union, 2008b, p. 4). A similar way to accommodate Member States' preferences was chosen regarding the aim to exclude the possibility of double insurance, referring to Article 5(1) point (e) of the proposal, following a request of the Dutch delegation (Council of the European Union, 2008c, p. 12). Also this time, incongruences between EU and national laws were sought to be removed by including into the proposal references to national legal frameworks. The corresponding provision eventually established that, if provided for by national law, the third-country national can attest for adequate health insurance by means of an application for sickness insurance in the Member State concerned. Again, Member States were left with discretion based on the fact that national legal frameworks were taken as a reference point (Eisele, 2013: 9).

Member States furthermore objected to the Directive's requirements regarding unregulated professions established by Article 5(1)(c), requiring from third-country nationals to 'present the documents attesting the relevant higher professional qualifications in the occupation or sector specified in the work contract or in the binding offer of work'. From the reactions of the Dutch, but also Swedish and Polish delegations, it becomes obvious that the envisaged rules were considered to make admission more complex and increase the workload of national authorities (Council of the European Union, 2008b, p. 5; Council of the European Union, 2008c, p. 11). The Dutch Government took the view that the requirements for unregulated professions impeded the Directive's objective of fostering intra-EU mobility (*Parliamentary Papers II* 2007/08, 22112, no. 595, p. 12). Moreover, they did not correspond with the approach of Dutch law and met with incomprehension on the part of the Dutch Government. The Government did not understand the necessity of having regulatory measures for professions supposed to be 'non-regulated' (*Parliamentary Papers II* 2007/08, 22112, no. 595, p. 12). Therefore, the Dutch delegation, supported by the Irish delegation, advocated the removal of this provision (Council of the European Union, 2008d, p. 9). However, on this point the proposal remained largely unchanged.

The salary threshold was another issue on which Member States' views differed. Article 5(2) of the proposal suggested a gross monthly salary which should be 'at least three times the minimum gross monthly wage as set by national law'. While some Member States, including the Netherlands, aimed for a lower standard, other Member States like Germany and Ireland insisted on establishing a high salary threshold (Council of the European Union, 2008b, p. 7). The final compromise that eventually emerged, foresees a threshold of at least 1.5 times the average gross annual salary applicable in the Member State concerned (Article 5(3)). Furthermore it allowed Member States representing the second country of admission to positively derogate from the salary threshold established by the Directive by means of Article 4(2). The Dutch delegation, however, feared that the envisaged upper limits of the salary threshold would trigger fraud, exposing migrants to the risk of not receiving a high salary (Groen and De Lange, 2010: 339). Therefore the Dutch delegation sought to align EU rules on this point with the lower threshold as included in the Knowledge Migration Regulation. However, the Dutch delegation failed in asserting these preferences.

9.3.4 Volumes of admission

A particular Dutch concern related to the volumes of admission. Member States should have, as laid down in Article 7, the right to put a limit to the admission of third-country nationals by setting quotas, including the implicit permission of setting zero quotas. The Dutch delegation, however, aimed for a more explicit wording of this Article, aiming to preclude by all means applications of third-country nationals working as professional soccer players, clerics and prostitutes (Groen and De Lange, 2011: 339-340; interview). Preventing these particular groups of migrants from applying for admission was in line with national rules provided for by the Dutch Regulation (European Migration Network, 2007: 15) and was envisaged by national legislation in the pipeline (interview). The German delegation supported the idea of being more precise in the exclusion of particular groups (Council of the European Union, 2008d, p. 11). At its request and in line with the preferences of the Dutch delegation, EU rules were amended accordingly by establishing in the preamble to the Directive that 'regarding volumes of admission, Member States retain the possibility not to grant residence permits for employment in general or for certain professions, economic sectors or regions' (recital (8)).

9.3.5 Blue Card Validity

Initially, the Commission proposal suggested a validity of the Blue Card of two years, which could be renewed for the same duration. This arrangement was seen to be in line with the idea of a national labour market test to be carried out prior to Member States' decision on renewing the Blue Card (Groen and De Lange, 2011: 340-341). In case of a work contract of less than two years, the Blue Card should be issued for the duration of the contract includ-

ing three additional months as set out in Article 8(2). Member States' opinions were divided regarding the length of the proposed validity. The Spanish delegation, for example, favoured a shorter period while the Dutch delegation questioned if there should be any such period at all. Greece supported the Commission's idea of renewal and therefore the possibility to check whether or not the Blue Card holder was still in compliance with the relevant conditions (Council of the European Union, 2008b, p. 10). The Dutch delegation, on the other hand, urged to simplify matters. It took the view that unnecessary administrative burdens should be avoided, also in order to foster the Directive's objective of intra-EU mobility procedures (*Parliamentary Papers II* 2007/08, 22112, no. 595, p. 12). Therefore it came up with the suggestion, supported by amongst others the Polish and Swedish delegations, to make the validity of the Blue Card dependent on the length of the work contract with an additional extension of three months. Standard validity should be based on a minimum of two up to a maximum of five years (Council of the European Union, 2008e, p. 11). Such an arrangement would have corresponded with Dutch rules already in place. Under the Knowledge Migrant Regulation the work and residence permit were granted to non-EU nationals for a period of five years. Be it as it may, the final agreement eventually struck in the Council of Ministers was not in line with Dutch preferences. According to Article 7(2) of the Directive, the Blue Card has a minimum validity of one year and a maximum validity of up to four years, which, on certain conditions, can be extended by three months.

9.4 Analysis

At a first guess, one certainly expects that discretion was of relevance in the negotiations on the Blue Card Directive. Already from the legislative proposal it becomes clear that some discretion would be granted for the national implementation of the Directive (Peers, 2009) – arguably due to the Commission's anticipation of Member States' objections to relinquish too much decision-making power. Without even looking further into the negotiation process, the observations from the coding exercise seem to support this observation. The Directive was selected for further analysis because of its higher discretion margin stemming from a number of permissions, most of them not being restrained by additional conditions. Remarkable in this regard is the vast amount of references that the Directive makes to national legal frameworks. In addition to that, from a cursory comparison of the initial Commission proposal and the final draft Directive, it can be concluded that the number of discretionary provisions has increased. Two relevant observations can be made. First, in at least a handful of cases shall-clauses were changed into may-clauses and, second, a number of permissions were added to the original text of the Commission proposal. From this it follows that Member States were provided with wide discretion (see Parkes and Angenendt, 2010; Eisele, 2013). This applies, for instance, to Articles 8, 9 and

11 which, in contrast to the original proposal, offer Member States a broader range of grounds on which they can justify the rejection of applications for admission.[29] It also holds for Articles 12 and 18 where Member States have additional flexibility in allowing migrants from third countries access to their labour markets.[30] Apparently, not only more discretion was eventually offered to Member States. In addition, through the incorporation of further permissions in case of articles formerly worded in obligatory language, the conferral of discretionary powers was also made more explicit.

However, from the very fact that the Directive implies a higher discretion margin, nothing can be derived as to why discretion was used and with what effects. Discussing the previously developed expectations is supposed to shed more light on the dark. The controversial debates during the negotiations reveal the different national views and approaches regarding labour migration. Nevertheless, the EU Blue Card became political reality with its adoption on 25 May 2009. Denmark, the United Kingdom and Ireland made use of their opt-out clauses. What was the role of discretion in the negotiation process? Did discretion facilitate the Directive's adoption procedure?

9.4.1 Discretion and policy area

According to the first expectation the less a policy area is influenced by the EU in institutional and legal terms, the more discretion is granted to Member States. Regarding the present case, a number of indicators point into this direction: first, long-standing intergovernmental cooperation and flexible arrangements such as opt-outs or variable geometry; second, Member States' rejection to the Commission's attempts to harmonise national approaches to labour migration prior the proposal for the Blue Card Directive; third, and as apparent from the Treaty of Amsterdam, the continuation of the rule of unanimity in the Council, also applying to EU decision-making on the Blue Card Directive. Furthermore, on a number of occasions during the negotiations the incorporation of additional discretion into the Directive provided an answer to Member States' disagreement with some of the Directive's requirements. The most telling example in this regard refers to the Commission's attempt to replace national admissions schemes by the Blue Card system. This was precluded by adding to the proposal additional derogation and minimum harmonisation provisions (Articles 3(4) and 4(2)).

29 See in particular: Articles 8(3) and (4) according to which the non-EU national's application can be rejected in case that volumes of admission set by Member States are exceeded as established in Article 6 and, second, to ensure ethical recruitment from third countries. Additionally, Article 9(3) states that rejection may be grounded if the applicant poses a threat to public policy, public security or public health, or finally, if the application is found inadequate or incomplete as established by Article 11(2).

30 This becomes apparent from Article 12(1) which formerly included an obligation. Article 18(2) was added in the negotiations. It is addressed at the second Member State of admission that is allowed to deny applicants' access to the national labour market until admission has been officially granted.

It is noteworthy that, in retrospect, the Commission itself established a link between the unanimity requirement in the Council, the difficulties experienced in the negotiations, and the granting of discretion. In this regard, it arrived at the conclusion that by setting minimum standards and using formulations including may-clauses and references to national legislation, the Directive left wide discretionary leeway to the Member States for its implementation into national law (European Commission, 2014, p. 10).

In the light of these findings, the *policy area expectation* is found to hold true: little EU influence went hand in hand with granting more discretion to Member States. Nevertheless, the question remains for what reasons was discretion incorporated?

9.4.2 Discretion, political sensitivity and compatibility

This brings up expectations 2 and 3. The core idea of the former is that the more politically sensitive the directive's policy issue is, the more Member States are inclined to retain decision-making power which leads to more discretion being incorporated into the directive to ensure Member States' approval of it. To this end, the explanatory analysis sought to provide a broader insight illustrating, next to the Dutch position on the proposal, also the views of other Member States for political sensitivity is associated with controversy among Member States in the Council. Compatibility implies that the less compatible the EU directive and already existing national legislation are the more Member States seek to translate own preferences into the directive proposal. Since their preferences differ, however, it is more discretion which is incorporated into the directive to reach common agreement. As for the compatibility argument, the focus was laid on the match between the Blue Card Directive and the relevant legislation in the Netherlands.

To begin with, there is a general consensus that labour migration and the JHA field more in general are politically sensitive areas which has made EU integration in this field a cumbersome process (Guidron, 2000; Geddes, 2003; Carrera and Formisano, 2005; Kostakopoulou, 2007; Cerna, 2010; Gümüs, 2010; Eiseler, 2013). This has been explained by the fact that the JHA area addresses the domain of 'high politics' (Kostakopoulou, 2007: 153) and therefore issues that are 'deeply entrenched in [the] national and juridical systems' of the Member States (Lavenex and Wallace, 2005: 458). Migration control is a specific case in point, being an 'emblem of national sovereignty' (Guiraudon, 2000: 251) and therefore an area where ultimate decision-making competence rested with the Member States. In addition to that, due to its 'transversal character' showing in the fact that it affects a range of domestic issues such as national labour markets, economics, foreign affairs, and social affairs (Guiraudon, 2000, 252; see also Carrera and Formisano, 2005), migration control is a matter of not only political but also public concern, carrying with it the potential for political and public controversy. The negotiations on the Blue Card Directive exemplify the political sensitivity and controversy that the Directive triggered: almost all

directive provisions raised objections, revealing different national views and approaches, prompting the Member States to insert reservations and suggest amendments which more than once resulted in the incorporation of more discretion into the Directive (Hailbronner and Schmidt, 2010). Hence, being a delicate political issue which used to be under Member States' control, harmonisation called forth resistance: 'It would be anything but farfetched to assume that Member States want[ed] to keep sufficient control of these issues to guarantee that the influx of migrants does not put nationals at a disadvantage in the context of labour or the provision of social benefits' (Cerna, 2008: 24).

In fact, the negotiations on the Blue Card Directive reflect a typical approach taken by Member States on legislative initiatives in the area of migration more generally. In this regard, Bia notes that the Commission itself was aware of the fact that its proposals were usually exposed to critical reviews in the Council being motivated by Member States' determination to avoid any adjustments of their national legislation (Bia, 2004: 8-9).

Member States' insistence, not least by the Netherlands, to keep national admission schemes in place, and the resulting conferral of more discretionary power upon Member States through the above-mentioned minimum harmonisation and derogation arrangements is an example par excellence of the fact that asserting national preferences can be linked to the making available of discretion for national transposition. Moreover, negotiations on the Directive's key terms and admission criteria show that as a solution to divergent views and wishes on these provisions the wording of the Directive was changed, resulting in the formulation of provisions taking national legal systems as reference points. This happened upon explicit request by the Dutch delegation (regarding insurance matters). It also followed from the objections of other Member States, criticising the lacking compatibility between the Directive and their national legal arrangements as illustrated, for instance, by the proposal's requirement of a 'binding job offer' which did not make part of national legislation in Hungary and Poland. By incorporating references to the national legal order and practices, EU rules were brought into better alignment with national rules. What motivated negotiation efforts in this respect, can be explained with some certainty for the Dutch delegation. Its suggestions for adding amendments to, for instance, the provisions regarding the volumes of admission or the validity of the Blue Card were motivated by considerations to retain own legislation as well as to keep administrative burdens low.

All things considered, the reasons for the Directive's larger margin of discretion lie in the fact that it entailed a number of politically sensitive and controversial issues. Furthermore, the wide scope of discretion results from Member States' attempts to translate national legal arrangements into the Directive in order to increase the latter's compatibility with national rules. With specific regard to the participation of the Dutch delegation in the negotiations, the attempt to upload own standards was driven by considerations to facilitate national transposition and implementation. Get-

ting discretion incorporated into the Directive turned out, however, to be more feasible than turning own legislation into a part of the EU Directive. This is due to the fact that Member States' preferences diverged, making coalition-formation to assert common objectives apparently a less attractive strategy to embark on. Besides, uploading of own standards was not always crowned by success, as evidenced by the Dutch efforts to bring EU rules with regard to the Blue Card's validity more in line with those of the Knowledge Migrant Regulation and its attempt to change EU requirements for unregulated professions to make them more compatible with national rules already in place.

Funny enough, preference divergence, on the other hand, unified Member States in their wish to leave national rules intact which resulted more than once in the granting of discretionary powers for the purpose of implementation. In this way, disagreement was apparently resolved and potential deadlock avoided. In the prospect of having discretion available for the (formal) implementation of the Directive, it seems that Member States were more willing to agree on even controversial issues. As Cerna notes, 'the Directive's flexibility regarding how member states might make use of the scheme might be one of the reasons that the Directive was passed' (Cerna, 2013: 186). This view was confirmed by the Dutch civil servant involved in the negotiations on the Blue Card Directive:

> Yes, discretion played a very important role; just look at the number of provisions including shall that were changed during the negotiations into may-provisions. Without discretion being granted to Member States, the Directive would have never been adopted (…). The negotiations show that Member States wanted to turn the proposal into a copy of their national legislation. Generally speaking, the more discretion is created, the easier it is for a Member State to approve of EU rules.

9.4.3 Discretion and European Parliament

So far the discussion has left out the European Parliament and especially the question if anything can be derived from its opinion on the Commission proposal in support of expectation 4 of the analytical framework. This expectation concerns the idea that the European Parliament seeks to influence the granting of discretion to Member States. To be more precise, according to this expectation, it is posited that the greater the role of the European Parliament in the legislative process, the less discretion is granted to Member States. To start with, the role of the European Parliament in the negotiation process was limited; it could merely deliver a non-binding opinion on the proposal. Although it has been pointed out that with the approaching changes introduced by the Lisbon Treaty the position of the European Parliament in the legislative process was taken more seriously in the negotiations (Eisele, 2013: 15), the case study results do not show that the European Parliament had a crucial say in shaping the final decision outcome. This finding matches the general observation that both the consultation procedure and unanimity voting leave only little scope for influence of

the European Parliament in legislative decision-making especially if contentious issues have to be resolved in political sensitive areas such as justice and home affairs (Thomson and Hosli, 2006).

Like the Netherlands, the European Parliament considered the Directive to offer short-term solutions to future economic and demographic challenges which Member States would have to tackle in the long-run by adopting more structural measures (European Parliament, 2008). On the whole, the European Parliament advocated a more favourable treatment of third-country nationals under the Blue Card Directive compared to the rather restrictive approach taken by some Member States in the negotiations.[31] Endorsing the proposal's objectives of creating an attractive European labour market fostering EU-intra mobility and therefore the idea of a common and comprehensive approach towards labour migration, the European Parliament disapproved of the inclusion of any requirements implying substantial deviation from EU rules (European Parliament, 2008, p. 34). As can be derived from its legislative resolution, the European Parliament was therefore cautious in allowing derogations, with few exceptions referring to the positive derogation from the salary threshold in the case of admission to another Member State (European Parliament, 2008, p. 17). Nonetheless, the European Parliament supported the conferral of discretionary powers on Member States in two respects: with a view to Member States' right to make admission conditional on the situation of their domestic labour markets and regarding the setting of zero quotas or admission volumes for particular sectors. In its argumentation, the European Parliament linked the granting of discretion to the aim of achieving a balance in the distribution of decision-making powers between the Member States and the EU: due to the implications of migration for domestic labour markets, Member States should retain decision-making competences which should furthermore ensure the Directive's compatibility with the principle of subsidiarity. Moreover, and confirming earlier observations regarding the link between discretion and the sensitivity of the policy issue addressed, the European Parliament recognised Member States' control over access of migrants to their labour markets as an expression of their sovereignty (European Parliament, 2008, pp. 35-36). Against this background and due to the marginal role that the European Parliament played in the negotiation process, the expectation that it reduces the scope of discretion granted to Member States does not have any weight for the present case. It is furthermore concluded that even though the European Parliament did not support the granting of considerable discretion for national (formal) implementation, it, however, approved that discretion was conferred upon Member States. The conferral of discretion was supported because it was seen as a way of showing

31 It is possible that such a restrictive approach resulted from the implications of the economic crisis, and was thus triggered by Member States' concerns about their (high) social security standards and domestic labour markets which should make available sufficient employment possibilities for nationals. See in this respect Cerna, 2013.

respect of Member States' ultimate decision-making powers on issues of strong national relevance (European Parliament, 2008, pp. 34-36). Taking this point in the argumentation of the European Parliament one step further, the latter's support of making discretion available reflects the idea, which is implied by the EU treaties, namely that discretion is granted by the EU legislature to show respect for the fundamental political and constitutional structures of the Member States, in other words their national legal identities.

9.5 Conclusion

All in all, it can be concluded with some certainty that discretion was important for the negotiation process on the EU Blue Card Directive. Discretion being incorporated into the legislative text on a number of points, guaranteed the Member States a high level of flexibility in transposing and implementing the provisions of the Directive. This should, however, not give the erroneous impression that discretion was frequently referred to by Member States during the negotiations. In fact, from the Council documentation of legislative decision-making on directives more in general and the interviews with civil servants involved in these processes, the general picture emerges that the wish for more discretion is usually not explicitly voiced by Member States when meeting at the negotiating table to discuss a legislative proposal. It can well be the case that Member States, as illustrated by the present context, ask for more flexibility in the implementation of a specific EU requirement and that this results into the inclusion of flexibility arrangements such as derogations or other facultative (non-discretionary) provisions. More concrete, the case of the Blue Card Directive shows that seeking more discretion can be part of Member States' suggestions for amendments. It can, thus, be an implicit goal of their negotiating strategies. In addition, the descriptive analysis of the negotiation process brings into view that discretion can take an important role within negotiations. To use an image for illustration purposes, like lubricating oil in the engine of a vehicle, discretion kept the negotiation process on the Directive running thereby facilitating decision-making in contributing to reaching compromises in the Council.

While this conclusion of the above analysis puts discretion in a positive light, I do not want to ignore that the role of discretion has been assessed differently in the literature on EU integration in the area of migration and with regard to the Blue Card Directive in particular. The following assessment is a case in point:

> In any event, taking into consideration the option for member states to apply national highly skilled systems in parallel and the wide discretion that many provisions of the Blue Card Directive leave to the member states challenge the initial idea of creating "common rules for admission" for highly skilled migrants who should enjoy "the same level of rights throughout the EU" as envisaged by the Commission. We have now in place a multi-layer, complex system, as the Blue Card Directive exists alongside the (possibly up to 28) national systems for highly qualified employment (Eisele, 2013: 17).

In addition, Eisele points to the negative implications from available discretion for the level of rights of third-country nationals residing legally in a Member State (chapter five of the Directive) (see also Peers, 2009). According to her, the number of discretionary provisions which were added to the proposal during the negotiations lowered the high-level standards for third-country nationals which the Directive proposal had initially envisaged regarding provisions on equal treatment. The same, i.e. the lowering of initially envisaged standards, was considered to result from the positive derogations from initial Directive requirements which had actually been intended to improve the legal situation of third-country nationals and their family members (Eisele, 2013: 9-14).[32] Eisele's point of departure differs from the one chosen in the dissertation in that she does not primarily look into the question of which functions and effects discretion has within EU negotiations or what the motive behind the concept of discretion is and what its use within EU law implies. Instead, she seems to be more interested in finding out whether discretion can be expected to contribute to the Directive's objective of establishing common standards regarding migration for the purpose of highly qualified employment. The way she interprets the role of discretion within the negotiations of the Blue Card Directive seems to suggest that she doubts a positive contribution of discretion in this regard. Eisele anticipates that Member States use discretion to implement restrictive approaches to legal migration which are rather compromising than advancing the Directive's objectives. In my opinion, however, the role of discretion should be viewed more positively, by taking into consideration the broader political context. Such an approach is taken by Peers who makes the following observation:

> Certainly, back in 1994 when the EU adopted its highly negative resolution on admission of workers, and after 2001 when the Commission's proposal for a regime on labour migration was 'dead on arrival' in the Council, it was hard to imagine the EU adopting, just a few years later by unanimity, a Directive which explicitly aims to encourage significant levels of labour immigration to the Union. Moreover, as compared to prior immigration legislation, the Council has reduced the standards in the Commission proposal by less than usual, and even improved them on a few points (Peers, 2009: 410).

Against this background, the granting of discretion to Member States for national implementation should be seen as having facilitated the adoption of the Blue Card Directive, giving decisive impetus to EU regulation in an area that had previously been dominated by the pursuit of national interests (Cerna, 2013: 186). It should be born in mind that with a view to legislative EU arrangements – and not withstanding the fact that it continues to develop – the JHA is an area which is still in its infancy, certainly if compared to the more Europeanised fields of consumer protection and the environment. Moreover, the evolution of the latter two policy areas illus-

32 See in particular Articles 14 on equal treatment and Article 15 on the rights for family members of the EU Blue Card holder.

trates that EU integration proceeds stepwise, i.e. through phased EU harmonisation. Where this process has advanced considerably such as in the area of consumer protection, particularly product regulation, it is shown that initially discretionary directives are further elaborated, and discretion therefore reduced, through recasts. Through these recasts directives become more detailed and the differences between directives and regulations get blurred (Van der Burg and Voermans, 2015: 43), with the result that directives turn into 'pseudo-regulations'. In fact, in a last step of EU harmonisation these directives are replaced by regulations which are directy applicable at the national level and leave virtually no discretion. In fact, the Commission promotes the application of regulations instead of directives in a number of policy areas, including the JHA area (European Commission, 2007a). Meanwhile, the adoption of regulations in the JHA area has already become political reality (Hailbronner, 2010). Against this backdrop, expectations may not be unrealistic that the Blue Card Directive eventually will become more than what is regarded by some as a measure of merely symbolic value (Boswell and Geddes, 2011). At least, the Directive might foster the progressive development towards harmonisation of national migration laws. Be it as it may, even before the Directive was enacted, it seemed to be clear for the Dutch Ministry of Security and Justice, that the Directive, represented only a first step towards a common, European approach to migration of highly-skilled migrants (Ministry of Security and Justice, 2008a, p. 5).[33]

From the detailed discussion of the negotiation process, the focus now shifts to the transposition of the Directive in the Netherlands which is analysed in more detail in the next sections.

9.6 Transposition

The transposition of the Blue Card Directive in the Netherlands is analysed by applying the analytical framework which was previously developed. The presentation of the transposition process shall not be exhaustive but focus on the use of some discretionary provisions in order to shed light on the role of discretion in transposition. In this context the analysis seeks to provide answers to the following questions: how did transposition proceed? Was discretion used in transposing the Directive into national law and if so, how did discretion affect the process alongside other factors such as national-level characteristics which possibly had an influence on national transposition? Alongside a thorough study of relevant literature and documents, the discussion draws on an analysis of Dutch implementing legislation and insights provided by interviewees which were directly involved in the transposition process.

33 Letter Immigration Policy Department, Ministry of Justice to European Affairs Committee, Dutch Senate, 5565180/DVB, 19 September 2008.

In the Netherlands, European directives are transposed by means of the standard legislative procedure. The type of legislation by which transposition shall be carried out (e.g. lower-level instruments or acts of parliament) is determined by the content of the directive and principles of national law (Steunenberg and Voermans, 2006: 21).[34] The Blue Card Directive was transposed into the Dutch legal system by virtue of an administrative order amending the Dutch Foreigners Decree (Vreemdelingenbesluit 2000).[35] The Decree elaborates some Articles of the Dutch Alien Act (Vreemdelingenwet 2000). Chapter three of the Decree lays down the conditions for residence of third-country nationals. The Decree was, however, amended in 2011 resulting from the introduction of new legislation (Modern Migration Act).[36] Since the structure of the Dutch Alien Act provided for delegation possibilities, transposition could be carried out by means of a lower-level instrument. Hence, involving the national Parliament was not required. As was already the case with the negotiations, also the transposition of the Blue Card Directive was, mainly in the hands of the Ministry of Security and Justice.[37]

Member States (except Denmark, Ireland and the United Kingdom) had to transpose the Blue Card Directive by 19 June 2011. However, due to non-compliance, the Commission started infringement proceedings against twenty Member States, of which the last ones were closed in 2012 (European Commission, 2014; see also Cerna, 2013: 187-188). On the part of the Dutch Government, timely transposition had been viewed as feasible right from the start of the negotiations (*Parliamentary Papers II* 2007/08, 22 112, no. 595, p. 10) and was eventually achieved (see table 9). Contrary to the majority of Member States, the Netherlands implemented the Directive without delay.

Table 9: Fact sheet transposition Blue Card Directive

Transposition deadline:	19 Jun 11
Publication transposition legislation:	30 Jul 10 17 Jun 11
Sort transposition measure (and number):	Order in council (2)
In charge:	Ministry of Justice
Legal Framework:	Dutch Alien Act 2000 Dutch Alien Decree 2000

34 This is in accordance with the principle of primacy of the legislature.

35 Adopted on 24 July 2010.

36 Besluit van 15 juni 2011 tot vaststelling van het tijdstip van inwerkingtreding van onderdelen van het Besluit modern migratiebeleid en tot wijziging van het Vreemdelingenbesluit 2000 en het Besluit inburgering in verband met die inwerkingtreding. respectively. Cf. *Official Bulletin,* 2010, 307.

37 But a cabinet change had taken place. The new Dutch coalition cabinet, the so-called 'Rutte I cabinet' (2010-2012), was formed by the political parties People's Party for Freedom and Democracy (VVD) and Christian Democratic Appeal (CDA).

9.6.1 Admission scope and criteria

To qualify for the EU Blue Card in the Netherlands, neither higher professional qualifications nor higher educational qualifications are required. Hence, the possibility of making admission depending on the applicant's level of professional experience (of up to five years) was not used once the Directive was transposed at the national level. This was arguably due to Dutch wishes to exclude, as mentioned earlier, the application of third-country football players and clerics. It probably also resulted from the fact that under the Knowledge Migration Scheme, approval of admission is based on compliance with the salary criterion and no further condition has to be met. To ensure the exclusion of the third undesired category of workers, i.e. prostitutes, Article 3.32 of the Dutch Foreigners Decree precludes residence permits for sex workers. As shown in the correspondence table listing the Directive's articles and the corresponding Dutch implementing measures, Article 3.32 is meant to transpose Article 6 of the Blue Card Directive regarding admission volumes (*Official Bulletin*, 2010, 307, p. 208). According to the Dutch transposition law, admission for the purpose of highly qualified employment is not made dependent on the outcome of a preceding examination of the Dutch labour market; hence the corresponding Directive provision (Article 8(2)) was not transposed which is in line with national practice; also the Knowledge Migrant Scheme does not provide for such a measure (*Parliamentary Papers II* 2007/08, 29 861, no. 29, p. 4).

Based on Article 3.30b of the Foreigners Decree, the applicant is required to meet the salary criterion. It implies a gross annual salary of 60.000 Euro, being indexed and published annually by the Ministry of Social Affairs and Employment. In addition, the applicant has to present a valid work contract or binding job offer as well as evidence of formal qualifications which are further specified for both regulated and non-regulated professions in Article 3.30c of the Foreigners Decree. The processing time for Blue Card applications is up to 90 days which is considerably longer if compared to the maximum of six weeks regarding applications obtainable under the national scheme (Kroes, 2011).[38] The Directive's insurance requirement[39] made already part of existing legislation.[40] In order to contribute to the Directive's objective to foster intra-EU mobility instead of compromising it, Dutch transposition legislation does not require, as permitted under the Directive, a higher threshold for those Blue Card holders which are about to move to the Netherlands from another Member State.[41] Likewise, arguably

38 Kroes, S. (2011) Netherlands: The EU Blue Card and the Dutch Knowledge Migrant Scheme, http://www.abilblog.com/global-blog/netherlands-the-eu-blue-card-and-the-dutch-knowledge-migrant-scheme (accessed 23 November 2015).

39 Cf. Article 5(1), point (e).

40 Cf. Article 3(7) under clause (c) of sub-section (1) of Foreigners Decree 2000.

41 See Article 4(2) of the Blue Card Directive.

due to already established national practice which does not provide for it, the option to lower the prescribed threshold from 1.5 to 1.2 times the average gross annual salary for sectors in specific need of labour force has not been transposed.[42]

9.6.2 Non-admission and grounds for refusal

Dutch transposition of Article 5(1) under point (e) foresees that to acquire the Blue Card the applicant must not pose a threat to public policy, public order, or public security.[43] While the Directive's requirement also refers to the notion of 'public health' it has been subsumed in the Dutch translation under the notion of 'public order',[44] of which, however, no mentioning is made in the Directive. While doubts have been raised as to the correctness of transposing the notion of public order this way (Groen and De Lange, 2011: 343), other Member States have also used the notion of public order instead of public policy when implementing the Directive's requirements as noted by the European Commission (European Commission, 2014, p. 7).

Article 8 of the Directive which contains the grounds for refusing the granting of the Blue Card is largely covered by the 2000 Dutch Alien Act. Article 18.1 of this Act comprises a number of reasons, including those specified by the Directive such as the refusal to grant the Blue Card in case that the applicant has presented false documents.[45] More interesting in this regard is the transposition of Article 8(5) of the Directive, which permits Member States to reject an application for an EU Blue Card on the ground that according to national law sanctions have been imposed on the employer for undeclared work and / or illegal employment. Discretion, as implied by this provision, has not only been used by the Dutch authorities in transposing these EU rules. In fact, the Dutch transposition is stricter than what is prescribed by the Directive. This becomes manifest not only from the obligatory language of the relevant Dutch measure but also stems from its content: refusal of admission is considered as justified if the employer has been punished within a period of up to five years preceding the application for a Blue Card.[46] The five-year interval linked to the sanctioning of the employer is an element that does not make part of the Directive but was added to the Dutch transposition measure.[47] Regarding this point, Groen and De Lange regard the Dutch transposition as disproportionate and as undermining the Directive's attractiveness. In their view this way to transpose the Directive provision cannot be simply justified on the ground that

42 See Article 5(5) of the Directive.
43 Cf. Articles 3(30) sub-section one under clause (f) of Foreigners Decree 2000.
44 See *Official Bulletin*, 2010, 307, p. 128.
45 Cf. Article 8(1) of the Blue Card Directive.
46 See Article 3(30) sub-section one under clause (b) of Foreigners Decree 2000.
47 This is actually something that is to be avoided according to the Instructions for drafting legislation (no. 331).

it fits into the context of Dutch legislation (the Modern Migration Policy Act) as argued by the Ministry of Security and Justice (Groen and De Lange, 2011: 343). Interestingly, the same argumentation – to transpose the Directive's provision in harmony with Dutch law – was used by the Ministry to explain the non-transposition of Article 8(4). It gives Member States the option to reject an application for an EU Blue Card to ensure ethical recruitment which aims to mitigate brain drain from third countries. This Article was not transposed into Dutch legislation, because, according to the Minister, national plans were already under way to introduce a code of conduct for ethical recruitment in the Netherlands (*Parliamentary Papers II* 2007/08, 22 112, no. 663, 7). Finally, in line with the Dutch transposition law, unemployment does not constitute a reason for withdrawing the Blue Card from third-country nationals already residing in the Netherlands for the purpose of highly-qualified employment. However, discretion granted by Article 9(3) of the Directive has been used to establish that unemployment justifies refusal of renewing the Blue Card.[48]

9.6.3 Intra-EU mobility

The Netherlands supported the Directive's objective to foster intra-EU mobility and therefore did not approve of nor implemented, as already noted, the Directive's provisions concerning the labour market test and derogation from the salary threshold. Intra-EU mobility also plays a role with regard to the migration of family members that the Directive addresses in Article 15. In this regard, the Directive implies more favourable provisions than its Dutch counterpart. Article 15(5) obliges Member States to derogate from already existing EU rules on family reunification when it comes to the provision of residence permits to the Blue Card holder's family members (Groen and de Lange, 2011: 348). Under the condition that the family was already constituted in the first Member States, the family members shall have the possibility to accompany the Blue Card holder in moving to a second Member State (Article 19(1)). The Dutch transposition of these EU rules, however, turned out to be stricter, arguably due to the difference between the Directive and national rules regarding the obligation of immediate application. According to the Dutch transposition law, moving to another Member States is only permitted for family members if they have, corresponding with the requirement for the Blue Card holder, resided in the Netherlands for at least eighteen months. This does not seem to be in line with the Directive which does not include any rules justifying such a strict interpretation, as applied by the Dutch transposing authority (Groen and De Lange, 2011: 346).

Having taken a closer look at the Dutch transposition of the Blue Card Directive, it is now time to turn to the explanatory analysis.

48 See the newly added Articles 3.89b and 3.91c of the Foreigners Decree 2000.

9.7 Analysis

The descriptive analysis provided a number of insights into the Dutch transposition of the EU Blue Card Directive which shall now be used to assess the role of discretion by means of the sets of expectations previously developed with regard to the formal implementation of European directives.

9.7.1 Discretion-in-national-law

The *discretion-in-national-law expectation* implies that having a wide margin of discretion available for the purpose of transposition facilitates integrating EU rules into the national legal corpus. Was that so in the case of the Dutch transposition of the Blue Card Directive? The Netherlands already had their own national admission system in place, the Knowledge Migrant Scheme, from which the European counterpart diverged in a few aspects – despite the amendments which the Commission proposal had undergone during the negotiations. However, it appears that the Dutch transposition authority, the Ministry of Security and Justice, managed to smoothly convert EU rules into national migration law. Discretion certainly played a relevant role in this regard. Due to the Directive's wide margin of discretion it was possible for the Netherlands to maintain the status quo, and hence, to hold on to an admission system that had already proved to work well and that provided the reference point for future national legislation.

Discretion is described by implementation scholars as providing Member States with a broader range of policy alternatives in transposition. This can be understood as implying that all of the alternatives are based on the idea that discretion is used whereas I believe that one of these alternatives is also not to make use of discretion. In other words, if a Member States uses discretion when transposing EU rules it may do so with a view to leaving national rules intact. The same objective may, however, be pursued by not using discretion. This is evidenced by the Dutch transposition of the Directive's rules relating to domestic labour markets and salary standards. Neither the option of applying a labour market test prior to granting admission nor any changes to the salary threshold were taken over in Dutch transposition legislation. Hence, in not being forced to use these options the discretionary decision was made not to consider them, and thus, to keep the status quo in place that did not provide for any such measures. What's more, additional administrative burdens which would have resulted from the introduction of the aforementioned EU rules could be avoided.

Discretion also played a role in some cases where national transposition turned out not to be entirely in line with the Directive. Having diverging national rules in place or facing the obligation to create new ones for the purpose of transposition, were apparently also reasons for the transposing Ministry to formally implement EU rules differently than intended by the Directive. This is exemplified by the way mobility rights of the Blue Card holder's family members were transposed: regarding this point the Dutch

transposition measure is stricter than the relevant EU rules but in line with Dutch law and practice. It also shows in the fact that the ethical recruitment provision was not transposed which would have required additional transposition efforts since Dutch migration law did not provide for corresponding rules. Finally, the stricter approach emerging from the Dutch transposition law with regard to rejecting applications for the Blue Card in case of sanctions against the future employer of the third-country migrant was justified on the ground that it was seen to be in line with new national legislation. Especially in the latter case it becomes evident that additional discretion was apparently sought outside the Directive's limits. This 'illicit' discretion did, nevertheless, not trigger any criticism on the part of the European Commission. The Netherlands were not considered responsible for infringing Directive's requirements, in contrast to many other Member States that were eventually found not to comply with the Blue Card Directive.

9.7.2 Discretion and disagreement

Compliance with the Direcive, does, nevertheless, not remove that fact that the final Blue Card Directive did not only include requirements meeting Dutch preferences. Next to the validity of the Blue Card and rules regarding unregulated professions, it was also the salary threshold that could not be brought more in line with already existing Dutch rules. This brings expectation 6 into the picture. It is expected that Member State disagreement with a directive's requirement raises the likelihood of deficient transposition, and that this effect becomes more positive as the degree of discretion decreases. In other words, if a Member State lacks discretion for transposing the relevant requirement, it is supposed not to implement it properly. This expectation can be ruled out, however, since the Blue Card Directive came along with a wide margin of discretion. Additional discretion was used to create 'suitable solutions'. The latter shows in the way the Netherlands realised their wish to exclude certain professions from the scope of the Blue Card by using discretion flowing not only from the Directive's substantive part (Article 6), but also from its standard provisions (definition) and specifications in the preamble.[49] What's more, no problems were reported regarding the transposition of requirements that had not been brought into closer alignment with Dutch rules during the negotiations and hence did not entirely match Dutch preferences (e.g. those related to unregulated professions or the Blue Card's validity). Finally, it should be noted that in the absence of any complaints by the European Commission, Dutch transposition did not appear to be deficient.

49 For the exclusion of sex workers Article 6 was used, being specified by recital 8 (see section 9.3.4).

9.7.3 Discretion, compatibility, administrative capacity and transposition actors

The foregoing does not change the fact that affording Member States higher levels of discretion may under certain circumstances turn discretion into an impeding factor in the process of transposing a directive, in particular the more EU and national rules are not compatible, if administrative capacity is lacking but also in the presence of a high number of actors carrying out transposition.

Discretion can, however, also enforce positive effects from factors such as compatibility, particularly if it is granted by larger degrees and if the match between EU Directive and national legislation appears to be good (expectation 7). These two conditions apply in the present case: legal disparities between the Directive and Dutch law did not become very pronounced due to the fact that national admission schemes continued to co-exist with the Blue Card admission scheme. What's more, legal incongruence between EU and Dutch legislation was eventually low, in other words, the Directive and Dutch migration law matched relatively well. This observation is supported by taking Steunenberg's and Toshkov's concept of compatibility as a benchmark. According to this concept a small legal misfit applies if transposition is carried out by means of two or fewer transposition measures which are lower-ranking legal instruments (delegated legislation) (Steunenberg and Toshkov, 2009: 960). The Blue Card Directive required the adoption of not more than two administrative decrees. Furthermore, difficulties in the formal implementation of the Directive resulting from administrative shortcomings such as lacking administrative capacity (insufficient transposition knowledge) or coordination problems within the responsible Ministry did not arise. On the contrary, transposition went smoothly. This is for instance evidenced by the fact that all stages in the process, including the treatment of the draft transposition measure in both the Dutch Council of Ministers and the Council of State, had been passed within the envisaged time frame. This can be derived from the i-timer report which the Dutch Ministry of Foreign Affairs regularly submits to the Dutch Parliament.[50] On top of all that, the Directive has a wide scope of discretion and, as noted further up, discretion facilitated the incorporation of EU requirements into national law. Having said this, it seems safe to say that the *compatibility interaction expectation* holds true.

Next, the *capacity interaction expectation* assumes that administrative capacity raises the likelihood of proper transposition but that this effect becomes less strong the more discretion is granted by a directive. While considerable discretion was available for transposition, administrative capacity, i.e. insufficient transposition knowledge and / or coordination problems

50 See the attachment to the Ministry's letter to the Dutch Parliament about the state of affairs concerning the implementation of EU law, fourth quarter of 2010, BLG98235, 21109, no. 198, 3 February 2011.

within the transposing national authority, did not play any role. Hence, the *capacity interaction expectation* does not appear to be of relevance in the present case.

Finally, transposition may be hampered by more actors entrusted with this task in combination with more discretion being granted by a directive (expectation 9). The transposition of the Blue Card Directive only involved one (main) transposition actor. This precluded any controversy with other domestic actors about how to transpose the Directive. Neither the coordination tasks that had largely been carried out already at the negotiation stage, involving next to the implementing Ministry of Security and Justice, the Ministry of Social Affairs and Employment nor the internal communication between the former's political and legal units involved in the Directive's dossier, impeded transposition (interview). Against this background, the plausibility of the expectation is difficult to establish. Hence, the conclusion that there was no interaction effect from more actors involved in transposition and the Directive's wider discretion scope.

All things considered, it seems that discretion could unfold positive effects on the Dutch transposition of the Blue Card Directive. In this regard, discretion did not only contribute to timely and legally correct transposition. The fact that, through discretion, the national scheme could be preserved and the preferences of a number of domestic actors therefore accommodated, including alongside the Dutch Government and Parliament also the national authority in charge of the practical application of the EU's requirements (the Immigration and Naturalisation Service, IND), seems to have enhanced the domestic support of the Directive and its incorporation into the Dutch legal framework.

The domestic responses to the Directive in and beyond the Netherlands have, however, triggered negative reactions. Concerns have been voiced about restrictive approaches taken by Member States in transposing the Directive since wide discretion allowed them to do so (Cerna, 2013). But, as can be derived from the recent Commission report on Member States' implementation of the Directive, with a view to the Netherlands, it does not seem to have adopted a purely minimalist approach to transposition. On the contrary, it has shown a more favourable approach than other Member States to some of the Directive's requirements (European Commission, 2014). Nonetheless, the Dutch transposition case illustrates that the attractiveness of the Directive is harmed by the fact that EU and national admission schemes compete (Cerna, 2013: 192). The Commission's figures for the year 2012 are telling in this regard: while within this period Member States like Germany, Spain or Lithuania were countries with the greatest share of the total amount of Blue Cards granted within the EU (Germany: 2584, Spain: 461, Lithuania: 183), the Netherlands was one of those Member States with the lowest share of the overall amount of Blue Cards – having granted merely one Blue Card. This sharply contrasts with 5514 permits that third-country nationals obtained in the same period under the Dutch admission scheme (European Commission, 2014, p. 3; 13).

9.8 Conclusion

The possibility cannot be ruled out that discretion may be used by Member States to make restrictive policies. Nor can it be denied that discretion adds to legal diversity in the application of a number of issues the Directive regulates (e.g. admission criteria, volume, salary threshold, validity, grounds for refusal) undermining a more unified approach towards legal migration within the EU. In spite of it all, the case of the Blue Card Directive shows that discretion had a number of positive effects which may in the long-term outweigh immediate disadvantages: Due to discretion the first measure ever seeking to establish a common EU approach to labour migration was adopted in a field previously governed by national interests. In the negotiations, discretion came to the fore as facilitating factor, by means of which different Member States' interests could be reconciled. Moreover, the directive has meanwhile been transposed by all Member States whereby, as exemplified by the Directive's formal implementation in the Netherlands, discretion has eased converting EU rules into Dutch law and shown its potential in fulfilling a facilitating-fit-function in transposition.

10 Pyrotechnic Articles Directive

10.1 Introduction

In this chapter EU- and national-level processes regarding the Pyrotechnic Articles Directive[1] take centre stage. Mapping out the area of consumer law and the background to the Directive, is followed by a closer examination of the negotiations and Dutch transposition of it. Presentation of either process includes a descriptive and explanatory analysis. Both analyses are geared towards shedding light on the role of discretion.

10.2 The directive

Consumer law is an area where the European legislature defines legislation mostly in the form of directives (Antoniolli, 2006: 868) of which the Pyrotechnic Articles Directive, adopted in May 2007, provides one example. Based on Article 95 TEC (now Article 114 TFEU),[2] the so-called internal market article – envisaging harmonisation of national laws with a view to EU-wide market integration – [3] introduces a certification system for pyrotechnic products. Lying at the interface of consumer protection / product safety and the internal market, the Directive is a piece of EU regulation pursuing the objectives of free circulation of pyrotechnic articles in the internal market – in line with one of the EU's founding principles, the free movement of goods (Article 23 TEC, now Article 28 TFEU) – and a high level of human health protection, public security and safety of consumers.[4] Pyrotechnic articles are defined broadly in the Directive, in so far as they do not merely include fireworks, but 'any article containing explosive substances or an explosive mixture of substances designed to produce heat, light, sound, gas or smoke or a combination of such effects through self-sustained exothermic chemical reactions.'[5] This description applies next to fireworks, also to theatrical pyrotechnic articles, and pyrotechnic articles for vehicles as well as a variety of products designed for a more specific application (Aufauvre,

1 Directive 2007/23/EC of the European Parliament and of the Council of 23 May 2007 on the placing on the market of pyrotechnic articles, OJ L 154, 14 June 2007, pp. 1-21.
2 Also Article 115 TFEU implies legislative harmonisation but requires unanimity voting, unlike Article 114 TFEU which is based on 'qualified majority voting'.
3 Article 95 EC provided the legal basis for Community institutions for taking measures aiming at promoting the establishment and functioning of the internal market.
4 See Article (1) of Directive 2007/23/EC.
5 Cf. Article 2(1).

2008: 59). While the 1993 Explosives for Civil Use Directive[6] excluded pyrotechnic products explicitly from its scope, it anticipated the adoption of EU regulation on this matter.[7] Both Directives on Explosives and Pyrotechnic Articles follow the new approach to technical harmonisation and standardisation. This new regulatory technique, outlined first in a 1985 Commission White Paper, was agreed by the Council with the aim of simplifying and further facilitating harmonisation for the purpose of economic and market integration.[8] It is based on the principle of mutual recognition which, translated to the present case, means that for pyrotechnic articles lawfully marketed in one Member State access to the market of another Member State shall be guaranteed. 'Lawfully' means 'according to EU-wide harmonised essential safety requirements' and is supposed to ensure the free circulation of goods – as well as a high level of consumer health protection – also in situations where the buying Member State has technical rules in place with which the traded pyrotechnic products do not comply. Harmonisation is facilitated by the fact that, as reflected by the Directive, it is limited to the essential safety requirements and applied to only very few other issues. Compliance with the essential safety requirements is controlled by a system of market surveillance and conformity assessment procedures at the end of which, if the product complies with EU harmonised standards, the CE marking is affixed to the product. Trade in fireworks involves a number of economic operators. Therefore the Directive establishes obligations for not only Member States but also for economic manufacturers, importers and distributors – not removing, however the ultimate responsibility from Member States to provide for the proper transposition and application of the Directive.[9] With its aims to remove (trade) barriers to intra-Community trade and legislative harmonisation at minimum level (regarding safety requirements and information provisions on safe handling and use of pyrotechnic articles), the Directive reflects both negative and positive integration dynamics that underlay the development of the internal market (as an area being internally free of borders, thus allowing for three movement of goods). In so doing, the Directive provides a typical instance of product

6 See Directive 93/15/EEC of 5 April 1993 on the harmonisation of the provisions relating to the placing on the market and supervision of explosives for civil uses, OJ L 121, 15 May 1993, pp. 20-36.

7 The preamble of the Directive stipulates that 'Whereas, pyrotechnical articles require appropriate measures to ensure the protection of consumers and the safety of the public; *whereas an additional directive is planned in this field*' [italics added].

8 See Council Resolution of 21 December 1989 on a global approach to conformity assessment, OJ C 10, 16 January 1990, pp. 1-2 and implementation by means of Council Decision of 22 July 1993 concerning the modules for the various phases of the conformity assessment procedures and the rules for the affixing and use of the CE conformity marking, which are intended to be used in the technical harmonisation directives OJ L 220, 30 August 1993, pp. 23-39.

9 Directives are, in principal, addressed to the Member States. See Article 288 TFEU (ex Article 249 TEC).

safety regulation that brings with it measures of both market regulation and deregulation.

10.2.1 The area of consumer protection

Already for a good while, the EU has been active in the field of consumer protection and product safety – even though, the overall development of EU consumer law was built on thin ground. The Treaty of Rome (1957) referred to 'the consumer' only sporadically alongside rules on the free movement of goods and services that were of direct or indirect relevance to the consumer (Weatherill, 2013: 3; 6). It should be noted that, in a field where the directive has become the prominent regulatory instrument, it was, however, soft law, issued by both the Commission and the Member States in the Council that gave essential impulses to the development of EU consumer law (Antoniolli, 2006: 862). This is all the more interesting because soft law in EU areas including consumer protection is not devoid of any legal effects (Senden, 2005: 81; Weatherill, 2013). In this regard, it is relevant to note that the European Court of Justice has supported the harmonisation of national laws regarding consumer protection by referring to soft law in its interpretation of consumer-related treaty provisions[10] as well as, at later stages in the evolution of consumer law, by emphasising both the effects of harmonising directives found to confer consumer rights and the obligation of Member States to ensure these rights.[11] In any case soft law has paved the way for legislative initiatives regarding consumer law, the 1975 Council Resolution[12] being only one example out of many. In setting out out a consumer protection and information policy, it highlighted five consumer rights, including the 'right to protection of health and product safety' and the 'right to protection of economic interest' as top priorities. Moreover, the Council Resolution is illustrative of the fact that the close connection between economic integration / EU internal market project and consumer / product safety was established early on (Weatherill, 2013: 254-255; see also Twigg-Flesner, 2012).

10 As shown in case C-362/88, GB–INNO–BM v Confederation du Commerce Luxembourgeois [1990] ECR I-667. Weatherill states that the Court was also explicit in its judgments about its use of soft law in interpreting binding legal provisions as emerges from case C-322/88, Grimaldi v Fonds des Maladies Professionnelles [1989] ECR 4407. Cf. Weatherill, 2013, p. 8.

11 See, in particular, the case C-9/90, Francovich and Others v Italy [1991] ECR I-5357and later judgments, amongst others, case C-91/92, Faccini Dori v Recreb [1994] ECR I-3325.

12 Other measures followed: Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, Council Resolution of 15 December 1986 on the integration of consumer policy in other common policies, Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy.

While the Treaty of Rome underlined the benefits for consumers from economic integration, the following soft law initiatives increasingly emphasised the EU's intention to ensure that integration through trade with a view to economic expansion and the free movement of goods would not jeopardise the interest and safety of consumers. The increase in available products should bring with it more choice and better quality as well as an attractive cost-to-performance ratio for consumers. At the same time, the idea of consumer protection began to crystallise showing in both the Resolutions of the Council and Commission papers which set out a vision of future measures regarding the protection and promotion of consumer interests against the background of growing economic integration. The focus on the protection of consumers' interests became apparent in the Council's reflections upon the possibility to integrate consumer protection as an objective into common EU policies, and the importance of ensuring the safety of products and services (Council of European Union, 1986). It furthermore was expressed by the Commission's wish to give a 'new impetus for consumer protection policy' (European Commission, 1985) in the light of the fact that progress in the area remained slow. By means of a new approach to technical harmonisation, the Commission's idea was to breathe new life into the development of consumer protection laws and policies: common health and safety objectives should be achieved by having in place common standards for goods.

From the foregoing it can be followed that in the pre-Maastricht period the development of EU consumer law was shaped through three major streams or 'routes': soft law measures, internal market promotion and legislative harmonisation (the so-called 'new approach' to technical harmonisation). The latter two streams are interwoven with each other as noted by Weatherill: '[i]n so far as economic integration improves the consumer's position by promoting a more efficiently functioning market, then harmonisation is a pro-consumer policy' (2013: 11; 15). In other words, legislative harmonisation has been framed by the EU institutions as a means used on behalf of the consumer to protect his needs and rights (Twigg-Flesner, 2012).

Already with the European Single Act (1986), and in particular Article 100A (later Article 95 TEC), a supranational commitment was expressed to guarantee a high level of consumer protection with a view to measures concerning the functioning of the internal market (Antoniolli, 2006: 862-863). This commitment was also reflected by the foundation of the Commission's Consumer Policy Directorate General in 1995, and, already before, the development of the area had reached a peak with the adoption of the Treaty of Maastricht, and the new Title IX on 'common commercial policy', in particular, which was added to the EU legal framework. With these legal arrangements in place, the EU entered a new stage of development, gaining legislative competence in the field of consumer law. The new Titel of the Treaty centred on consumer protection without exclusively linking it to the EU's internal market project (Article 129a TEC). EU harmonisation was given a boost by both the application of the co-decision procedure to

EU consumer law-making and the establishment of qualified majority voting in the Council regarding legislation concerning the completion of the internal market. And yet, even though the legislative activities of the EU increased in subsequent years, many of its measures were not taken on the basis of the newly required competence. This was apparently due to the fact that – as reflected in Article 129a[13] and maintained in later treaty changes (Article 153 TEC and now Article 169 TFEU) – the EU's role was understood as supplementary to that of the Member States which remained in the driver's seat (Weatherill, 2013: 306-307). In general, it seems that the allocation of decision-making competences between the EU and national levels became an increasingly relevant topic. After all, with the Maastricht Treaty also the principle of subsidiarity was introduced which aimed to clarify the conditions under which the EU was to take legislative action or leave it to the Member States.[14] Being a principle covering areas not belonging to the realm of exclusive Community competence, the principle of subsidiarity was to be observed by the EU in justifying its legislative acts, including those proposed in the area of consumer law. The introduction of this principle made it all the more obvious that the EU merely had an assisting role and its application emphasised the idea that 'Community intervention must complement, rather than substitute for, state action' (Antoniolli, 2006: 865).

In the post-Maastricht period and continuing beyond the Amsterdam and Nice Treaties, the Commission set up further objectives and strategies in its 'action plans' and 'consumer policy strategies'. The Commission's primary concern was not anymore with legislative output but with the quality of legislation as evidenced by its better-law-making initiative. Since its inception in 1995 it covers all areas of EU activity, including, as reflected in the Commission's policy plan, the area of consumer law (European Commission, 1999). Re-enforcing its commitment to better law-making in 2002[15] resulted in the review of a list of future legislative measures which should now be shaped with a view to the objectives of deregulation and simplification. This review exercise may have prompted the Commission to get back to plans concerning a directive on pyrotechnics that had come to a halt (interview). Furthermore, it is relevant to note that both the quality of legislation and the dissatisfying implementation results led the Commission to adopt a more rigorous approach in the field of consumer law.

13 According to Article 129a TEC a high level of consumer protection shall be achieved by 'specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.'

14 Article 3b(2) TEC, now Article 5(3)(1) TEU.

15 COM(2002) 275 final. See also the Interinstitutional Agreement on better law-making in which the European Commission, the Council of the European Union and the European Parliament affirm their intention to facilitate, with a view to principles such as democratic legitimacy, subsidiarity and proportionality, and legal certainty, the legislative process and to improve legislative quality of EU acts. Cf. Interinstitutional agreement on better law-making. OJ C 321, 31 December 2003, pp. 1-5.

The widespread use of directives implying the minimum harmonisation of national laws had apparently led to different interpretations of EU directives, and therefore inconsistency in the application of EU consumer law as a whole. This appeared to be detrimental to the aim of achieving common safety standards, consumer confidence and legal certainty for business and consumers throughout the EU. In the face of this problem, the Commission sought to intensify legislative harmonisation by increasingly promoting full (or maximum) instead of minimum harmonisation to tackle market fragmentation caused by divergent national legal frameworks (Reich, 2012b: 3).

The shift from minimum harmonisation to full harmonisation in the development of EU consumer law is of relevance with regard to legislative discretion. After all, it is quite obvious that increasing harmonisation of national legal frameworks implies little legislative discretion being left for the Member States to implement EU directives. Seen in this light, the Pyrotechnic Articles Directive possibly reflects the shifting paradigm in EU Consumer Law from the earlier minimum harmonisation approach to more detailed legislation and fuller harmonisation aspirations of the Commission. The Directive contains minimum harmonisation arrangements. Hence, it grants discretion. At the same time, however, its detailed and lengthy provisions reduce the discretion available for Member State implementation. Meanwhile, the trend towards full harmonisation has not remained without consequences for the Pyrotechnic Articles Directive. The Directive has been revised in 2013 with the purpose of further clarifying terms, concepts and conditions. This amendment has resulted in a still more detailed and therefore lengthier piece of legislation which more explicitly pursues the aim to harmonise national laws, indicating this objective already in its title.[16]

10.2.2 Purpose and background to the directive

In fact, plans for a directive regarding pyrotechnics had already been discussed parallel to the preparations and negotiations of the Explosives for Civil Use Directive. But they did not materialise – arguably due to national differences concerning the sale and use of pyrotechnic articles – and were eventually put aside (interviews). A decade later, a new attempt was launched by the Commission which preferred a regulation over a directive. However, support for directly binding EU rules did not find support among the Member States and, as for the new approach to technical harmonisation, it was only applied in combination with directives; hence the Commission abandoned the idea of using a regulation as regulatory instrument (interview).

16 See Directive 2013/29/EU of the European Parliament and of the Council of 12 June 2013 on the harmonisation of the laws of the Member States relating to the relating to the making available on the market of pyrotechnic articles (recast), OJ L 178, 28 June 2013, pp. 27-65.

The proposal for the Pyrotechnic Articles Directive was tabled in October 2005. It entailed a number of clear-cut aims relating to the internal market and consumer protection. To begin with, it set out to achieve the free circulation of pyrotechnic products within the EU – with the exclusion of those products that were used by armed forces, police, in aircraft or covered by other EU legislation. The free movement of goods should be facilitated by the harmonisation of safety requirements of national consumer laws. Common safety standards should, in turn, contribute to the increased protection of consumers and professionals alike and eventually reduce accidents resulting from the misuse and malfunctioning of pyrotechnic products (European Commission, 2005). The emphasis on the safety of fireworks matched one of the Commission's top priorities: to achieve a high and common level of consumer protection as reflected in its 2002-2006 consumer policy strategy (European Commission, 2002).

Despite the EU's early announcement in the 1993 Explosives for Civil Use Directive to come up with legislation regulating consumer protection and public safety regarding pyrotechnic products, preparations in this regard started a mere ten years later with the setting up of an EU-level working group for pyrotechnic articles composed of various stakeholders from the Member States: representatives of relevant industries, above all the Pyrotechnic industry, public authorities dealing with pyrotechnics as well as the European Committee for Standardisation, in particular its technical committee for pyrotechnic articles which played a leading role in the drafting of the essential safety requirements. The different stakeholder groups voiced support for the Directive, except for representatives from the United Kingdom and Sweden that saw no need for EU legislation on this matter (European Commission, 2005, p. 5).

The proposal for a Pyrotechnic Articles Directive seemed to be in the best interest of the Member States. The Directive has been assessed as a 'real opportunity to achieve a higher safety level with fireworks articles through harmonised testing and quality assessment procedures' (Aufauvre, 2008: 59). Having in place one single legal framework for the promotion of pyrotechnic articles replacing the various national approval procedures was seen as guaranteeing the free circulation of products and therefore benefitting the domestic industries (Brochier and Branka, 2007: 619). What's more, a harmonised approval system for the placing of pyrotechnic articles on the market would reduce administrative burdens for all parties involved in the European single market, especially enterprises (Aufauvre, 2007). Finally, the EU's regulatory approach seemed to benefit Member States also in another respect. While national differences regarding the examination of fireworks and approval processes for market placing of pyrotechnic products, as well as restrictions on the availability of certain consumer fireworks were to be ironed out by a comprehensive and coherent legislative framework at Community level, the removal of

barriers to intra-Community trade should,[17] however, not unnecessarily interfere with national legal orders and practices. Hence – and in line with Article 95 TEC – the choice for a directive as regulatory instrument shows that the Commission paid due attention to the various regional traditions and local customs in the usage of fireworks within Member States (European Commission, 2005, p. 5). The Directive proposal was subject to the co-decision procedure, thus involving alongside the Council also the European Parliament. The leading role, on the part of the European Parliament, was taken by the Committee on the Internal Market and Consumer Protection. It was responsible for drafting the legislative resolution, being herein supported by the Committee on Industry, Research and Energy. In general, the European Parliament welcomed the proposal, considering it, with a view to the Commission's efforts at better law-making, as a 'good example of deregulation and simplification' (European Parliament, 2006a, p. 44). It emphasised, however, the need for some clarification, pertaining, for instance, to the concept of 'pyrotechnic articles' or 'manufacturers' in order to truly realise the Directive's objectives (European Parliament, 2006a, p. 37). To this end, the European Parliament came up with various suggestions to improve the quality of the proposal to guarantee coherency in the application of the envisaged legal framework.

10.3 Negotiations

While the Commission proposal was submitted in October 2005, Council negotiations did not commence immediately owing to some organisational difficulties during the start-up phase (interview). Under the Presidency of Finland, the Member States got down to business in the second half of 2006. Negotiations took place in the Council Working Group Technical Harmonisation and proceeded fast as witnessed by the participating civil servant from the Ministry of Infrastructure and the Environment. Indeed, the European Parliament approved the proposed Directive at first reading by the end of November 2006 (European Parliament, 2006b). Negotiations in the Council were eventually concluded with the adoption of the final Directive in April 2007 (Council of the European Union, 2007). The Directive

17 Interstate-barriers to trade refers to the situation where goods produced in one Member State are not allowed access to the market of another Member State because the latter applies different technical rules concerning these goods than the former. Since the meanwhile famous 'Cassis de Dijon'- judgment of 20 February 1979 these kinds of restrictions on the free movement of goods are considered unlawful. From the judgment it followed that goods that can be lawfully produced or marketed in one Member State and are not subject to Union harmonisation should be allowed to be marketed in any other Member State. This shall apply even if the product does not entirely comply with the technical standards of the Member State of destination. This is also known as 'principle of mutual recognition'. Cf. case 120/78, Rewe Zentrale v Bundesmonopolverwaltung für Branntwein [1979] ECR 649 ('Cassis de Dijon').

was treated as an A-item throughout the entire negotiation process which, therefore, took less time than negotiations on the more controversial B-items would have required (see table 10).[18]

Table 10: Timeline for negotiations on the Pyrotechnic Articles Directive

11 Oct 05	Adoption by Commission proposal
17 May 06	European Economic and Social Committee opinion
30 Nov 06	Adoption of the directive at first reading by European Parliament
16 Apr 07	Approval by the Council of the European Parliament position at 1st reading
23 May 07	Formal adoption by Council and European Parliament

Additionally, and in conformity with Article 259 TEC (now Article 302 TFEU) the Economic and Social Committee delivered its opinion on 17 May 2006.

The Netherlands were amongst the majority of countries that supported the idea of introducing common rules on the marketing and use of pyrotechnic articles. The Dutch position on the proposal had been prepared by the Working Group Assessment New Commission Proposals (Werkgroep Beoordeling Nieuwe Commissievoorstellen (BNC)). In principal, being composed of civil servants from all ministries and representatives of the regional and local authorities,[19] its composition can slightly differ from case to case depending on the content of the directive under negotiation. Next to local representatives, the Working Group involved, in the present case, the Ministry of Infrastructure and the Environment – as the authority being chiefly responsible for the dossier on the Pyrotechnic Articles Directive – the Ministries of Economic Affairs, the Ministry of Justice (nowadays Security and Justice), the Ministry of Finances and a few others. Member States' support for the proposal did not only result from the economic advantages it implied for domestic pyrotechnics industries. In particular the safety of pyrotechnics seemed to be a problem with a European dimension even though Member States were differently affected by it (European Commission, 2005, p. 3). Be it as it may, in 2006, coinciding with the negotiations on the Directive proposal, EU wide figures were estimated at 45.000 casualties

18 To briefly recall from the previous discussion: As a rule, treating the directive proposal as a B-Item in the negotiations, indicates that the proposal contains contested issues which require further debate to reach agreement. A-items, by contrast, only require formal adoption because agreement on the proposal has already been reached in the Council preparatory bodies (see section 8.5.2.1).

19 Dutch regional and local authorities are: the Association of Provinces of the Netherlands (Interprovinciaal overleg, IPO) and the Association of Netherlands Municipalities (Vereniging van Nederlandse Gemeenten, VNG).

resulting from the misuse or malfunctioning of pyrotechnic products (Bos, 2006).[20]

Problems with pyrotechnic articles had caused a fireworks explosion earlier on, in the Dutch city of Enschede on 13 May 2000. Being the worst fireworks disaster ever occurring on European territory, it was a 'dramatic experience for the country' (interviewee of the Ministry of Infrastructure and the Environment) causing deaths (23) and injuries (947), and the destruction of residential areas and public space (Speksnijder and Wiegman, 2000).[21] Later on it was found that very dangerous fireworks had intentionally been classified as not dangerous when being put on transport to be eventually stored close to a residential area (interview). The Government's response in the aftermath of this disaster was to bring new legislation into force, by means of the 2002 Fireworks Decree (Vuurwerkbesluit) which was amended in 2004 to improve its practical application and enforcement. The Fireworks Decree includes rules addressing all stages of the product cycle (amongst others import, assembling, selling, transporting, storing, and igniting) to ensure high safety levels (*Official Bulletin*, 2009, 605, p. 33). Even though new legislation and additional measures in the enforcement sphere alleviated the problem of unsafe and illegal fireworks circulating on Dutch territory to a certain extent in the years after the Enschede fireworks disaster, it nevertheless persisted (Biezeveld, 2010: 42).

Given this situation, it may not come as a surprise that the Dutch Government did not object to the Commission proposal. Maybe it was even seen as an opportunity to further improve own legislation. After all, the Dutch Fireworks Decree has been assessed as lacking a clear definition of professional fireworks from which requirements for its use and sale could have been derived (Biezeveld, 2010: 44-45). In any case, the Dutch Government acknowledged the economic benefits which the single market for pyrotechnic articles entailed and the fact that safety rules and measures against illegal fireworks were planned to be realised, even though, it wished the envisaged rules regarding the enforcement of the Directive to be more in line with national practices. Especially these rules should be clarified and provide for more effective enforcement through, for instance, the extension of safety requirements to the transport and storage of pyrotechnic articles, an issue which the proposal did not address (*Parliamentary Papers II* 2005/06, 22112, no. 429).

It is not only due to the experience of the Enschede fireworks disaster that the Dutch situation regarding the sale and use of pyrotechnic articles is a specific one compared to other Member States. Relatively speaking, considering the EU as one sales market for pyrotechnic articles and taking the per capita consumption as a benchmark, the popularity of pyro-

20 Bos, 'Vuurwerkverschillen tussen EU-landen verdwijnen', in Algemeen Nederlands Persbureau (ANP) 30 November, 2006.

21 C. Speksnijder and M. Wiegman 'Deuren tussen de bunkers moeten hebben opengestaan', in Het Parool 15 May 2000.

technic articles in the Netherlands appears to be one of the highest among other countries (interview). Against this background it is a dilemma that not only legal fireworks but also illegal ones – being illegal for reasons of safety and health – are among those consumed, making up, in fact, fifteen percent of the annual consumption of fireworks. In fact, the Netherlands have been struggling more than other Member States with the problem of 'illegal fireworks' that put consumers in dangerous and harmful situations. This is additionally aggravated by the fact that illegal fireworks are difficult to distinguish from their legal counterparts. While this may, on the face of it, suggest that illegal fireworks constitute a truly 'Dutch problem' caused by national habit, trade in fireworks certainly is a cross-border business, involving other countries for transportation and storage purposes.[22]

In any case, for the Netherlands, the safety of pyrotechnic articles was a major issue when entering the negotiations on the draft directive. But it certainly was not the only Member State with clear preferences.

10.3.1 Placing on the market

According to the civil servant from the Ministry of Infrastructure and the Environment who was closely involved in the negotiations on the Directive, Germany appeared to be very assertive in attaining outcomes resembling its own rules enshrined in the German Explosives Act (Sprengstoffgesetz). It was herein supported by a couple of other Member States such as France and Denmark, but also others that approved of proposals forwarded by the German delegation. On the other hand, negotiations revealed the various cultural traditions between the Member States in dealing with pyrotechnic articles and the different preferences resulting from this.

The Commission proposal specified conditions on the placing on the market of pyrotechnic articles in Article 5: goods have to meet the obligations of the Directive, bear a CE marking and comply with the conformity assessment procedure established to determine whether or not the placing of the marking is lawful. 'Placing on the market' refers to products being available on the Community market for the purpose of distribution or use – either for payment or free of charge (Article 2(2)). The delegation from Malta objected to the definition by pointing out that, if it was applied, Malta could not preserve its local custom of having, within its territory, fireworks produced by associations for village fairs. According to the proposed EU rules domestically produced fireworks would have to be subjected to the intended certification and assessment procedures. It was therefore unlikely that the fireworks produced by the Maltese associations would be approved. And yet, Malta wanted to maintain its 'century-old tradition' and

22 In this context it should be mentioned that the Directive is also applicable to the European Economic Area and therefore to Iceland, Norway and Lichtenstein. In other words, products that are for instance placed on the market in Norway are considered to having been made available on the Community market.

to accommodate its preferences, which were also shared by other Member States such as Spain, the definition was extended resulting in the so-called 'Malta-clause'. It established that articles produced by domestic manufacturers for own use and approved by the Member State concerned for use on its territory would be excluded from the definition given in the draft directive (interview). Recital (8) of the final draft points to Member States' religious, cultural and traditional festivities justifying the limitation of the definition. This amendment was also supported by the European Parliament which was well aware of the specific national regulations on the marketing and use of fireworks resulting from different customs and traditions (European Parliament, 2006a).

10.3.2 Categorisation

The Commission proposal distinguished between two different types of pyrotechnic articles, fireworks and other pyrotechnic articles which were further divided into different sub-categories and hazard levels (low-medium-high). According to its suggestions made at first reading, the European Parliament wanted to have a still clearer distinction between the various types of pyrotechnic products as well as a further criterion on the basis of which, within the type of fireworks, categories were to be distinguished (European Parliament, 2006a). This became the noise level, on the basis of which, next to the level of hazard, four different categories are distinguished: category 1, 2 and 3 pertain to fireworks for consumers, category 4 to fireworks for use only by persons with specialist knowledge.

These amendments were certainly in accordance with ideas of the Dutch delegation which wished to have clearer and more explicit distinctions between the relevant categories, especially between those three pertaining to pyrotechnic articles for consumers, which were – up to that point – only implicitly mentioned, on the basis of product features listed in the Annex to the Directive. Having established clearer distinctions between categories in the substantive part of the Directive was considered to facilitate its practical application and enforcement (*Parliamentary Papers II* 2005/06, 22112, no. 429).

The Dutch Government also wanted the numbering of categories within Article 3(1) to be changed. The proposal mentioned categories 1 to 4 reflecting a scale from the least dangerous (1) to the most dangerous (4) pyrotechnic articles (according to different hazard and noise levels). This numbering was seen as 'confusingly' similar to the classification of pyrotechnic products for transport purposes where class 1.1. is used to identify very dangerous products and class 1.4 refers to those that are the least dangerous (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 27). Possibly due to the Enschede accident, fears were that similarities of classification systems might be exploited for false hazard classifications, increasing chances that very dangerous fireworks might fall into the hands of consumers. Alongside this, the Dutch Government urged that it should be prohibited that articles

within category 4 professional fireworks, presenting a high hazard, become available for private use. Even though the Directive proposal addressed this aspect in Article 7(3), the Government still saw room for improvement especially in respect to limitations on trading (*Parliamentary Papers II* 2005/06, 22 112, no. 429, p. 27).

This wish of the Dutch Government corresponded with the national approach already applied; the Fireworks Decree pursued the aim to effectively combat trade in illegal fireworks, including the possibility to sanction the (mis-)use of these products (Fireworks Decree, 2002).[23] Whereas for clarification purposes a third category (theatrical pyrotechnic articles) was added to Article 3(1), the classification numbering suggested by the Directive proposal remained the same.[24] Dutch preferences were also not accommodated as regards the prohibition of certain category 4 professional fireworks. This concerned, for example, firework rockets creating a sound effect, which are not allowed to be used in the Netherlands but, on the contrary, are regularly used in Spain. The Dutch Government was not alone in wishing to get this prohibition into the Directive. But then again, other Member States as well as the Commission considered such a ban as a likely obstacle to the objective of a common market in pyrotechnics. The requested introduction of a ban was certainly a thorn in the side of the pyrotechnics industry which, while not sitting at the negotiation tables in Brussels, had previously been consulted on the draft directive (interview). As for Article 3(2), requiring from Member States to inform the Commission about their authorisation and identification procedures regarding 'persons with specialist knowledge' the Dutch Government accepted that a legal basis, so far lacking, would have to be introduced into Dutch law (Parliamentary Papers II 2005/06, 22112, no. 429, p. 27). With a view to the principle of subsidiarity, the Government objected, however, to further specification of the content of these rules. The final directive does not imply any further specification.

10.3.3 Consumer restrictions

The Netherlands were not the only country that advocated stricter measures. Specific preferences had already emerged from the Commission's consultation rounds in preparing the legislative proposal. It became obvious that a number of Member States would not support EU legislation which implied giving priority to economic benefits over safety. It was clear to the Commission that, for instance, Greece and Ireland, having in place a ban on the sale of fireworks to consumers, would not agree to a proposal disregarding their national circumstances (interview). Therefore, and in line

23 See Article 1.2.6 of the 2002 Fireworks Decree.

24 It is interesting to note that with the 'recasted' Directive 2013/29/EU being adopted, the categories for fireworks were eventually amended. Article 6 of the Directive now divides fireworks into the categories F1, F2, F3, and F4, with F standing for 'fireworks'. This was the result of a proposal from Germany (interview).

with Dutch preferences to attain high levels of health protection and safety, the Commission proposal established in Article 6(2) a limitation on the 'free movement clause' concerning pyrotechnic articles as foreseen by Article 6(1). Accordingly, Member States could justify restrictions on the possession, use, and / or sale of fireworks of category 2 and 3 to consumers on the grounds of public order, security or safety, or – following from an amendment by the European Parliament – environmental protection. Recital 10 of the final draft Directive explicitly links the conferral of discretion in implementation to the different cultural practices of the Member States:

> The use of pyrotechnic articles and, in particular, the use of fireworks, is subject to markedly divergent cultural customs and traditions in the respective Member States. This makes it necessary to allow Member States to take national measures to limit the use or sale of certain categories of fireworks to the general public for reasons of public security or safety.[25,26]

On similar grounds Member States are allowed to increase age limits, according to Article 7, regarding the use of the three different types of pyrotechnic articles that are established in Article 3. Member States are also permitted to lower age limits with regard to those persons that are vocationally trained or complete such training (Article 7(2)). Apparently, the Commission was aware of the need to confer discretion upon Member States. In the face of legal diversity and therefore preference divergence which it encountered during the preparation and consultation phase, it ensured that some discretion was built into the Directive proposal (European Commission, 2005, p. 3). As a consequence, the provision was not substantially amended during the negotiations and also the Dutch Government did not see any problems resulting from it for Dutch national legislation on fireworks (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 27).

25 Article 16 of the final Directive includes a safeguard clause (Article 15 of the initial proposal): in case that one Member State does not agree with restrictions imposed by another Member State on the grounds laid down by Article 6(2), it can notify the Commission which takes the final decision regarding the justification of these measures.

26 In spite of this permission the circulation of unsafe and very dangerous pyrotechnic articles cannot be entirely ruled out. As pointed out by the civil servant from the Ministry of Infrastructure and the Environment, the idea of free circulation of pyrotechnic articles as enshrined in Article 6(1) as well as the lack of specific rules on the storage of these articles, make it possible that articles which are actually restricted under national rules become available, however, to consumers. This can happen if articles that are meant to be placed on the market only if market access is allowed by a Member State, are, nevertheless, placed on the market of a Member State that prohibits the placing on its market but allows these articles to be stored on its territory.

10.3.4 Certification procedure

According to the Commission proposal the placing on the market of pyrotechnic articles was to be preceded by an ex-ante control of products which several Member States already had in place. In the final draft Directive the procedure boils down to the following steps. Next to categorising each product, manufacturers are to ensure that products placed on the market comply with the essential safety requirements; compliance is controlled by a so-called notified body to be designated by the Member States (Articles 9 and 10). It shall check if pyrotechnic products meet the relevant essential safety requirements provided in Annex I to the Directive. If this is the case, the manufacturer has to affix CE marking to the product (Article 4), to indicate compliance. If the manufacturer is established outside the Community, the importer has to ensure that the latter has fulfilled his obligations and can be held liable in this regard (Article 4(2)) by national authorities. Distributors, finally, have verification responsibilities: they have to ensure that pyrotechnic articles display the CE marking and are accompanied by other relevant documents containing product information (Article 4(3)). Assessments should be carried out based on harmonised standards, which under a mandate from the Commission are adopted by a European standardisation body (Article 8) for the design, manufacture and testing of pyrotechnic articles. Adhering to EU harmonised standards is recommended but not compulsory for Member States.[27] Next to the CE marking, the conformity assessment procedures shall verify whether pyrotechnic articles other than fireworks are properly labelled following the minimum standards established in Article 12(2) or, as implied by this provision, adhering to stricter standards imposed by the Member States. These minimum requirements leave some discretion to Member States.

Whereas some Member States, such as Germany, already had ex-ante approval systems in place, the introduction of such an approval procedure implied a decisive change for the Netherlands where enforcement practices were based on controlling products already placed on the market. The Commission proposal underlined that harmonising national approval systems would make an end to the different systems and varieties of national standards applied in the Member States and therefore reduce administrative burdens considerably. While acknowledging that the proposed certification system and presumption of conformity[28] would facilitate the task of national authorities in supervising compliance ex-post, the Dutch Govern-

27 Cf. Recital (9) of the Pyrotechnic Articles Directive.

28 See in this regard Article 8(3) of the final Directive which stipulates that 'Member States shall consider pyrotechnic articles falling within the scope of the Directive which comply with the relevant national standards transposing the harmonised standards in the Official Journal of the European Union to be in conformity with the essential safety requirements set out in Annex I (…)'. See in this respect also recital (16) of the Directive's preamble.

ment expected costs running into millions from having to create this certification system from scratch (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 25).[29,30] Against this backdrop, the Ministry of Economic Affairs sought to invite the Commission to come up with an alternative to the CE marking or to otherwise relax rules concerning the identification of producers for the least dangerous group of pyrotechnic articles (category 1). But the Netherlands, being isolated with this request, was fighting a losing battle (interview). The measure was a core part of the Commission proposal and as such it remained in place. Failing to assert Dutch preferences in this decisive respect, it should, however, be noted that the Dutch delegation succeeded in getting some of its preferences incorporated into the Directive, with respect to the essential safety requirements for pyrotechnic products. Both safety distances and noise levels were determined along the lines of the suggestions made by the Dutch delegations during the negotiations (interview). In addition, under the Directive it was made possible to establish an administrative cooperation group of Member State market surveillance authorities (ADCO).[31] This turned out to be important from the Dutch perspective because it provides for better control of fireworks coming from neighbouring countries, in particular Belgium, and fireworks bought via the Internet. The setting up of the ADCO was initiated by the Netherlands (interview with Commission civil servant).

10.4 Analysis

Looking at the final outcome, the Directive grants little discretion. The coding exercise already pointed into this direction, merely indicating as 'discretionary' the permission to restrict the free movement of pyrotechnics (Article 6(2)), to set higher minimum age limits (Article 7(2)) as well as the permission granted to Member States to designate notified bodies carrying out the conformity assessment procedures (Article 10), granting discretion on the principle of institutional autonomy. In addition, and as highlighted in the

29 It is worthy of note that the introduction of the Fireworks Decree amounted to 2.7 million for 2530 companies. As regards the Pyrotechnic Articles Directive, by contrast, the total amount of its implementation was estimated to be 12 million based on the figures of the annual amount of consumer fireworks available – in 2001 boiling down to 8000 million – and the amount of 1500 Euros for CE marking for each individual product. Further budgetary effects could not be specified but were not considered unlikely. *Parliamentary Papers II* 2005/06, 22112, no. 429, p. 25.

30 It was expected that enforcement was not facilitated but rendered more difficult by the proposed rules. As an implication of the new definition of fireworks Dutch authorities had to carry out controls at retailers and not, as before, at importers of pyrotechnic articles. Suffice it to say that tracing of unsafe and dangerous products at the importer used to be easier due to the fact that greater amounts of products were concentrated here before they were distributed in smaller amounts to retailers (interview).

31 See paragraph 8.6 of the European Commission's Guide to the implementation of directives based on the New Approach and the Global Approach published in 2000.

interviews, being typical of European directives related to the achievement of the internal market and therefore approximation of Member States' laws, the Pyrotechnic Articles did not grant considerable discretion. Having said this, does it mean that discretion did not play any relevant role in the negotiations? The preceding analysis offers a number of insights that shall serve to answer this question.

10.4.1 Discretion, policy area and political sensitivity

To start with, consumer protection is certainly not an area where EU lawmaking is in its infancy. Even though explicit legislative competence was only conferred upon the EU with its actual establishment through the Treaty of Maastricht that subjected consumer protection to the Community method (first pillar), it has promoted integration for decades, using the rhetoric of consumer interest, protection and confidence against the background of the emerging internal market to motivate its legislative initiatives. Aptly put, in Weatherill's words: 'The project to construct an internal market for the EU is itself a form of consumer policy' (Weatherill, 2013: 307). Hence, the EU has become influential in terms of legislation, even if it did not exhaustively made use of its legislative powers conferred upon it by the Maastricht Treaty. EU integration in the area of consumer protection has been largely based on legislative harmonisation justified by the EU's objective of an internal market. Where harmonisation is pursued, the role of legislative discretion is limited from the outset. The Pyrotechnic Articles Directive seems to fit well into this context. First, because it is based on Article 95 which pursues the approximation of Member States' law for the sake of economic integration (common market) and second, because it is an instance of the new approach to technical harmonisation which additionally promotes legislative harmonisation. The conclusion that the Directive implies a small discretion margin (also based on the codebook exercise), was not only confirmed during the interviews. It was furthermore pointed out that with its detailed provisions the Directive resembles for some part an EU regulation which is known for its lack of discretion and direct applicability of EU rules. All things considered, support is found for the link between the influence of EU legislative competence in a policy area and the amount of discretion granted to Member States by directives related to it (expectation 1). In the case at hand, increased EU impact results into the conferral of less discretion for national implementation.

And yet, the simple truth is that EU integration can hardly proceed without ensuring that Member States stay 'on board'. Therefore integration in the area of consumer law was pursued true to the motto that a common objective needs a shared will: minimum harmonisation followed from this, leaving Member States discretionary room for own (additional) measures. In addition, consumer protection is a shared competence as evidenced by the current treaty framework (Lisbon Treaty). In fact, EU consumer law provides an example of the ongoing debate on the distribution of competences between the EU and its Member States. In this debate discretion plays a

role, too, albeit rather indirectly, for the focus is on the principle of subsidiarity which Member States have apparently used as an argument to limit increasing EU competences resulting from the Commission's re-orientation towards measures implying full harmonisation (Weatherill, 2013: 18-24; see also Antoniolli, 2006; Reich 2012a, 2012b). Granted, the subsidiarity principle is of less relevance in the present analysis. But insights into the negotiations on the Pyrotechnic Articles Directive suggest that discretion played a relevant role in mediating between the envisaged application of EU law and peculiarities of national laws. The debate on the definition of the 'placing on the market' that conflicted with national customs in the use of pyrotechnics exemplifies this. The two sides of consumer law-making are brought into view here: while legislative harmonisation on the grounds of consumer protection and product safety was largely supported, above all by the Netherlands, EU harmonisation seemed to be at odds with the different national legal cultures and regulatory techniques as regards the sale and use of pyrotechnic articles. Member States generally subscribed to the two major objectives of the proposal, establishing an internal market for pyrotechnic articles and ensuring health protection / product safety in dealing with these articles; and yet discretion was incorporated in fact already prior to the negotiations as reflected by the initial Commission proposal, in order to cope with potentially contentious issues resulting from highly divergent cultural traditions and national habits in the Member States. This leaves no doubt that the Directive proposal entailed political sensitive issues and therefore potential for controversy. The sole fact that a decade had to pass from the first Directive proposal being prepared until the matter of pyrotechnic articles was actually addressed by the Member States in the Council supports this view. Arguably due to the fact that the Directive proposal which was finally tabled by the Commission already provided for some discretion in matters relevant to the Member States,[32] political controversy, however, did not seriously affect the process of negotiations once they were under way.

Seen in this light, the present case does not seem to lend itself to illustrate the plausibility of the second expectation under consideration. It posits that political sensitivity arising from the content of the directive under negotiation results into the granting of more discretion to Member States. On the other hand, if the expectation is understood less strictly, it still holds true for the present case, as it cannot be denied that for this reason more discretion was incorporated into the Directive, albeit prior to the actual negotiations. As a matter of fact and as pointed out by the Commission civil servant involved in the negotiations, discretion granted by Article 6(2) is unusual for a Directive related to the internal market for it restricts the core principle of the latter, the free movement of goods. From the viewpoint of the Commission and the pyrotechnics industry legislative discretion was also undesirable; for what was preferred were common rules guaranteeing

32 See Articles 6(2) – limitation of free movement and 7(2) – age limits.

the removal of trade-barriers, contributing to the creation of a level playing field in the Community. And yet, the Commission was quite aware that by incorporating discretion, achieving Member States' agreement on the Directive would be facilitated (interview). In fact, both civil servants from the Ministry of Infrastructure and the Environment and the Commission, explicitly stated that without discretion there would have been no Directive due to lack of approval by the Member States. Hence, even if granted only by little degrees, discretion did play a decisive role in contributing to the successful conclusion of the negotiations, leading to the adoption of the Directive without any opposing votes or abstentions (Council of the European Union, 2007). Against this background, the political sensitivity expectation is found to partially hold true. The granting of at least some discretion to Member States for the purpose of implementation was also supported by the European Parliament, another relevant actor in the negotiations.

10.4.2 Discretion and European Parliament

With the entry into force of the Maastricht Treaty, the European Parliament was promoted to co-legislator with the Council in a number of areas, including consumer protection. The descriptive analysis gives to some extent an insight into its legislative contribution to the Directive. Taking a closer look at both the European Parliament's legislative resolution and the Directive finally adopted, it can be concluded that the European Parliament influenced the content of the Directive to a rather great extent. With very few exceptions all of its amendments were taken over in the final draft Directive.[33] In contrast to the Council, where negotiations took a bit longer to get started, the European Parliament 'played its cards well': it swiftly reached a common view on the proposal (interview). As a supporter of the internal market project, the European Parliament is known to favour the new approach to technical harmonisation and has taken an active legislative role in promoting harmonisation directives (Maciejewksi, 2015).[34] With a view to the present case, does that mean that an assertive European Parliament sought to keep legislative discretion to a minimum (expectation 4)? First of all, it is difficult to give a clear-cut answer to this question. On the one hand, it could be argued that corrections and improvements made by the European Parliament certainly pursued the objective of legislative harmonisation as envisaged by the new approach which was highlighted as inadmissible for the completion of the internal market (European Parliament, 2006a,

33 In this regard it is interesting to note that the European Parliament obviously sought to underline its position as co-legislator vis-à-vis the Commission. This shows in the amendments it made to Article 18 regarding implementing measures. Whereas previously, as proposed by the Commission, the Article was worded broadly, references to the 1999 Comitology decision, added by the European Parliament, made the limitations of the Commission's implementing powers more explicit. Cf. European Parliament, 2006a, p. 23.

34 Maciejewski, M. (2015) 'Free movement of goods', EU Fact Sheets, retrieved from http://www.europarl.europa.eu/ftu/pdf/en/FTU_3.1.2.pdf (accessed 23 November 2013).

p. 38). On the other hand, the analysis of the European Parliament's position does not offer more explicit statements on the conferral of discretionary power to the Member States. What's more, although it supported the common objective of an internal market in pyrotechnics, the legislative resolution brings into view that the European Parliament accepted the granting of legislative discretion to the Member States for imposing restrictions to the free movement of goods under certain conditions (Article 6(2)) as well as for the setting of standards regarding the minimum age of consumers and persons undergoing vocational training (European Parliament, 2006). While it supported the Directive's aims, including next to the creation of an internal market also the safety and health protection objectives, it obviously acknowledged that cultural differences had to be respected showing in its support for not only Article 6(2) but also with regard to the so-called 'Malta clause' (Recital 9 and Article 2(2)).

Considering the foregoing, I tend to conclude that despite the European Parliament's important role in legislative decision-making on the Directive, the immediate result from its powerful position was not in the first place to minimise Member States' discretion. Instead, it seems that the European Parliament accepted the conferral of discretion based on the consideration that it should ensure the achievement of the Directive's objectives.

10.4.3 Discretion and compatibility

Another issue that is of importance in shedding light on the role of discretion during the negotiations on the Pyrotechnic Articles Directive relates to the match between EU requirements and already existing legal arrangements in the Netherlands. In this regard it is expected, in line with the third expectation of the analytical framework, that the less compatible EU and relevant national rules are, the more likely it is that discretion is incorporated into the directive. It is a fact that the Directive did not entirely correspond with Dutch preferences and that efforts made during the negotiations to bring the Commission proposal more in line with them produced mixed results. Even though amendments to the categorisation of pyrotechnic articles (Article 3) alongside the proposed limitation on the free movement of pyrotechnics contributed to maintaining standards of enforcement and safety, the numbering of the category system which the Dutch Government considered likely to create undesirable conditions regarding the circulation of unsafe fireworks, stayed unaltered. Additionally, the ban on certain category 4 products precluding that very dangerous fireworks would be available for private use did not make it into the final draft Directive. What's more, the ex-ante approval system for obtaining the CE marking remained a core part of the Directive, thereby implying considerable mismatch with domestic arrangements,[35] including administrative burdens and

35 The transposition analysis below is more explicit as to the sort of misfit this requirement implied.

costs for business and higher prices for consumers. In this light it seems to be a tiny success for the Dutch delegation that the content of the essential safety requirements was partially informed by its ideas. Finally, the Directive did not include any rules concerning the transport and storage of fireworks which for safety reasons was considered important by the Dutch Government. The absence of these rules did not imply, however, any incompatibility since Member States could take this matter into their own hands by establishing national rules.[36]

In view of the foregoing, it should be noted that lacking compatibility did not result in the incorporation of wide discretionary provisions into the Directive. Hence, the expectation analysed above does not hold true. It remains to be seen to what extent EU and Dutch rules were not compatible in legal terms and the transposition analysis shall return to this aspect. It remains a fact that the Netherlands could not push through more flexible arrangements in the Council of Ministers regarding the requirement of introducing a pre-market approval system. Generally speaking, the Directive's small scope of discretion is, however, not too surprising given the fact that the Directive addresses product safety and internal market aspects, and therefore implies rather high levels of legislative harmonisation which are, in principle, not detrimental but rather in line with Member States' preferences for high safety standards as well as economic benefits which can only result from common market rules.

10.5 Conclusion

What can be said in conclusion about the role of discretion, after having brought together and discussed the various insights derived from the descriptive analysis? To begin with, and on a more general note, what can be expected from EU directives that relate to the field of consumer law and to internal market matters is that they do not imply high degrees of discretion. After all, these directives are adopted with the primary aim to contribute to the creation of the internal market which is based on a coherent legal framework. Hence, there is no relevant role of discretion. On the contrary, discretion is rather avoided for it entails the possibility that EU rules are interpreted and applied differently in the Member States, leading to market barriers or different safety levels for products (and services). As pointed out in the interview, the pyrotechnics industry, being an important stakeholder in the European fireworks market, is against too much flexibility as it undermines the creation of a common level-playing field. Member States, on the other hand, even if they support the creation of the internal market,

36 This does not mean, though, that Member States were granted discretion. After all, discretion, as it is defined in this study, flows from EU primary and secondary legislation and is therefore not implied by the absence of EU rules.

they nevertheless seek discretion to be able to exclude products from their markets for safety reasons or in order to preserve national particularities.

Another important conclusion is that discretion had a relevant role to play despite the overall rather small margin of discretion granted to Member States. Put differently, not necessarily more discretion was decisive to achieve compromise among Member States, but discretion in relation to particular aspects that were of primary concern to the Member States such as the permission to limit the circulation of pyrotechnics under specific national conditions. What's more, granting discretion was done consciously indicating the Commission's awareness of the relevance of discretion in securing Member States' support for new legislation on pyrotechnics. It is not only the facilitating role of discretion in contributing to reaching a negotiation outcome in the Council that shows here. The inclusion of discretion by the Commission also substantiates the claim that discretion is used intentionally in law-making processes. Finally, the motives underlying the conferral of discretion upon Member States reflect the role of discretion as a preserving factor: having the prospect of discretion in transposition, Member States suppose that they are able to incorporate EU rules by maintaining national legal frameworks and practices.

Having reached a conclusion regarding the role of discretion in the negotiations on the Pyrotechnic Articles Directive, the subsequent sections present and discuss the Dutch transposition of the Directive to gain insights into the role of discretion.

10.6 Transposition

The Dutch transposition of the Pyrotechnic Articles Directive is mainly traced by analysing the relevant documents and using material from interviews held with experts involved in this process. Especially the explanatory memorandum to the main transposition measure (the amended Fireworks Decree) provides relevant information such as the considerations made by the transposing authority in converting the Directive's rules into national law, including its use of discretionary provisions.

The Pyrotechnic Articles Directive was adopted on 23 May 2007 and required from Member States to complete transposition by 4 January 2010 and practically apply the Directive by 4 July 2010 to fireworks of categories 1 through 3 (Article 21(1)). For fireworks of category 4 as well as other pyrotechnic articles and for theatrical pyrotechnic articles a transitional period was granted, making the practical application of rules compulsory by 4 July 2013 (Article 21(2)). From the implementation report commissioned by the European Commission, it becomes obvious that the formal implementation of the Directive raised a number of issues causing incomplete or incorrect transposition in various Member States (Van der Burgt et al., 2011). In fact, the Commission had previously come into action against some Member

States: Dutch transposition was delayed by six months and, as a result, formal implementation only partially completed which prompted the Commission to open an infringement proceeding by initiating a letter of formal notice which was also sent to Luxemburg and Hungary for the same reason: deficient transposition.[37] Against the background that German legislation partially served as a blueprint for the Pyrotechnic Articles Directive, it is interesting to note that Germany was amongst those Member States that did not comply with the Directive, receiving, still in January 2014, a reasoned opinion[38] in which the European Commission requested it to review its national transposition legislation. Additional obligations resulting from German rules and being outside the Directive's scope were found to undermine the latter's internal market objective (European Commission, 2014). In other cases, including the Netherlands, where additional measures were found (likely) to impede the internal market, no further action was, however, taken by the Commission.[39]

In the Netherlands, the Pyrotechnic Articles Directive was transposed by three lower-level instruments (see table 11): an amendment to the 2002 Fireworks Decree – by means of which also the EU Service Directive was transposed – as well as two ministerial orders, one of them transposing the Directive's rules concerning the category of 'other pyrotechnic articles', which given their different scope (not addressing all stages of the product cycle), did not fit into the Fireworks Decree. In addition, another ministerial order pertained to consumer and theatrical pyrotechnic articles (*Official Bulletin*, 2009, 605, p. 33). Since there was no need to transpose the Directive by means of legislative act(s), the role of the national Parliament was marginal. In line with Dutch administrative and environmental law, the national Parliament was involved in the transposition process by means of a notification procedure following the drafting of transposition measures by the Ministry of Infrastructure and the Environment (*Official Bulletin*, 2009, 605, p. 52).[40]

37 Like in the Netherlands, the Directive was only partially transposed in Luxembourg. In Hungary transposition measures were completely lacking. See Van der Burgt et al. (2011).

38 The Commission's reasoned opinions represent the second stage in EU infringement proceedings.

39 Regarding the Dutch transposition of the Directive, the Commission deplored that cross-border transfer of products by persons had to be notified to the Dutch Ministry in charge. This was seen as a likely barrier to the free market. The Netherlands were also among those Member States that were criticised for their transposition of Article 14(6) allowing Member States to withdraw products from the market considered to be liable to endanger health and safety of persons. See European Commission, 2011. Interestingly, the revised Directive 2013/29/EU does not contain this provision anymore, possibly due to the incorrect and incomplete transposition it was found to have caused.

40 Cf. Article 1:8 of Dutch Administrative Law and Article 21.6 of the Environmental Management Act.

Table 11: Fact sheet transposition Pyrotechnic Articles Directive

Transposition deadline:	04 Jan 10
Publication transposition legislation:	*29 Dec 09* 16 Jul 10 19 Oct 10
Sort transposition measure (and number):	*Order in council* (1), ministerial decision (2)
In charge:	Ministry of the Environment
Legal Framework:	Dutch Fireworks Decree 2002

The amendment to the Fireworks Decree was assessed by Actal, the independent Dutch advisory board on regulatory burden. Its comments, however, did not prompt the Ministry to add substantial changes (*Official Bulletin*, 2009, 605, pp. 51-52). Likewise, responses from other parties, including the Dutch pyrotechnics industry which asked for the clarification of some aspects, did not lead to significant alterations of the draft transposition measure (interview).

While transposition was the chief task of the Ministry of Infrastructure and the Environment, also the Dutch Public Prosecution Service (Openbaar Ministerie)[41] took an interest in the Directive dossier. It had been involved in the formulation of the national Fireworks Decree after the Enschede accident, its major concern back then being with illegal fireworks. Therefore it sought to influence the position taken by the Dutch Government in the negotiations on the Directive. Additionally, it attempted to exert influence on the way the Ministry of Infrastructure and the Environment set out to transpose the Directive, in particular regarding safety issues. Against the background that the final draft Directive did not include any ban on certain articles of category 4 (professional fireworks) and applied a different approach to the definition and categorisation of pyrotechnic articles in general, efforts of the Public Prosecution Service were geared towards maintaining a firm national approach to enforcement. This approach aimed to keep chances low that unsafe products would be traded illegally and therefore fall into the hands of consumers (*Official Bulletin*, 2009, 605, p. 47). Hence, communication between the Ministry of Infrastructure and the Environment and the Public Prosecution Service during the transposition process, concentrated on the question of how to maintain the national practice of banning illegal fireworks. Unlike the Directive's categorisation system taking specific features as basis for determining types of fireworks, the national approach was based on the identification of pyrotechnic articles

41 In spite of the Dutch name 'Openbaar Ministerie', the Public Prosecution Service does not belong to the group of national ministeries but represents the body of public prosecutors in the Dutch criminal justice system.

according to the purpose of use. From the Directive's approach it followed that potentially dangerous articles, being so far unobtainable for consumers under Dutch rules, could now become available for private use. In the first place this pertained to pyrotechnic articles of category 4 but also to products of category 2 and 3. Exchanging views regarding this point possibly contributed to the fact that transposition did not proceed swiftly. Officially, however, delay was explained by the Ministry of Infrastructure and the Environment as a result of difficulties flowing from the complex technical requirements of the Directive as well as from lacking clarity of terms and concepts used in it, impeding smooth transposition (*Parliamentary Papers II* 2009/10, 21109, no. 195, pp. 3-4).

10.6.1 Transposition measures

The Dutch Fireworks Decree is composed of five chapters, the first one addressing the scope of the measure, containing rules on both consumer fireworks and professional fireworks which are, for each group, explained in greater depth in chapters 2 and 3 respectively. Chapter 4 deals with safety distances regarding groups of harmful objects and chapter five includes other transitional provisions. The transposition of the Pyrotechnic Articles Directive brought some changes to the structure of the first three chapters. Chapter 1 was extended by the insertion of chapter 1A comprising rules adopted for the specific purpose of formally implementing the Directive. They concern, more concretely, the obligations to observe the essential safety requirements established by the Directive's Annex I, provisions on the conformity assessment procedures, the CE marking and the designation of notified bodies (*Official Bulletin*, 2009, 605, p. 44). In adding a new chapter 3A it was furthermore taken into account that henceforth, theatrical pyrotechnic articles were to be considered, in line with the Directive (Article 3(1) (b)) as a category in their own right instead of the previous Dutch approach to subsume them under the category of professional fireworks. Despite these changes in the structure and content of the Decree, the Ministry of Infrastructure and the Environment, however, noted in the explanatory memorandum to the amendment, that large parts of the Fireworks Decree remained unchanged; in the words of the Ministry the 'truly national part' of the Fireworks Decree – lacking any linkage with the rules concerning the placing on the market of pyrotechnic articles – was preserved (*Official Bulletin*, 2009, 605, p. 38; 41). Provisions on, for instance, age limits (Directive's Article 7) or labelling requirements (Article 12) were incorporated into national law without noticeably altering the Decree.[42] The Directive's definitions and categorisation, on the other hand, entailed changes, albeit to a limited extent.

42 Parts of Article 7(1) were incorporated into chapter 2 (Article 2.3.5), Article 7(3) into chapter 3 (Articles 3.3.1, 3A.3.1). Article 7(2), being not obligatory, was not transposed. Article 12 of the Directive was mainly integrated into chapter 2. Cf. correspondence table, *Official Bulletin*, 2009, 605, p. 87.

10.6.2 Definitions and categorisation

Prior to the Directive, the Dutch Fireworks Decree distinguished between two groups of fireworks, based on their purpose of use: consumer fireworks and professional fireworks – both being deemed as complementary to one another. The basic principle was that any fireworks intended for use by consumers was automatically regarded as consumer fireworks, the purpose of the product thus being the distinguishing feature (*Official Bulletin*, 2009, 605, p. 42; 47). Both terms, consumer fireworks and professional fireworks, have a firm place within the Fireworks Decree, being used in the rules on storage of pyrotechnics, as well as in the provisions of other Decrees.[43] And yet, in the Directive, the purpose of use is not the decisive criterion. Instead, and as noted above, in Article 3 three types of pyrotechnic articles are defined according to characteristic features (hazard and noise levels): fireworks, theatrical pyrotechnic articles and other pyrotechnic articles. The Ministry's intention was, however, to keep changes to Dutch legislation to a minimum. Hence, the terminology applied in the Decree was retained and therefore already firmly established terms such as 'consumer fireworks' and 'professional fireworks' continued to be used. At the same time, the Ministry attempted to ensure that the definitions of the Directive were taken into due account. The Directive's division into categories was transposed by means of Article 1A.1.3 – for fireworks and theatrical pyrotechnic articles, while other pyrotechnic articles were transposed by means of a separate ministerial order. Especially relevant is the Dutch transposition of EU rules concerning fireworks of categories 1, 2, 3, and 4. As for categories 1 and 4, both could smoothly be integrated into the Fireworks Decree, the former category largely corresponding with the scope of consumer fireworks and the latter category fitting in well with the scope of professional fireworks as established by the Decree. A specific approach was chosen by the Ministry of Infrastructure and the Environment as regards the transposition of categories 2 and 3 fireworks. By extending the scope of the Directive's category 4 fireworks in its own transposition legislation, the Ministry ensured that certain fireworks of the Directive's categories 2 and especially 3 would become available only for professional use. These fireworks were thus identified as professional fireworks even though the Directive did not stipulate that (Official Bulletin, 2009, 605, p. 42). Maintaining national practice for safety reasons was possible by making use of the discretion granted under Article 6(2) which explicitly allowed Member States under specific conditions to prohibit or restrict the possession, use and / or the sale to the general public of category 2 and 3 fireworks, as well as theatrical pyrotechnic articles and other pyrotechnic articles (Official Bulletin, 2009, 605, p. 38).

43 That concerns the Establishments and Permits (Environmental Management) Decree, the Decree on External Safety of Establishments, and the Working Conditions Decree.

Further changes to the Fireworks Decree became necessary due to the new category of 'theatrical pyrotechnic articles' introduced by the Pyrotechnic Articles Directive. Articles of this new category of theatrical pyrotechnic articles were, in contrast to the 'theatrical fireworks' of the Dutch Decree not subsumed under professional fireworks but put into a separate category.[44] To bring national law in line with the Directive, chapter 3 of the Fireworks Decree was changed through the addition of chapter 3A, which now covers the rules on 'theatrical fireworks', the latter being treated as a sub-category of the Directive's 'theatrical pyrotechnic articles'. Having shifted the rules concerning these articles to a new category, the term 'theatrical fireworks', however, continued to be in use. In doing this, the transposing Ministry ensured that other parts of the Fireworks Decree, including the 'truly national one' were left intact. In addition to that, national safety standards for this category (as well as for the consumer and professional fireworks), previously laid down in Article 1.2.1 were replaced by the Directive's essential safety requirements (Annex I).[45] The new Article 1A.1.5 provides the legal basis for the recognition of harmonised EU standards in national legislation. In this context, alongside the Fireworks Decree, the 2004 ministerial order concerning further specification of requirements for fireworks (Regeling nadere eisen aan vuurwerk, Rnev) was replaced by another ministerial order, the Regulation on the designation of consumer and theatrical pyrotechnic articles (Regeling aanwijzingen consumenten en theatervuurwerk).

10.6.3 Consumer restriction and enforcement

The discretion granted under Article 6(2) served more than one purpose while the Directive's requirements were transposed into Dutch law. Making use of discretion was important from the viewpoint of storage. In fact, and as mentioned above, the Directive did not include any requirements concerning the storage or transport of fireworks. Hence, Member States could come up with own regulation in this regard. In the Netherlands, corresponding rules are closely connected to the type of fireworks which may be made accessible to consumers (*Official Bulletin*, 2009, 605, p. 47). As laid down in Dutch regulation, the net explosive content of fireworks for private use (category 2 and 3 fireworks) are limited. Bangers, for instance, may contain no more than 2.5 gram of black powder while the corresponding amount is higher in European Standards (6 gram). Having to provide for storage (space) for these 'heavier' fireworks would have made it necessary to change Dutch storage regulation. Next to legal burdens, it would also have required investments into storage facilities to ensure the safe storage of heavier fireworks. To avoid all this, discretion under Article 6(2) was used to restrict access of these fireworks, for storage purposes, to Dutch ter-

44 See Article 3(1) under (b).
45 As established by the new Article 1A.1.4.

ritory by making more detailed rules for the determination of category 2 and 3 fireworks.[46] In other words, discretion made it possible to continue to apply national rules and practices with regard to aspects of implementation and enforcement as stated by the Ministry of Infrastructure and the Environment (Official Bulletin, 2009, 605, p. 42).

Alongside this objective, it was again the wish to retain current national practice, which motivated the Ministry in making those fireworks unavailable to consumers which fell outside the scope of national regulation, being considered as unsafe and dangerous (interview). The discretionary choice of how to transpose the Directive – deciding upon implementation forms and methods – also appeared to be helpful in tackling the problem of availability of very dangerous products, including illegal fireworks, to the public at large that given the Directive's definition and categorisation of fireworks seemed to become more aggravated. The way Article 7(3) was transposed reflects this aspect. Article 7(3) restricts the placing on the market of pyrotechnic articles of category 4 fireworks as well as certain products from the categories of theatrical and other pyrotechnic articles – further specified in sub-points (a) and (b) – to persons with specialist knowledge. The provision was partially – as concerns category 4 fireworks – transposed by the new Article 1.2.2 which was an outcome of the collaboration between the Ministry of Infrastructure and the Environment and the Public Prosecution Service (*Official Bulletin*, 2009, 605, p. 48). In line with Dutch practices, the prohibition on making available professional and theatrical pyrotechnic articles concerned all stages of the product cycle, addressing next to manufacturers, also importers and distributors. However, in order to also keep products within category 2 and 3, understood as 'professional fireworks' away from consumers, use was made of the discretion flowing from Article 6(2) to justify restrictions and prohibitions on these products which should be further specified in a ministerial order for which the amended Fireworks Decree provided a legal basis.[47] On similar grounds – i.e. to transpose Article 7(3) and to keep specific pyrotechnics out of consumers' reach – discretion was used for the introduction of other prohibitions into chapter 3 of the Decree. It was also used to justify the continuation of restrictions emerging from chapter 2 on consumer fireworks.

The Ministry of Infrastructure and the Environment did not in all of the foregoing cases decide single-handedly on how to make use of discretion but consulted the European Commission on particular questions. Mapping out a problem and reporting it to the Commission has been described as the typical Dutch way to settle issues during transposition (Jordan and Liefferink, 2004: 142). This approach also shows in the present case. Vis-à-vis the Commission, the Ministry did not make any secret of the fact that, in light of national cultural customs and fireworks traditions, it wanted to maintain

46 See Appendix 1 of Regulation on the designation of consumer and theatrical pyrotechnic articles, *Government Gazette*, 2010, 11226.

47 Cf. Article 2.1.1. of the amended Fireworks Decree.

national safety standards and that to this end, discretion should be used for keeping in place prohibitions on specific sorts of flash bangers and other fireworks of the categories 2 and 3 of the Directive.[48] Taking Article 6(2) as a legal ground for enacting national restrictions was, however, not quite in line with the wishes of the Commission, which tried to encourage Member States to take such measures by basing them on the typology determined during the EU standardisation process. This way, the Commission wanted to ensure uniformity in restrictions to facilitate uniform enforcement as explained by the Commission civil servant interviewed. But since Article 6(2) made part of the compromise struck in the Council, the Ministry's use of discretion was, from a legal point of view, compatible with the Directive.

10.6.4 Minimum age and labelling requirements

The Directive included further discretionary provisions pertaining to age limits (Article 7) as well as labelling requirements (Article 12). No use of discretion was made in the former case. Apparently, it was neither seen as necessary to positively derogate from age limits for reasons of public order, security or safety, nor to negatively derogate from them in cases where people dispose of or undergo vocational training. In the latter case (Article 12), the minimum requirements for labelling pyrotechnic articles and theatrical pyrotechnic articles were transposed by adding those not already included to the provisions of the Decree (*Official Bulletin*, 2009, 605, p. 37).

10.7 Analysis

Up to this point various case study findings regarding the transposition of the Pyrotechnic Articles Directive have been presented. They shall now be further discussed in the explanatory analysis in order to illuminate the role of discretion.

10.7.1 Discretion-in-national-law

The *discretion-in-national-law expectation* implies that the more discretion is available, the better the Directive is incorporated into national law. Does the case of the Pyrotechnic Articles Directive confirm this expectation?

The first thing to note is that – and as verified in the interviews – the Directive, granted only little discretion, and even if discretion was present, it was not always used (e.g. derogation of age limits). And yet, discretion, in more than one respect, appeared to be a valuable 'glue' to stick

48 This becomes evident from the Ministry's letters on the subject of clarification of Article 6(2) of the Pyrotechnic Articles Directive which were sent to the European Commission in November 2007 and April 2008. These letters were made available to me by the senior policy officer interviewed.

EU and national rules together. One should not forget that directives, by design, grant discretion. Freedom in choosing how to transpose the Directive certainly contributed to the fact that differences in defining categories of fireworks leading to incongruences between the Directive and the Dutch Fireworks Decree did not obstruct converting EU rules into national law; incorporating even incongruent definitions / categories of the Directive into national legislation did not lead to breaking down legal structures but allowed for relatively 'harmless' additions to already existing rules, thus leaving national legislation for most parts intact. The use of discretion in transposing the Pyrotechnic Articles Directive seems to be like a text book example for illustrating the treaty considerations underlying the use of directives and therefore discretion: to shape EU integration by leaving intact Member States' fundamental constitutional structures, in short, their national legal identities. To this end, discretion was consciously used as reflected in the explanations of the decisions and choices taken in transposing the Directive which were made explicit in both the explanatory memorandum to the transposition measure and in the interviews.

Especially the use of the Directive's discretionary provision established in Article 6(2) as argued hereafter shows that discretion was used to shape solutions to overcome some incompatibilities between the EU and national legal arrangements. In order not to anticipate too much of the discussion, suffice it to say at this stage that discretion was used to alleviate discrepancies between EU and national rules pertaining to the definition and categorisation of fireworks as well as to introduce or maintain restrictions and bans on fireworks deemed unsafe and illegal. This way, discretion served to compensate for the lacking ban on products within category 4 fireworks – a proposal, which while being favoured by the Dutch and the delegations of other Member States had not made it into the final Directive text. As this example illustrates, the availability of discretion apparently helped to avoid deficient transposition of directive provisions that conflicted with Dutch interests.

Nonetheless, while a facilitating effect of discretion on the transposition of the Directive can be detected, the overall case study findings do not lend support to the first expectation. For one, this is because, for the expectation to hold true, it is presupposed that more discretion is available for transposition. The empirical results, however, do not square with this part of the claim. Furthermore, even if, as empirically shown, discretion contributed to fitting the Directive into the Dutch legal framework, it needs to be concluded that transposition was not achieved on time. In fact, the outcome of the Dutch transposition of the Directive was non-compliance with the latter's rules.

10.7.2 Discretion, administrative capacity and transposition actors

First of all, it is expected that administrative capacity raises the likelihood of proper transposition, but that this effect decreases as the degree of discretion increases (expectation 8). Second, it is claimed that with more actors being involved in transposition the likelihood of deficient transposition is increased and that this effect becomes stronger as the degree of discretion increases (expectation 9).

Turning to expectation eight the following relevant considerations can be presented. As noted further up, the Directive's technical complexity and lacking clarity flowing from parts of its content were mentioned by the Ministry as major reasons for failing to provide for the necessary transposition measures on time. This is interesting given the fact that – as established by the interviews conducted – the civil servant who transposed the directive had a profound knowledge of the dossier. The thorough motivation of choices as reflected by the explanatory memorandum to the key transposition measure as well as in the interview, do not point to a transposition process suffering from lacking knowledge of 'how to do it'. In addition, the civil servant in charge had closely followed the negotiations on the Directive which was, as he himself put it, conducive for the subsequent transposition process. Being the one responsible for both negotiation and transposition activities on behalf of the Netherlands, intra-ministerial coordination problems can also be excluded as a source of difficulties. The fact remains, however, that the Directive was delayed. All things considered, it therefore seems that the positive effect of administrative capacity on transposition was not strong enough to lead to proper (timely) transposition. Being granted by small degrees, discretion did not play any decisive role in this regard. In other words, expectation 8 does not hold true in the present case. What about expectation 9 which explains deficient transposition as resulting from an interaction effect of the number of transposition actors and a larger margin of discretion? This appears to be a more plausible explanation for transposition delay. While the Ministry of Infrastructure and the Environment remained mainly responsible for transposition, it had to take into account the specific interests from the Dutch Public Prosecution Service and this collaboration was time-consuming, as mentioned in the interview, leading to a slowing down of the overall process. Since discretion was only granted by little degrees, it is not very likely, however, that it enforced this impeding effect and contributed to delay. All this leads me to conclude that while the number of actors involved in transposition carries some relevance in explaining why the Dutch transposition of the Pyrotechnic Articles Directive was delayed, delay is not explained by an interaction effect of this factor and discretion.

10.7.3 Discretion, compatibility and disagreement

It is furthermore expected that compatibility between the EU directive and national rules raises the likelihood of proper transposition, and that this effect becomes stronger as the degree of discretion increases (expectation 7). This does not remove the fact that if compatibility is poor, transposition might be slowed down despite discretion being granted. In the present case, three transposition measures were devised for transposing the Directive into Dutch legislation. Does this indicate incompatibility between EU and Dutch rules and was this one reason for the belated transposition?

First of all, it cannot be denied that the Directive did not match Dutch legislation in all aspects. After all, the Netherlands did not have any ex-ante approval system nor a national mandatory conformity marking comparable to the EU's CE marking. It seems, thus, that the Pyrotechnic Articles Directive challenged national policy goals and practices. In contrast to the Dutch legal situation, the Directive allowed for the availability of fireworks to consumers which were in the Netherlands considered to be too dangerous. Additionally, it implied a different approach to defining types of fireworks. These two differences alongside the ex-ante approval system lacking in the Netherlands point to a policy misfit[49] between EU and national rules. From a legal point of view, however, levels of misfit were rather low. Based on the facts presented regarding transposition by means of the (amended) Fireworks Decree, I would describe legal misfit as limited (Steunenberg and Toshkov, 2009: 960). Despite the fact that the definition of 'limited legal misfit' departs from the idea of more than two transposing acts – whereas in the present case three transposition measures were devised – the other elements of the definition nevertheless appropriately describe the present case: the Directive was transposed by means of second and third order acts regulation (order of council) and ordinances (ministerial orders). What's more, these transposition measures amended already existing norms – those of the Fireworks Decree (amongst others national safety requirements). Another aspect which confirms that legal misfit can be considered as limited is presented by the fact that, as noted by the transposing Ministry, on the whole, the Fireworks Decree stayed largely unaltered. As furthermore shown by the analysis, rules of the Directive were often added or weaved into national legislation (e.g. rules on theatrical pyrotechnic articles; essential safety requirements). All in all, legal misfit seemed to have played a minor role in causing delay. On the other hand, policy misfit regarding safety levels – flowing from differences between the Directive and Dutch legislation as regards the definition and therefore availability of fireworks – certainly prompted the Public Prosecution Service to get involved which, as

49 The concept of policy misfit implies a mismatch between EU measures and national measures as regards elements of policy: e.g. policy goals, regulatory instruments, standards and problem-solving approaches. Cf. Börzel, 2005, pp. 49-50, also Börzel and Risse, 2000.

already mentioned, negatively affected the speed of transposition. This negative effect on transposition in the context of policy misfit could apparently not be compensated by positive effects from the interaction of good legal compatibility and available discretion. Put differently, even if EU and Dutch rules were quite compatible in legal terms and discretion facilitated to some extent the incorporation of the Directive into national law this joint effect alone did not suffice to make transposition timely. Therefore the expectation that compatibility together with discretion can contribute to proper transposition does not hold true in this transposition case.

Last but not least, the *disagreement interaction expectation* has to be addressed. It links the negotiation and transposition stages by positing that Member State disagreement with a directive's requirement during the EU decision-making process raises the likelihood of deficient transposition, and that this effect becomes stronger as the degree of discretion decreases. With respect to the present case, it cannot be denied that the Dutch delegation was not completely satisfied with the Directive proposal. Above all, introducing the envisaged ex-ante approval system implied administrative and financial burdens. However, the case study findings do not give conclusive support to the idea that previous disagreements with this or other Directive requirements in combination with little discretion being granted to realise them on national ground had impeding effects on the Dutch transposition of the Directive. Hence, it cannot be claimed that expectation 6 is of any relevance in the case under consideration here.

10.8 Conclusion

By way of conclusion, and similar to the outcome regarding the negotiations on the Pyrotechnic Articles Directive, discretion played a relevant role in the Dutch transposition of this Directive. The case of the Pyrotechnic Articles Directive, in fact, leads to a new insight into the relevance of discretion. The Pyrotechnic Articles Directive has a small scope of discretion, and yet discretion facilitated the transposition of EU rules into Dutch law. This suggests that discretion can have facilitating effects on national transposition even if it is granted by small degrees. Furthermore, the case study confirms the importance of taking into account other contextual factors which can interact with discretion and may account for transposition delay.

11 Waste Framework Directive

11.1 Introduction

In the following sections the Waste Framework Directive[1] takes centre stage. Its content, purpose, and background are mapped out and linked to the broader context of EU environmental law-making. The negotiations and Dutch transposition of the Directive are analysed and the role of discretion in both processes put under close scrutiny.

11.2 The directive

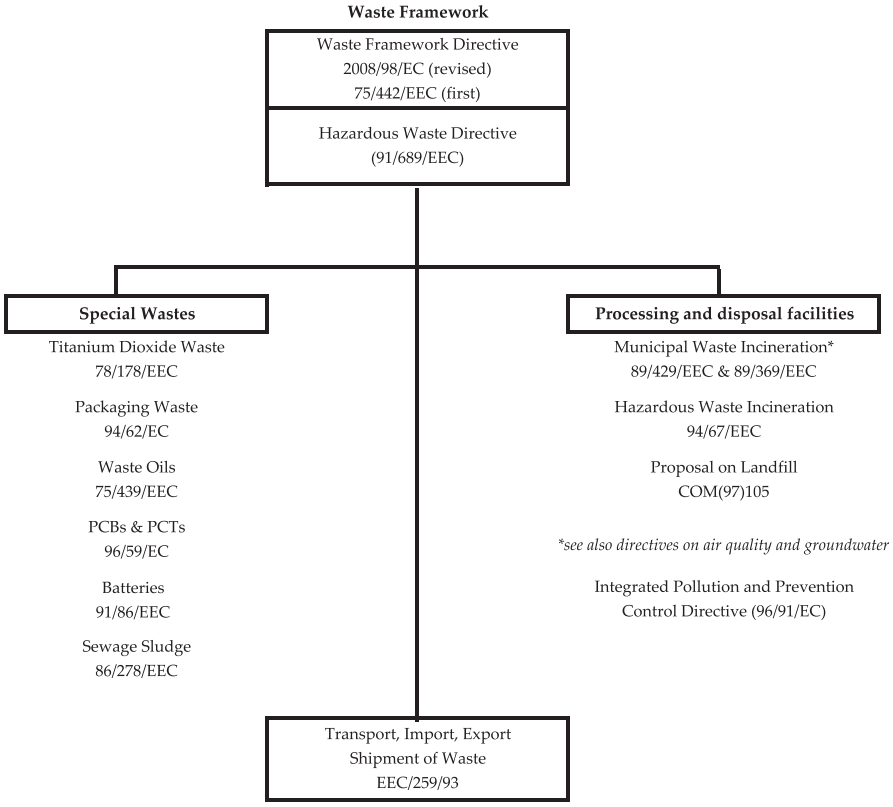
EU rules on waste management had already been in place for more than three decades when the new Waste Framework Directive was adopted in November 2008. Its predecessor, the 1975 Waste Framework Directive,[2] was one amongst the first legal measures taken at the EU level to protect the environment while at the same time it marked the beginning of EU legislation on waste. Before, waste management, and the responsibility for waste recovery in particular, had been in the hands of the Member States, with regulatory responsibility usually being vested at the local levels. But the diversity of national approaches to waste management started to obstruct the operation of the internal market (Oosterhuis et al., 2011: 350-351). The EU was lacking legislative competence in the area of environment by that time. Hence, the Directive was justified as necessary in the light of internal market integration. It was, however, also promoted to help improve the protection of the environment. In subsequent decades, EU waste legislation developed from a general legal framework, establishing laws and standards for landfills and incinerators, into a system addressing more specific issues such as waste recycling (Oosterhuis et al., 2011: 357). The Waste Framework Directive takes an overarching role in the body of EU waste legislation as shown in figure 4. Together with the Hazardous Waste Directive, the Directive lays down ground rules on which further waste management legislation is developed. In establishing these rules as well as key definitions for all other pieces of EU legislation relative to waste – it impacts all of them

1 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22 November 2008, pp. 3-30.

2 See Council Directive 75/442/EEC of 15 July 1975 on waste, OJ L 194, 25 July 1975, pp. 39-41. In the literature it is also referred to as Waste Framework Directive as it sets out the general lines for specific waste streams, elaborations on its provisions being provided by other directives. Cf. Oosterhuis et al., 2011, p. 362.

either directly or indirectly (European Commission, 2005). The Directive is linked to a number of specific directives, addressing special waste streams as well as processing and disposal facilities, and, finally, legislation which is enshrined in EU regulations. With only six EU Member States negotiating the Directive back then in the early 1970s and given the fact that Member States' legislation, in particular German, French and Italian law, served as blueprints for the EU measure, negotiations on the Directive were finalised within a year and therefore relatively swiftly (European Commission, 1995).

Figure 4: EU Waste Management



The same cannot be said about the negotiations on the 2008 Waste Framework Directive. For some reasons which are explained below, these negotiations were more cumbersome. The revised Directive was introduced as an important piece of EU waste legislation as it stood for a new approach to waste management. Its overall aim consisted in minimising the impact of waste on both human health and the environment, reflecting a shift from the Commission's medium specific approach towards a thematic approach which focuses on the link between the environment and health (Lenschow, 2010: 309). Core elements of the Directive concern the concept of a waste

hierarchy which prioritises waste prevention, and the idea of an entire life-cycle of products and materials, meaning that EU rules take into account the latter's production phase, and are not only confined to provide for regulation of the final, waste, phase (Article 4). Moreover, the Directive extends the principle of producer responsibility for waste generation to include the post-consumer stage of a product's life cycle (Article 8(1)) and promotes recycling and recovery by means of separate waste collection (Article 10(2)). In addition to that, it specifies goals for individual waste streams (Articles 17-22). Finally, it seeks to strengthen Member States' commitment to waste management and environment protection by obliging them to introduce national waste management plans and prevention programmes (Articles 28 and 29).[3]

In fact, the 2008 revised Waste Framework Directive was not a direct successor to the first Waste Framework Directive adopted three decades earlier. Changes within economic, social and technical circumstances, including the rising public awareness of the negative implications of waste, were amongst the reasons for previous amendment and codification of the Directive in 1991 and 2006 respectively.[4] In addition to that, by the end of 2005, the European Commission submitted a legislative proposal for a new Waste Framework Directive as a reaction to the problems of flawed implementation of EU waste legislation in the Member States. Deficient implementation was, however, not confined to EU waste legislation. During the 1990s it became increasingly clear to the Commission that this was a problem pertaining to EU environmental law as a whole. The treaty obliges Member States to finance and implement the environment policy (Article 174(4) TEC, now 192(4) TFEU). But while legislative output used to be high, implementation deficits have been a cause of concern and a reason for the reduced effectiveness of environmental measures (Jordan, 1999; Krämer, 2002: 177-178; Lenschow, 2010: 308). At the turn of the century, it was the area of environment which was found to have the highest implementation deficit among all other EU areas including the single market, transport and consumer affairs (Lenschow, 2010: 319). Bad implementation records seemed to oddly contrast with the EU's commitment to promote environmental protection and improvement.

3 BIO Intelligence Service (2011) Implementing EU waste legislation for green growth, final report prepared for European Commission DG ENV, Paris. Retrieved from: http://ec.europa.eu/environment/waste/studies/pdf/Coherence_waste_legislation.pdf (accessed 23 November 2015).

4 See Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste, OJ L 78, 26 March 1991, pp. 32-37 and Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, OJ L 114, 27 April 2006, pp. 9-21.

11.2.1 The area of environment

Lacking any legal basis in the treaties establishing the European Economic Community (EEC) (Lenschow, 2010), the environment is nowadays an area where the EU acts as a key legislative player. Environmental law covers all kind of aspects relating to the environment. It is based on a number of overarching principles (e.g. polluter pays, prevention and precaution principle) and uses various instruments which in recent times have taken the form of environmental agreements or market-based environmental policy instruments like pollution permits (Krämer, 2002; Lenschow, 2010). This also applies to EU waste legislation and the 2008 Waste Framework Directive in particular, which underlines the importance of economic instruments in the management of waste.[5] Among the more traditional (hard) law instruments, the most frequently used is the directive in the field of the environment (Collins and Earnshaw, 1992: 226): by mid-2011 more than 400 environmental directives had been adopted (Beijen, 2011). In the area of waste management, directives specify targets that Member States have to reach, introduce controls for the shipment or disposal of hazardous wastes, and aim to stimulate the use of cleaner technologies and encourage greater producer responsibility (Weale et al., 2000: 2). As regards the Waste Framework Directive, it is a central piece of legislation in the area of waste; other EU measures pertain to air, water, soil, and noise, amongst others.

The relevance of environmental matters for the EU is reflected by its institutional set-up. In 1981 the European Commission Directorate General on the Environment was established, having as its aim the protection, preservation and improvement of the environment. It was followed in 1990 by the founding of the European Environmental Agency[6] which provides information and support to environmental actors in shaping environmental policies. Environmental matters have regularly ranked high on the agenda of the Environment Council, being made up of national ministers responsible for matters pertaining to the environment. In addition to that, the European Parliament displays a high level of commitment in the area, showing for instance in its efforts, during the 1990s, to make implementation issues a more prominent topic on the EU agenda. Furthermore, its Committee on the Environment, Public Health and Consumer Protection has been described as 'one of the committees most involved in legislative procedures' (Lenschow, 2010: 312). Also with regard to waste management, the proactive approach of the European Parliament has contributed to the development of legislation in this area. For example, during the preparation of the Commission proposal for a revised Waste Framework Directive, the European Parliament stressed the importance of arriving at a clear distinction between the terms recovery and disposal of waste and underlined the necessity to

5 The relevance of economic instruments is for instance highlighted in recital (42).

6 Taking up duties in 1994, the EEA was established four years earlier in accordance with Council Regulation (EEC) 1210/90.

clarify the conceptual difference between waste and non-waste (European Parliament, 2004) – issues that were to become crucial matters in the later negotiations on the Directive.

The extension of the co-decision procedure to areas including the environment through the Treaty of Amsterdam (1999) has strengthened the role of the European Parliament. Since then it has been co-legislating on equal footing with the Council.[7] The position of the European Parliament has further been bolstered by the case law of the European Court of Justice, which, more generally, has enhanced the role of environmental law-making vis-à-vis the EU's internal market programme (Lenschow, 2010: 317-318).[8] Both fields of EU activities have, however, developed in close connection with each other (Weale et al., 2000: 7).

Contrasting with the role of the European Parliament is the marginal role of EU advisory bodies such as the Economic Social Committee and the Committee of the Regions in environmental matters (Krämer, 2002: 161). Finally, public interests are relatively well organised and represented due to the institutionalisation of environmental interests at both EU and national levels where interest groups seek to influence EU environmental decision-making as well as national implementation and enforcement by mobilising the public or by providing expertise (Lenschow, 2010: 318-319).

As witnessed with the development of environmental law-making from the early 1970s up to today, the environment has become an independent policy domain, whereas before, the objective to protect the environment was seen as a logical consequence of economic integration showing in the adoption of regulatory measures against air and water pollution which were based on provisions relating to the internal market in the EEC and subsequent European treaties[9] (Lenschow, 2010). At regular intervals the European Commission has set out objectives and principles in environmental action programmes, the first one being adopted in 1973. Important developments in the legislative sphere only set in, however, by the end of the 1980s not least because of the growing concern about harmful consequences of both the economic development and waste growth for the environment (Lenschow, 2010: 306). For the establishment of the legal framework, the

7 In fact, co-decision applied earlier but only to environmental measures related to the internal market. Environmental law-making not being linked to it, was still subjected to the principle of unanimity and consultation with the European Parliament. See Lenschow, 2010, p. 307.

8 In the 'Danish bottle case', the Court ruled that the principle of free movement can be subordinated to Community environmental objectives; see case C-302/86, Commission v Denmark [1988] ECR 4607. Furthermore, the Court strengthened the European Parliament's participation in legislative procedures as follows from the Titanium Dioxide case. See case C-300/89, Commission v Council [1991] ECR I-02867. Cf. Lenschow, 2010, p. 317.

9 See the 'internal market provisions' as laid down in Article 95 TEC (now Article 114 TFEU), in particular Article 95(3): The approximation of national rules for the purpose of market integration should consider measures to ensure the protection of the environment.

Single European Act proved decisive: it introduced qualified majority voting linked to internal market harmonisation (Article 100a). Additionally, it introduced into the EEC legal framework, by means of 130R-T (now art. 191-193 TFEU), a title on the environment which was detached from the internal market provisions. Furthermore, the legal and institutional changes brought about by the Maastricht (1993) and Amsterdam (1999) treaties were important for the development of EU environmental law-making. While the former treaty established environmental protection as an EU objective (Article 2 TEC) and further extended qualified majority voting in the council, the latter made co-decision applicable to environmental matters as referred to in Article 175 TEC (ex Article 130s, now 192 TFEU). Furthermore, the Amsterdam Treaty also emphasised the need for integrating requirements for the purpose of environmental protection and sustainable development into the Union's policies and activities (Article 6 TEC, now 11 TFEU). In this respect, the European Commission stressed that waste management is essential in the EU's drive to sustainable development and the Commission has consequently urged Member States to provide for more efficiency and consistency in the implementation of corresponding EU measures (European Commission, 2011).

It was already noted that the national implementation of EU environmental law, including EU legislation on waste, has been beset with problems. To explain this shortcoming, various reasons have been identified (Collins and Earnshaw, 1992; Knill and Lenschow, 2000; Jordan and Liefferink, 2004; Börzel, 2007). The causes have largely been ascribed to features of the national implementation settings such as administrative shortcomings which refer to both the capacity and coordination problems of the implementing authorities. National legal cultures are mentioned as another cause of problems in implementation, showing in the fact that Member States take different approaches to environmental regulation than foreseen by corresponding EU legislation. Apart from these reasons, also lacking willingness on the part of the Member States to properly apply EU law as well as lacking precision in the wording of directives, environmental ones in particular, have been identified as causing deficient transposition and misapplication (Krämer, 2002: 165-166; see also Falkner et al., 2005; Beijen, 2011). Willingness and especially administrative capacity are prominent features that are used in the academic debate to distinguish between the so-called environmental 'leader' and 'laggard' states (Börzel, 2003; Wurzel, 2008). This analytical distinction represents an attempt to explain the phenomenon of better implementation performances of the economically advanced Northern European States vis-à-vis the poor implementation results booked by their less wealthy counterparts in the South. But it also makes obvious the simple fact that environmental interests differ between the North and the South of the EU's territory, mostly due to differences of geography and climate (Lenschow, 2010). The Netherlands have traditionally been considered as an environmental leader or 'green member state' which takes advanced measures regarding a number of environmental issues, including the man-

agement of waste. Additionally, it has a good environmental implementation record (Liefferink and Andersen, 1998; Liefferink and Van der Zouwen, 2004).

There has been an increasing awareness amongst the EU institutions – above all the European Commission – that gaps in implementation related to EU waste legislation are symptomatic of the general problem of non-compliance in the area of EU environmental law as a whole. Owing to this problem of non-compliance, the Commission has, since the late 1980s dedicated special attention to this matter in its environmental action programmes (Collins and Earnshaw, 1992).[10] What about the Member States? As a matter of fact recognising that more environmental measures have not necessarily been matched by better quality of the environment, Member States have not been sitting on their hands. Pooling together their respective experience and know-how in the framework of the European Network on the Implementation and Enforcement of Environmental Law (IMPEL) (Krämer, 2002), Member States share the common wish to improve their environmental performance. IMPEL is an informal forum for mutual exchange of experiences and best practices which was acknowledged as an important instrument in improving implementation by both the European Commission and Council in the course of the 1990s (IMPEL, 2010).[11] Being made up of representatives of the Commission and national as well as local authorities and allowing for the exchange of experience and best practices, it has sought to strengthen both the ability and commitment of national implementers to obligations and objectives laid down in EU environmental law (Lenschow, 2010: 320). In the past, the IMPEL Framework has also been used for cooperation between Member States, including the Netherlands, regarding the implementation of obligations flowing from the revised Waste Framework Directive.[12]

10 4th Environmental Action Programme (EAP) (1987 – 1992) [COM(86) 485 final], 5th EAP (1992-2002) [COM(92) 23 final], and 6th EAP (2002-2012) [COM(2001) 31 final].

11 See Commission and Council positions regarding the implementation and enforcement of Community environmental law: Communication from the Commission - Implementing Community Environmental Law, COM(96) 500 final, Brussels, 22 October 1996 and Council Resolution of 7 October 1997 on the drafting, implementation and enforcement of Community environmental law, OJEC, C 321, Brussels, 22 October 1997. See also 'About Impel. History, Mission and Achievements' (2012), available at: http://impel.eu/about/history/ (accessed 1 May 2015).

12 The Impel project focusing on Article 34(1) of the Directive (rules on inspections) has been based on a draft Action Plan of the European Commission which has aimed to combat illegal waste shipments by applying a consistent and uniform approach including integrated controls at the various stages of generation, collection and shipment of waste. See 'Impel Projects' (2012), available at: http://impel.eu/projects/waste-sites-phase-2/ (accessed 1 May 2015).

11.2.2 Purpose and background to the directive

Deficiencies in the implementation of the Directive resulted in a number of court proceedings and rulings[13] and not even the Directive's amendment in 1991 did anything to alter this development. Implementation practice suggested that regional differences in interpreting and applying the Directive were still prevalent, creating situations of legal uncertainty, with various problems for economic operators and competent national authorities as a result (European Commission, 2005a). To revise the Waste Framework Directive after it had been subjected to codification in 2006 was prompted by the Commission's desire to establish the EU as a credible and reliable actor in the field of waste management (European Commission, 2005a). And there were other reasons and objectives motivating the proposal.

To start with, the Commission was aware that the problem of deficient implementation of the Waste Framework Directive was partly 'homemade', being grounded on the fact that the Directive displayed flaws: the text of the 1975 Directive lacked clarity and overlapped with other pieces of waste legislation which caused unnecessary regulatory and administrative burdens (European Commission, 1995). Already in 2002 the Commission had pointed to the need of reviewing and elaborating on EU waste legislation.[14] Next to updating and revising already existing legislation – in line with the Commission's better regulation programme[15] aiming to simplify EU legislation – another goal was to shift the task of organising waste management from the national to the local levels. All these measures should contribute to more effective and consistent implementation, and hence alleviate problems with deficient transposition and practical application and enforcement of EU rules on waste management. Finally, the Commission proposal intended to answer the ongoing challenge posed by the growth in waste. By the end of 2005, at the time that the Directive proposal was submitted, high amounts of waste placed a heavy burden on recycling, landfill and incineration, making it obvious that waste was increasing proportional to the growth of the economy (European Commission, 2005c). The Directive was intended to put a halt to this development by prescribing national waste prevention programmes which should break the link between economic growth and the environmental impacts associated with the generation of waste.[16]

Probably due to its key role in the EU's corpus of legislation on waste – in setting the definitions and ground rules for all other pieces of EU legislation related to waste – the Commission's proposal for a revised Waste Frame-

13 See infraction proceedings resulting from breaches of the 1975 and 1991 Waste Framework Directives: case C-494/01, Commission v Ireland [2005] ECR I-3331 and case C-270/03, Commission v Italy [2005] ECR I-5233.

14 Cf. 6th EAP (footnote 234).

15 The Commission's better regulation programme is closely linked to its better law-making initiative which preceded the programme. See Haythornthwaite, (2007) 'Better Regulation in Europe', in S. Weatherill (ed.), *Better Regulation*, pp. 19-26. Oxford: Hart Publishing.

16 See Article 29(2) of the Directive.

work Directive envisaged to revise and repeal the 1975 predecessor without, however, fundamentally changing its structure. The former Directive should, instead, be refined and the definitions clarified, in particular those that are of key importance for other pieces of EU waste legislation, above all explanations pertaining to 'waste'. The novel strategy established by the revised Waste Framework Directive was that, in contrast to earlier legislation, the focus was now on waste prevention and the recycling of waste and the long-term goal of developing a European recycling society.[17] In formal terms, the 2008 Directive represented a new directive repealing other waste directives on Hazardous Waste and Waste Oil (*Parliamentary Papers II* 2009/10, 32392, no. 3, p. 3).[18] Content-wise, however, the revision drew on the latter directives by integrating pertinent parts of them into one measure, thereby merging them with the latest framework Directive[19] (European Commission, 2005a, p. 3). Based on Article 175(1) TEC (on environment), the Commission tabled the proposal for a revised Waste Framework Directive for discussion in the Council of Ministers alongside the so-called thematic strategy on the prevention and recycling of waste which had already been announced in the Commission's 6th environmental action programme. The strategy laid down guidelines for EU activities and ideas on how to improve waste management throughout the Union, with the overall aim of reducing waste, stimulating treatment activities like re-use, recycling, and the recovery of waste. The two instruments, the strategy and the Directive, should work complementary to each other: the thematic strategy established the Commission's political guidelines and provided an overview of its philosophy regarding waste management, while the objective of the Directive proposal was to translate the strategy into concrete legal measures which should serve to reduce general environmental impacts resulting from the generation and management of waste as well as the use of resources. Moreover, Member States should take measures to prevent and reduce the production of waste, including its harmful effects and, additionally, they should carry out waste recovery activities by means of re-use, recycling and other recovery operations (Article 1). Preparations of both measures, the thematic strategy and the Directive proposal, included several rounds of consultations involving experts and stakeholders from Member States as well as the drawing up of an impact assessment of the draft Directive (European Commission, 2005a; 2005b). But despite extensive preparations for working out a common basis, the negotiations on the Directive were no easy matter.

17 As repeatedly stated in the Directive's preamble and mentioned in Article 11(2) of the revised Waste Framework Directive.

18 Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, OJ L 377, 31 December 1991, pp. 20-27 and Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, OJ L 194, 25 July 1975, pp. 31-33 are meant here. Since the Directive is, formally speaking, a new Directive, the terms 'revised' and 'new' are both used.

19 See Directive 2006/12/EC.

11.3 Negotiations

Alongside the range of the objectives just mentioned, the Commission considered both the cross-border dimension of waste management and the aim of guaranteeing a fully functioning internal market as well-founded justifications for the need to revise the Waste Framework Directive (European Commission, 2005a). The corresponding proposal was transmitted to the European Parliament and the Council on 26 December 2005 for adoption by the co-decision procedure (Article 251 TEC, now Article 294 TFEU).

Table 12: Timeline for negotiations on the Waste Framework Directive

21 Dec 05	Adoption by Commission proposal
05 July 05	Committee of Regions opinion
13 Feb 07	European Parliament opinion on 1st reading
20 Dec 07	Adoption of common position by Council
17 Jun 08	European Parliament opinion on 2nd reading
20 Oct 08	Approval by the Council of the European Parliament amendments at 2nd reading
19 Nov 08	Formal adoption by Council and European Parliament

On 20 October 2008 the Directive was adopted, at second reading and by a qualified majority with the Irish delegation abstaining (Council of the European Union, 2008b). Negotiations started off in the first months of 2006, prior to the Council on the Environment in early March, and gained momentum in the second half of the year under the presidency of Finland. All in all, the negotiations took two and a half years, proving to be lengthy and difficult (see table 12).

The proposal was treated as a controversial issue (B-item) and remained as such on the Council agenda for the whole period of negotiations. As noted by the interviewee, all parties involved took great pains to avoid letting the negotiations on the Directive enter a third reading. The cumbersome nature of the process resulted from the fact that not only among Member States' opinions on the proposal differed. Insights gained from the interview and the study of the negotiation documents revealed that the European Parliament and the Council held divergent views on specific aspects of the Directive. The overall conflict was sparked by the question whether or not the incineration of municipal solid waste could be considered as energy efficient and therefore as a recovery operation (Council of the European Union, 2007a, 2007b). Next to several other Member States, such a viewpoint on recovery operations was taken by the Netherlands who already had a corresponding policy in place. But unlike the Member States in the Council, the European Parliament did not believe that incineration

along the lines of high standards would in practice be feasible to realise in the entire EU and therefore feared that air pollution would increase as a result (interview). Be it as it may, the fact remains that from both the European Parliament and the Member States many suggestions were forwarded which resulted in substantial amendments of the proposed Directive. But what was the position of the Dutch Government towards the Commission proposal?

11.3.1 Dutch position

From the viewpoint of the Dutch Government, the Commission's initiative to tackle the waste issue at European scale seemed to come at the right moment. In fact, the EU's plans regarding a revised Waste Framework Directive and Thematic Strategy on waste prevention and recycling reflected a number of points that had also turned out to be relevant in national debates, centring on the question of how to handle waste disposal. Cases in point include the need for waste prevention and the clarification of legislation for the purpose of practical application. Besides, the measures proposed by the Commission were found to be in line with the approach to both the waste management and the objectives of national projects and programmes, in particular the national waste plan (Landelijk Afvalbeheer Plan, LAP) setting out the agenda for Dutch waste management for the decade of 2002-2012 (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 33). What's more, as it addressed a European-wide problem, the Dutch Government could well identify with the aspects of the Commission proposal. As a matter of fact, the proposal picked up on aspects that played a significant role at the national level. Until the late 1980s waste had not ranked high on the political agenda of the previous Dutch Governments. But due to the low standards for the organisation of landfills and operation of incinerations causing damages to the environment, Dutch politicians felt compelled to change course. As a consequence, several measures were taken to alleviate the problems resulting from the failures of waste management. Examples of these measures concerned the introduction of producer responsibility obligations in relation to the generation and management of waste and the foundation of a body for exchange of information between the national, regional and local authorities on waste-related questions.[20] In spite of the fact that these measures brought about a temporary improvement, they fell, however, short of permanently and effectively tackling the problem of increasing waste. Waste growth turned into an issue of national concern (Oosterhuis et al., 2011: 349). Notwithstanding the slight decrease in waste around the turn of the millennium, in 2008 the same amount of waste was reached as in 2000 (Oosterhuis et al., 2011: 367-368). Hence, the issue

20 Meanwhile, operating under a different name, this consultation forum was founded in 1990 under the name Afval Overleg Orgaan.

of waste management became one of the most relevant ones for the Dutch Government (Backes et al., 2006).

Against this backdrop, it is not particularly surprising that the Directive proposal was seen in a positive light on the part of the Dutch Government and in particular by the Dutch Ministry of Infrastructure and the Environment, chiefly being in charge of preparing and participating in the negotiations on the proposal. Especially the idea of the Commission to modernise its approach to waste management, including the key definitions of 'waste', 'disposal', and 'recovery' was approved of – not only by the Dutch Ministry but by most Member States as well as the waste industry: the clarification and simplification of legislation could contribute to the effectiveness of the measure and therefore be conducive to both environmental protection and legal certainty for economic operators. Moreover, the integration of waste-related directives into one measure was expected to decrease administrative burdens, easing, for example, reporting obligations regarding the status of implementation of EU legislation (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 31; 32). Furthermore, the Ministry pointed out that the Directive proposal did not only match Dutch preferences because it emphasised the need for waste prevention. The proposal also promoted recovery operations, above all the re-use of certain waste, which was seen as an advantage for the Dutch industry in that sector (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 30; 34). Since the 1980s re-use has formed an integral part of waste management in the Netherlands. It has formed an essential part in a specific sequence of waste management activities applied for the treatment of waste which was introduced by the Government to combat waste more efficiently (Van Dijk et al., 2001).[21] This priority order of Dutch waste management activities resembled, in fact, the waste management hierarchy suggested by the Commission in its proposal for the revision of the Waste Framework Directive. Finally, the plans for revising this Directive appeared promising in economic respects. It might benefit the Dutch waste industry, and, in particular, those Dutch incineration plants with high energy efficiency. In line with Article 19(4) of the Directive proposal, these plants were expected to be classified as recovery plants, resulting in the extension and strengthening of the market position of the Dutch waste management industry within the European Community (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 30).

21 The Dutch order for waste management is known as 'Ladder of Lansink', including the following steps in waste treatment: prevention, element reuse, material reuse as well as useful application, incineration with energy recovery, incineration, and landfill. The 'ladder' has been extended to take account of more waste treatment options meanwhile developed and is now referred to as 'Delft ladder'. Cf. Van Dijk et al. (2001) 'Strategy for reuse of construction and demolition waste role of authorities', *HERON* 46(2): 89-94.

11.3.1.1 Other positions

The revision of the Waste Framework Directive was widely supported and claimed by the Member States – waste growth and disposal were both matters of common concern. A few issues were nevertheless raised and from Member States' reactions to specific aspects of the proposal, similarities but also differences of national approaches to the management of waste became obvious. For instance, several Member States including the Netherlands, Bulgaria, Italy, and Spain considered the definition of waste as 'any substance or object which the holder discards or intends or is required to discard' as too broad and lacking clarity. Furthermore, although the Commission's aim to simplify waste legislation was approved of, some Member States such as the Czech Republic, Italy, and Spain feared that this would decrease legislative quality and eventually have negative repercussions for the environment. In the context of simplification of legislation, also the repeal of the Waste Oils Directive was, for different reasons, seen by some Member States such as Hungary, Italy and Portugal as entailing risks whereas the United Kingdom and Finland fully supported the Commission's steps in this regard.

Also the European Parliament was not entirely satisfied with the Commission proposal. While the latter introduced the core idea of a waste management hierarchy prescribing a sequence of treatment operations in the detailed explanations of the proposal, an explicit reference to it in the substantive provisions of the Directive was missing and clarity lacking as to the conditions under which Member States would be able to depart from it (European Parliament, 2006, p. 64). The proposal was examined by two of its committees: the Committee on the Environment, Public Health and Food Safety and the Committee on Industry, Research and Energy. While the former did not have much to criticise about the Commission's attempts to simplify legislation, the latter took the view that the Commission had not fully succeeded in improving the Directive. Dissatisfaction was voiced regarding the definitions and scope of the Directive (European Parliament, 2006, pp. 64-67). According to the Committee on Industry, Research and Energy, the definitions provided in Article 3 of the Directive raised concerns among both the Member States and waste sectors. It was feared that legal uncertainty would be increased instead of being diminished. In its own words, the Committee took the view that the proposal 'while seeking to remedy some deficiencies, has added others.' To make up for this, the Committee added a number of additional definitions pertaining to key terms in waste management such as disposal and recovery. Additionally, it added definitions related to environmental standards (e.g. best available techniques). These amendments should increase both the clarity and precision of the draft Directive (European Parliament, 2006, pp. 17-25). Furthermore, the European Parliament shared Member States' concern that simplifying legislation by means, for instance, of repealing the Hazardous Waste Directive – would be at the expense of high environmental protection standards and therefore have adverse effects on public health and safety. Its amend-

ments to the proposal reflect the wish to see greater attention being paid to that matter. By suggesting, for example, to amend the Directive's subject matter,[22] the European Parliament put emphasis not only on waste prevention but it also sought to underline the necessity to protect both the environment and human health from the negative impacts of waste and waste treatment (European Parliament, 2006, p. 13). Likewise, the European Parliament's suggestions regarding the procedure of re-classification of hazardous waste as non-hazardous waste or the traceability and control of hazardous waste – to mention just a few examples – were taken over in the final Directive (European Parliament, 2006, p. 34; 36).[23]

Finally, returning to the Member States, some of them criticised the procedural measures envisaged under the Directive proposal. This concerned, in particular, the Directive's scope of implementing powers conferred to the Commission under the comitology procedure which was found as too broad according to a group of Member States including Denmark, France, Hungary, Finland, Portugal, and Latvia. It was advocated that the conferral of implementing powers to the Commission for further specification of particular aspects, such as the Directive's scope and definitions, should be precisely circumscribed, if not replaced by the co-decision procedure, implying that the elaboration of directive requirements should be left to the Member States.

11.3.2 Flexibility

The latter aspect concerning the distribution of competences between the Commission and the Member States is linked to the issue of legislative discretion and in this regard it is relevant to note, that Member States where explicitly asked by the General Secretariat of the Council to share their views regarding the question whether or not the proposed measure provided appropriate flexibility for implementation.[24] Opinions on this matter diverged. While some Member States held the view that the proposal made sufficient flexibility available (e.g. Hungary and Finland) others doubted that the Directive proposal granted enough discretion to Member States (e.g. Spain, theUnited Kingdom). Then again there were those Member States that preferred to have more binding rules (Czech Republic). Poland and the United Kingdom represented the opposite ends of the spectrum: Poland was convinced of the general suitability of having uniform standards for waste management. It advocated the further harmonisation beyond what was suggested by the proposal to ensure legal clarity and to prevent misinterpretation and misapplication of EU rules on the manage-

22 See Article 1 of the final Directive.

23 See Articles 7(4) and 17.

24 The corresponding question reads as follows: 'Will the development of guidelines and common standards at EU level leave the appropriate flexibility for Member States to implement measures at national level?' Cf. Council of the European Union, 2006a, p. 5.

ment of waste (Council of the European Union, 2006b, p. 31). The United Kingdom, on the other hand, disapproved of more harmonisation, doubting the conduciveness of minimum standards for encouraging waste recycling. Furthermore, it emphasised that the national authorities would be the more suitable actors to fulfil certain tasks such as assessing the risks entailed by recovery operations or imposing permit conditions for undertakings of waste treatment operations. These tasks were, however, amongst those that should, according to the proposal, be delegated to the Commission under the committee procedure (Council of the European Union, 2006b, pp. 47-48).

The Dutch Government did not express any disapproval regarding the scope of discretion which the Commission proposal envisaged to grant to Member States. On the contrary, the Ministry of Infrastructure and the Environment found the proposed measure, including both the thematic strategy and Directive proposal, proportionate and in accordance with the subsidiarity principle. The Ministry pointed out that the proposal enabled Member States to take into account national, regional and local characteristics by involving them in the drawing up of waste management plans and programmes. It apparently found that sufficient discretionary room was available for the implementation of the Directive (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 31). Discretion was additionally provided by the possibility to introduce stricter requirements regarding treatment operations for reasons of protecting the public health and the environment (Article 25 later 27), and the view was taken that minimum harmonisation more generally might move standards for waste management within the EU upwards and therefore closer to those high standards already established in the Netherlands. This was expected to improve the latter's market position within the waste management sector (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 33). Furthermore, the Dutch Government pointed out that both the trans-boundary character of waste management and the rulings of the European Court of Justice – the latter being considered as limiting the discretionary room for manoeuvre of national governments – would make the revision of EU legislation necessary and desirable (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 31). Finally, as pointed out in the interview, the Government's approval of the proposal also stemmed from the fact that the proposed EU requirements largely matched with Dutch waste legislation. This match was partly the result of lobbying activities pursued by the Ministry of Infrastructure and the Environment to influence the Commission's preparations of the Directive proposal (interview).

How did the European Parliament finally react to the proposed distribution of competences? From its legislative resolution the picture emerges that it sought to ensure harmonisation where it considered it necessary for attaining the Directive's objectives. To give an example, regarding the proposed registration requirements for waste establishments and undertakings (Article 25), the European Parliament objected to the conferral of discretion upon Member States by pointing out that minimum standards might lead to diverging requirements throughout the EU. This, the European Parlia-

ment pointed out, was 'undesirable in the interests of harmonisation' (European Parliament, 2006, p. 44). In order to have the same qualitative requirements for establishments and undertakings carrying out waste treatment operations applied by all Member States, it advocated the formulation of registration requirements instead of introducing minimum standards. More interesting, alongside some of the Member States, the European Parliament did not agree with the scope of implementing powers conferred upon the Commission. It took the view that the application of the comitology procedure should be confined to the technical adaptations of EU legislation, and hence should not concern other tasks beyond this area of responsibility. What's more, the European Parliament saw the granting of discretion to the Commission as representing an 'inappropriate encroachment on democratic decision-making' (European Parliament, 2006, p. 65). To increase both the transparency and legitimacy of the proposed procedures, the European Parliament wished to reduce the scope of the comitology provisions by subjecting some of the aspects mentioned therein to decision-making by co-decision (such as the determination of criteria for recovery operations). Likewise, the local communities were considered to be more suitable actors than the EU-level committees, to decide upon certain matters of the Directive, such as the content and format of the envisaged waste plans. Finally, the European Parliament objected to the Commission's scope for action regarding disposal operations and registration requirements for waste establishments and undertakings. According to the European Parliament, amending these requirements should not be left solely to the Commission. Only upon consultation with the Member States and relevant stakeholders (e.g. pyrotechnics industry), the Commission should be able to take action in this matter (European Parliament, 2006, pp. 65-66).[25]

11.3.3 Scope

Even though the Dutch Government generally supported the Commission proposal, one issue of concern to the Ministry of Infrastructure and the Environment, and in particular the Ministry of Transport, Public Works and Water Management pertained to Article 2 regarding the scope of the proposed Directive. The Article established that certain substances and objects, albeit falling under the definition of waste, were excluded from the framework of the Directive proposal to ensure either their undisturbed use or

25 Interestingly, in the later debate on the transposition of the Waste Framework Directive, criticism regarding the scope of implementing powers being conferred upon the Commission was also raised by domestic actors in the Netherlands. Members from the Dutch Democratic Party and representatives of the Dutch regional authorities (united in the Association of Dutch Municipalities) preferred the greater use of the co-decision procedure instead of applying the committee procedure (comitology) to elaborate the Directive. Cf. *Parliamentary Papers II* 2009/10, 32392 and VNG (2006) *VNG standpunt. EU Thematische Strategie inzake afvalpreventie en afvalrecycling. Herziening EU kaderrichtlijn betreffende afvalstoffen*, The Hague: Vereniging van Nederlandse Gemeenten.

because they were already addressed by other EU legislation. The Dutch authorities, however, were concerned that despite these exclusions from the Directive's scope, not enough discretionary room would be left for the specific Dutch approach to deal with the consequences of floods and droughts by using non-hazardous sediments. For this reason the Dutch delegation, being joined by the Danish delegation, advocated the explicit exclusion of non-hazardous excavated sediments from the remit of the Directive to bring the proposal into alignment with national provisions (Council of the European Union, 2006b). In line with this request the final Directive establishes in Article 2(3) that 'sediments relocated inside surface waters for the purpose of managing waters and waterways or of preventing floods or mitigating the effects of floods and droughts or land reclamation shall be excluded from the scope of this Directive if it is proved that the sediments are non-hazardous'.

11.3.4 Definitions

The Dutch Government shared the view of other Member States that the definition of waste, despite the Commission's efforts to improve it, was still lacking clarity. For the Government the clarification of the term was, however, very important since insufficient clarity had caused problems for the Dutch authorities in the application of waste legislation, and the EU regulation regarding the shipments of waste, in particular (interview).[26] But this aim was only partly achieved by the proposed revision of the Waste Framework Directive as pointed out in the interviews. In fact, if compared to previous definitions, the definition of waste provided by the Directive proposal had not undergone a fundamental change.[27] Nevertheless, by specifying what was not or should not be part of the notion of waste, for instance by introducing the definitions of 'by-products' and 'end-waste-status' of products, some clarification was provided.[28] These new terms were defined as follows: A substance or object generated by a production process may under certain conditions be regarded as by-product – and therefore not waste – if there is certainty about its further use or due to other conditions mentioned in the Directive (Article 5(1)). Waste ceases to be waste (with waste being defined as a substance or object the holder disposes of or intends or is required to dispose of) after having been subjected to a recovery or recy-

26 Cf. Regulation (EC) No. 1013/2006 of the European Parliament and of the Council on shipments of waste.
The interviewee pointed out that the Ministry and the Dutch Council of State differed in their interpretations of the definition.

27 See the similar formulations of the definition in both 1975 Waste Framework Directive and its 1991 amendment. One difference between the former and the latter Directive should be mentioned. The 1991 amending Directive determined that categories of waste are further specified by the Commission (comitology procedure) whereas the 1975 Directive leaves further clarification to national legislation.

28 See Articles 5 and 6 of the revised Waste Framework Directive.

cling operation. In addition, it ceases to be waste if it meets criteria which are developed in compliance with the conditions set out in the Directive such as, amongst others, the existence of a market or demand for the substance or object concerned.

It took a while and some efforts until agreement was reached on the final formulations of the relevant Articles. Member States were divided about the content of the two terms. What's more, the Council and the European Parliament held different views on this subject (see for instance Council of the European Union, 2007c and Council of the European Union, 2007d). To take the example of by-products, the Dutch delegation and the delegations of Italy, France, Poland, and the United Kingdom, amongst others, urged to formulate clear rules concerning this issue. The need was stressed for addressing it within the main part of the Directive instead of subjecting it to comitology. In addition to that, the Dutch delegation advocated introducing another requirement which was expected to guarantee that by-products did not fall under the category of waste and could be used for other purposes (Council of the European Union, 2007c; 2007e).[29] However, the Dutch request was not taken up. Instead of additional requirements clarifying the definition and uses of by-products, the Commission supported by, amongst others, Belgium, Denmark, Romania, and Finland favoured the drawing-up of interpretative guidelines. It was argued that these guidelines would take into consideration the relevant interpretations of the European Court of Justice on this issue. Furthermore it was pointed out that they would provide guidance to the national competent authorities in deciding whether or not a certain material qualifies waste (Council of the European Union, 2007c, pp. 9-10). In general, these guidelines were considered as a better means to improve the legal certainty of waste legislation. The Commission, anticipating that a compromise on the definition of by-product would not necessarily provide for more clarity, had already prepared a communication to this end (European Commission, 2007).

The Dutch delegation furthermore sought to achieve a sharper outline to the proposed definition and distinction of the terms 'disposal' and 'recovery' offered by the Directive. These terms are used in a number of provisions such as those concerning permits for waste undertakings and the classification of incineration facilities as recovery or disposal operations.[30] Due to already established national practice, the Dutch delegation strongly supported the idea that energy from waste should be included as a criterion for recovery. Contrary to this request, this criterion was, however, not part of the requirements for waste undertakings in obtaining a permit. Apparently, sufficient support was lacking for the Dutch request, possibly owing to the fact that the Dutch initiative was seen by some Member

29 This requirement included the introduction of an environmental license for the permission and specification of production processes. Cf. Council of the European Union, 2007f, p. 10.

30 Cf. Article 19 of the Directive proposal and Article 23 of the final Directive, respectively.

States as putting their domestic industries at a disadvantage: making this criterion obligatory, would have led to the immediate shutdown of all non-compliant plants (interview).[31] Nevertheless, probably due to the wishes of the Dutch delegation and others, some specifications of recovery operations were eventually incorporated into the list of recovery operations provided in the Annex II to the Directive (Council of the European Union, 2006c). In the interview it was, however, underlined that a compromise on further important specifications of the definitions of recovery and disposal could not be achieved within the Council. This issue was therefore delegated to the Commission (Article 38 of the Directive).[32] Apparently the delegation of discretionary implementing powers to the Commission served to avoid too lengthy debates on this matter. In the words of the civil servant interviewed, 'once the decision was made to let technicians discuss the issue under the comitology procedure, it no longer represented a controversial issue in the need to be solved within the Council negotiations.'

In its role as co-legislator also the European Parliament expressed its view on how to formulate rules on different waste treatment activities such as recovery, recycling, and the disposal of waste without, however, taking a clear stance, as it seems. The European Parliament acknowledged the relevance of recovery and recycling in the treatment of waste from both an environmental and economic point of view. And yet, in the light of efforts towards the reduction of energy expenditures, and the possibility to produce energy from waste, it pointed out that the disposal of waste should not be excluded as a waste treatment activity but, instead, be considered, as an alternative to recycling operations (European Parliament, 2006, p. 67).

11.3.5 Waste prevention plans and programmes

The Commission proposal obliged Member States to establish waste prevention plans and programmes.[33] Waste management plans should include an analysis of the actual situation of waste management in the entire territory of a Member State and the measures envisaged for the treatment of waste taking into account the priority order (prevention, reuse etc.) as defined by the proposed waste hierarchy. Waste prevention programmes, functioning as integral parts of these plans or individually, should state objectives for the purpose of waste prevention and assess those prevention measures that should be taken to achieve these objectives. Member States were furthermore required to determine specific qualitative and quanti-

31 See in this respect also the first reading debate of the European Parliament. See Council of the European Union, (2007d).

32 The Article allows the Commission to develop interpretative guidelines and to specify corresponding parts of the Directive's Annex that relate to this matter.

33 Corresponding rules were laid down in Article 26 (waste management plans) and Articles 29-31 (waste prevention programmes) corresponding with Articles 28, 29 and 30 of the later Directive.

tative targets and indicators for monitoring and assessing the progress of individual measures (Article 30).

The requirement to draw up waste management plans and programmes met with different reactions in the Council of Ministers. Italy, Latvia and Lithuania – arguably those Member States with less administrative capacity and financial resources – took the view that the Commission's plans were very ambitious. According to the Italian Government the envisaged requirement entailed high administrative burdens for Member States (Council of the European Union, 2006b, p. 20). Apparently, also the European Parliament shared this view. Its amendments to the corresponding provisions reflected its ambition to reduce red tape relating to the implementation of waste management plans and programmes. Another amendment of the European Parliament concerned the conferral of monitoring tasks to the Commission which it criticised, suggesting, instead, to give this task to local and regional authorities within the Member States as well as the European Environmental Agency (European Parliament, 2006, p. 48; 65).

Some Member States reacted positively to the proposed introduction of waste prevention plans and programmes. Finland, for example, considered it as essential in guaranteeing the effective management of waste (Council of the European Union, 2006b). Having national waste management plans already in place, the Netherlands probably shared this assessment because it engaged in similar practices. The Dutch Government, however, objected to one particular EU requirement: it disapproved of the idea to link waste prevention programmes to the achievement of quantitative targets. It held the view that by introducing such a requirement, differences between the Member States in terms of socio-economic conditions and the different levels of experience in waste management planning, were not sufficiently taken into account (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 34). Probably for the same reason, i.e. due to the insufficient consideration of national conditions, virtually all Member States found the requirement problematic and objected to it (Council of the European Union, 2007g, p. 31). EU rules were eventually relaxed by amendments to the wording of the provision and by turning the obligation to determine specific qualitative or quantitative targets and indicators into an optional requirement (see Article 29(3)).

While rejecting the setting of quantitative objectives, the Dutch Government favoured the application of modern policy instruments in implementing waste plans and programmes. The application of economic instruments was considered as guaranteeing low costs and high output. Economic instruments were already widely used at the national level, exemplified by the Dutch application of landfill taxes which was considered to be more efficient in promoting waste prevention than the setting of quantitative targets (*Parliamentary Papers II* 2005/06, 22112, no. 429, p. 34). Also other Member States such as Denmark, Ireland and Finland, to mention a few, emphasised the advantages of economic instruments in terms of efficiency and flexibility (Council of the European Union, 2006b). Due to Member States' support

for the application of economic instruments, it may not come as a surprise that this aspect was given greater prominence in the final draft Directive compared to the initial Directive proposal. In the final directive, the use of economic instruments is not only mentioned in relation to waste management plans.[34] Economic instruments are, additionally, promoted with regard to the separate collection and treatment of waste oils, provided that national conditions allow for their application.[35]

Finally, Dutch preferences were matched regarding the review obligation to which waste management and programmes were subjected (Article 30). The requirement to evaluate waste management plans and waste prevention programmes every five years diverged from the practice in the Netherlands which provided for six-year intervals between the relevant reviews.[36] The final draft of the Waste Framework Directive shows that the initial review requirement was amended and brought into closer alignment with the Dutch legislation on this matter. The Dutch request to get more time to transpose EU requirements into national law than the 24 months envisaged for the formal implementation of the Directive was, on the other hand, not granted.

11.4 Analysis

Based on the descriptive analysis, it is assessed in the subsequent sections what kind of role discretion took in the negotiation process on the Waste Framework Directive. The explanatory analysis seeks to clarify whether or not and in what ways discretion affected the process by addressing a number of expectations that link discretion to features of both the negotiation process and the Directive proposal.

11.4.1 Discretion, policy area and compatibility

The first expectation to be addressed brings up the issue of EU influence in a policy area and the scope of discretion which a directive from that area affords to the Member States. The scope of discretion is assumed to be smaller if the legislative position of the EU rests on firm ground, meaning the EU's institutional set-up is advanced and that it undertakes comprehensive legislative action. While in formal terms the environment is characterised as a relatively young policy area since relevant EU legislative powers where only established by the Single European Act of 1985 (Collins and Earnshaw, 1992: 213), it has meanwhile turned into one of the most developed fields of EU law, the 'vast majority of environmental policies [being]

34 See Article 28(4) under sub-point (b).
35 See Article 21(2) of the Directive.
36 Each national waste management plan, (Landelijk afvalbeheer plan, LAP), has a duration of six years.

made in Brussels rather than in the capitals of the member states' (Börzel, 2007: 227). This is remarkable given the long absence of a clear definition of the environment and anchoring of the EU's legislative authority in the treaties. It was further strengthened through the integration of the environment into the first pillar by the Treaty of Maastricht. Compared to other policy areas, environmental legislative output is one of the highest which manifests the strong commitment of the main EU bodies, above all the European Commission and European Parliament, to the protection of the environment. Both the Commission and the European Parliament have been promoting environmental protection for several decades being thereby being supported by rulings of the European Court of Justice in matters relating to the environment.

Is it, in the light of this strong foothold and commitment of the EU, not reasonable to expect that the Waste Framework Directive left only little discretion to Member States for the transposition of the Directive into national law?

At first sight, given the strong role of the EU in the realm of the environment, there is much to be said for it. Moreover, the proposal entailed an increase in legislative harmonisation (more common definitions, extended requirements of national waste management plans) which naturally reduces the scope of discretion granted to Member States. It should thereby be noted that many Member States, including the Netherlands, were not averse to or even in favour of more harmonisation for reasons of environmental protection but also for achieving a truly internal market for the management of waste. These two objectives illustrate the linkage between the environment and the internal market and the fact that it was apparently acceptable to the Member States, to cede discretionary decision-making power in order to achieve the objectives just-mentioned.

And yet, some caution is in order here to avoid jumping to premature conclusions. It should, for instance, be kept in mind that the preparations, negotiation and implementation of the Directive all fell within the period when decision-making on environmental matters was not an exclusive competence of the EU but, instead, shared with the Member States. Jordan speaks in this context of the 'paradoxical features' of EU environmental policy (Jordan, 1999: 70), which consists in having, on one side, the opposition between supranational environmental ambitions to which Member States in their role as law-makers committed themselves, and, on the other side, Member States' unwillingness to implement EU environmental law if it is seen as being incompatible with their national interests. In this respect, Jordan also highlights the strong position of Member States and the double role they take within a directive's life cycle, being policymakers and implementers at the same time (Jordan, 1999). The previous points taken together can make it more understandable why the revised Waste Framework Directive leaves more discretionary room than might be expected in a policy area where it seems that, due to the firm legislative influence of the EU, rather little or no discretion is granted to Member States.

What can be noted as regards the argument that compatibility between EU and national rules can provide one explanation for why a directive has a larger (or smaller) margin of discretion? In the present case, incompatibilities between the revised Waste Framework Directive and the relevant Dutch legislation did not seem to have played a pertinent role. The Commission proposal hardly included novelties that had to be introduced into the waste management system already established in the Netherlands. And even where incompatibilities between the European and Dutch systems arose, these were overcome by uploading Dutch preferences and hence, the incorporation of national arrangements into the legislative text as illustrated with regard to the Directive's scope and waste management plans and programmes: the Dutch delegation succeeded in preserving its approach to coping with the consequences of floods and droughts. Furthermore, it managed to keep in place economic instruments in waste prevention and management and, finally, it could avoid additional administrative burdens by aligning EU rules concerning the review of waste plans and programmes with its own legislation. This fits well into the general picture of the Netherlands which has been described as 'particularly good at uploading general policy concepts and strategies to the EU level' (Liefferink and Van der Zouwen, 2004: 142).

That being said, the empirical analysis does not lend support for the expectation that the less compatible the EU directive and already existing national legislation are, the more likely it is that discretion is incorporated into the directive (expectation 3). The expectation, however, makes highly sense if the argument is reversed: The high compatibility between the EU and Dutch waste management rules precluded the necessity to get more discretion incorporated into the Directive.

11.4.2 Discretion and political sensitivity

The descriptive analysis brings a number of aspects to light which provide the impression that discretion was, however, not irrelevant for the process. What's more, the final Directive includes a number of discretionary provisions in contrast to the initial Commission proposal with its very few may-provisions. The fact is that the substantial amendments and elaboration of the legislative text through the contributions of both the Member States and the European Parliament resulted in the incorporation of additional provisions, including discretionary ones, pertaining to issues such as the end-of-waste status (Article 6), the principle of extended producer responsibility (Article 8), the treatment of waste oils (Article 21) and waste action plans and programmes (Articles 28 and 29), to mention a few. The relevance of discretion shows first of all in the fact that it was an aspect which was intensively discussed at the early stage of negotiations in connection with the question if the proposed Directive provided sufficient flexibility with a view to later implementation. In revising the bedrock of waste management legislation, the European Commission apparently considered it to be

of utmost importance to stimulate both Member States' cooperation on the proposal and willingness to apply EU rules 'back home' to avoid problems that had in the past obstructed the proper implementation of the Directive. To this end, the provision of a certain degree of flexibility was necessary, as it seems. As revealed by the analysis, Member States held different views on the Directive, reflected in the Council debates on the issue of by-products or concerning the further specifications of the distinction between recovery and disposal. This makes clear that, albeit being a matter of common concern, waste management did not naturally represent a matter of uniform approach. The negotiations rather point to the diversity of Member States in dealing with waste resulting from different national circumstances in terms of, for example, geography, infrastructure, and seize of population. In other words, the diversity of legal systems and traditions caused different reactions from the Member States, revealing distinct preferences and a different willingness to commit to a common supranational solution where one had to be found. This brings into play the expectation that political sensitivity stimulates the incorporation of discretion into the draft text of the measure as a way out of tough negotiations and potential conflict (*political sensitivity expectation*). Put slightly differently, the more politically sensitive the directive's policy issue is, the more discretion is incorporated into the directive. With a view to the negotiations on the Waste Framework Directive, it is not unlikely that political sensitivity and controversy characterised some debates in the Council, namely in cases where the national approaches to aspects of waste management differed but a common approach had to be agreed upon. After all, the empirical evidence which indicates that negotiations were lengthy and controversial seems to substantiate this assumption. Besides, and as mentioned earlier, the final proposal includes several discretionary provisions, including those addressed to the Commission,[37] and it is conceivable that they were incorporated to facilitate the reaching of a compromise such as regarding EU rules on waste prevention programmes.[38] But even though it cannot be excluded that discretion came into play as a factor facilitating reaching agreements in the Council, the empirical results merely allow for speculation rather than that they provide, in my view, sufficient clear evidence of a direct link between discretion and political sensitivity. Therefore it is concluded that the insights provided do not justify concluding that the expectation under consideration applies to the case of the Waste Framework Directive.

37 See Article 38(1) delegating implementing powers to the Commission to develop guidelines for the interpretation of the definitions of recovery and disposal.

38 See Article 29(3) making the determination of qualitative and quantitative targets and indicators for waste prevention programmes optional.

11.4.3 Discretion and European Parliament

As pointed out earlier, the European Parliament is known for being committed to environmental issues. It is finally interesting to have a look at its role in the legislative process and to see whether its position on the proposal for the revised Waste Framework Directives reflects any particular views on legislative discretion and whether or not Member States should be provided with it for transposition. In this context, it is expected that the greater the role of the European Parliament in decision-making is, the lesser discretion is granted to Member States (expectation 4).

To begin with, the position of the European Parliament was certainly not a minor one in the negotiations on the Directive. First of all, it acted as co-legislator and in this role it appeared to be strongly committed to get its preferences incorporated into the proposal. While disagreements between the Member States in the Council had already been settled at first reading stage, an early agreement between the Council and the Parliament was impossible (interview). The European Parliament was determined in getting its amendments to the proposal translated into the final text. Negotiations were only finalised at second reading after a number of informal meetings, so-called trilogues had taken place, in which representatives of the European Parliament, the Council and the Commission had come together to reach an agreement on a package of amendments acceptable to both co-legislators.[39]

While all this makes it safe to say that the European Parliament was an assertive actor in the negotiations, the analysis does not allow for a clear-cut answer to the question whether or not its impact on the negotiations meant a decrease in legislative discretion eventually made available to Member States. The justifications of the suggested amendments provided by the legislative resolution of the European Parliament in which the importance of harmonisation was emphasised, may suggest this. But it is also interesting to note that among the 98 forwarded amendments, a few changes were included that implied the granting of discretion to Member States. Hence, while the European Parliament certainly did not support the generous conferral of discretionary powers for the purpose of implementation, it is nevertheless possible to assume that it accepted that some discretion was made available for transposition, knowing that this could help in bridging the gap between national differences in managing waste. Furthermore, its acceptance of additional discretion being built into the Directive may also have been prompted by the wish to increase the chances of the proper implementation of the revised Directive. This would perfectly fit the European Parliament's image of the 'greenest institution of the three EU bodies' which it has

39 Usually these trilogues are intended to reach compromise between the positions of the co-legislators during the first or early second reading stage. See F. M. Häge and Michael Kaeding (2007) 'Reconsidering the European Parliament's Legislative Influence: Formal vs. Informal Procedures', *Journal of European Integration*, 29(3): 341-361.

gained, amongst others, by virtue of its painstaking efforts to give implementation issues a more prominent position in political debates (Lenschow, 2010: 315-316).

Finally, in an attempt to provide another explanation relating to the relevance and role of discretion, it does not seem to be far-fetched to believe that discretion facilitated compromise among Members of the European Parliament. Discussions on the proposal within the European Parliament reflected different views of its Members on the Directive (Council of the European Union, 2008a). Seen in this light, discretion was probably not only accepted because it provided Member States with the necessary flexibility to take into account national particularities. It may also have helped to reconcile different interests within the European Parliament. Seen in this light, discretion may have enabled the European Parliament to speak with one voice and therefore to more successfully assert its preferences vis-à-vis the Council. While reflecting upon the European Parliament's share in determining the margin of discretion provided by the Waste Framework Directive does not allow for more than mere speculation, the analysis brings into view that the European Parliament played a pertinent role in the negotiation process, having a relevant impact on the content of the Directive.

11.5 Conclusion

Questions concerning the role of discretion in the negotiations on the Revised Waste Framework Directive cannot be solved by providing clear-cut answers. Some conclusive insights can be offered, however, by differentiating between basically two perspectives. Taking an individual country-approach and by adopting the Dutch perspective, it seems that discretion was rather irrelevant. Seeking more discretion was not a primary aim in the Dutch negotiation strategy due to the apparently good match between the proposed Directive and national legislation concerning the management of waste.

When broadening the focus on the negotiations, to take more interests into account, the following conclusions can be offered. Due to the link between waste management and the internal market, the objective of more harmonisation implied by the Directive was shared by no small number of Member States since it was considered to improve the legal certainty of waste legislation and, additionally, seen as a guarantee of establishing fair competition on the Community market. Then again, taking other relevant factors of the process and proposal into account, it appears that preferences of Member States in the Council diverged and also the positions of the Council and the European Parliament on the proposal differed. On top of that, the final draft Directive includes a number of discretionary provisions. Having on the one hand preference divergence within the Council and between the co-legislators and, on the other hand, more discretionary provisions included in the Directive than initially comprised by the Commission proposal, it seems reasonable to assume that discretion was not completely

irrelevant and facilitated the negotiations to some extent where otherwise achieving a compromise appeared to be difficult. However, due to the fact that a clear link between political sensitivity and controversy on the hand and, on the other hand, the granting of discretion could not be established, these considerations remain rather speculative.

The focus of the analysis now shifts from the negotiations on the Waste Framework Directive to the transposition of the Directive in the Netherlands.

11.6 Transposition

In the following sections the Dutch transposition of the revised Waste Framework Directive is mapped out. Insights into the process were gained from interviews and dossier research, both being carried out at the Ministry of Infrastructure and the Environment which was closely involved in the transposition of the Directive. In addition, insights were drawn from the study of the Dutch transposition legislation, in particular the amendment to the Dutch Environmental Management Act, representing the main transposition measure. While the first part of the discussion describes in more general lines how transposition proceeded by mainly addressing the amendment to the Environmental Management Act, the focus subsequently shifts towards the transposition of certain Directive provisions. From both, the general and more specific accounts, insights into the role of discretion for transposition are derived and other factors dealt with that might have affected the process.

The revised Waste Framework Directive should have applied as from 12 December 2010 (Article 40). By that time Member States were supposed to have fulfilled their transposition obligation by putting into effect the necessary laws, regulations and administrative provisions required for compliance. However, in many cases this obligation was not met. In fact, in January 2011 infringement proceedings were opened by the Commission against nearly all Member States and by October of the same year sixteen of these proceedings were still not closed and reasoned opinions addressed to Belgium and Romania for failure to issue the required legislation (European Commission, 2011).

Turning to the Netherlands, it was already noted that the EU Directive and Dutch rules were quite compatible with each other. Several aspects of the Directive fitted well into the national waste management system which, in line with the Directive, already promoted a preferential order in waste treatment, the use of waste plans as well as environmental principles such as the 'polluter pays' to which the Directive paid specific attention linking it to the principle of extended producer responsibility (Articles 8 and 14) (see Seerden and Heldeweg, 2002). However, in spite of this obvious harmony between EU and national rules, transposition in the Netherlands did not proceed entirely smoothly. The Dutch authorities adopted the last transpo-

sition measure only on 3 February 2011 (see table 13). But, since this delay was short, it did not lead to any serious action being taken by the Commission against the Netherlands.

Table 13: Fact sheet transposition Waste Framework Directive

Transposition deadline:	12 Dec 10
Publication transposition legislation:	23 Nov 10 21 Dec 10 10 Febr 11 *04 March 11* 04 March 11
Sort transposition measure (and number):	*Parliamentary act* (1) Order in council (2), ministerial decision (2)
In charge:	Ministry of the Environment
Legal Framework:	Dutch Environmental Management Act 1993

While timely transposition had initially been considered feasible if the first actions to this end were already undertaken during the negotiations, the Dutch delegation eventually requested more time for the formal implementation of the Directive. It was realised by then that adjusting national waste legislation to incorporate EU rules would have to include amending already existing statutes, mainly due to the further clarification of EU rules regarding the definition of 'waste' and other terms (interview). Boiling down to an amendment by parliamentary act, involving the House of Representatives of the Dutch Parliament, this measure alone would take up to 18 months, and for this reason it was feared that the time allocated for transposition would not suffice (interview). But, as already mentioned above, the Dutch request was not met and therefore no more time available than the twenty-four months granted for transposition.

In a statement to the Dutch Parliament the Minister explained the delay in transposition by pointing out that the Directive was a comprehensive piece of legislation, requiring a revision of already existing legislation. According to the Minister, taking stock of all steps needed to formally implement the Directive had been time-consuming, making the involvement of other departments necessary since previously incorporated EU rules on the management of waste made part of national legislation subjected to the purview of different ministries (*Parliamentary Papers II* 2009/10, 32392, no. 7, p. 1). Looking at the timeline of the process, provided by the national transposition monitoring instrument 'i-timer' which shows all stages to be passed prior to the adoption of transposition legislation, it becomes obvious that a time lag had occurred between the treatment of the draft transposition measure in the Dutch Council of Ministers and its submission to Parliament. A

further study of the Directive dossier provided relevant insights explaining this time lag by pointing to political changes occurring in the Netherlands at the time of transposition. The change of the Dutch Government in 2010 and the new composition of Parliament had caused a delay at the stage of examination of the draft transposition measure within the Council of Ministers.[40] This was also confirmed in the interviews.

The transposition of the Directive required the involvement of other domestic actors.[41] The Dutch Council of State recommended reviewing the draft measure on a few points, including editorial issues and some content-relatedaspects (*Parliamentary Papers II* 2009/2010, 32392 nr. 4).[42] Both the opinions of the Council of State and the Dutch Parliament, which was also actively involved in the transposition of the Directive (*Parliamentary Papers II* 2010/11, 32392, no.14), resulted in a few minor revisions of the draft transposition measure which did not pose any particular difficulties for the transposing Ministry (interview). The parliamentary debate focused on the proposed amendment to the Environmental Management Act (and other statutes) and was held on 20 November 2010. The amending act was agreed by Parliament ten days later and then forwarded to the Dutch Senate before being adopted and entering into force in February 2011.

From the parliamentary debate it emerged that a few implications of the Directive triggered concerns among Members of Parliament which were also voiced by the Royal Dutch Association of Waste Management and Cleaning (NRVD[43], 2010). With the revised EU rules in place, it was feared that source separation of waste would take the place of the well-proven national practice of post-consumer waste collection (*Parliamentary Papers II* 2009/10, 32392, no. 6, p. 8). The Minister, however, pointed out that transposition would take into account the discretion granted in this regard: under certain conditions,

---

40 It was agreed with the Ministry of Infrastructure and the Environment that information provided by the dossiers would be treated confidentially. Therefore no further indications concerning my sources are made here.

41 According to Article 73(1) of the Dutch Constitution, the Council of State delivers its opinion on draft legislation including proposals for lower-level regulations and ratifications of Treaties by Parliament. The Council's opinion is non-binding but usually taken into account by the Ministry concerned. Statutes, including those amending statutes for the purpose of transposing EU law, are adopted by the Parliament acting as co-legislator alongside the government (Article 81 of the Dutch constitution).

42 In a nutshell, it was recommended by the Council of State to improve the transposition measure with a view to the term 'waste'. According to the Council of State, transposition legislation could be brought even more in line with the Directive regarding this point. In addition, the Council of State recommended consulting the European Commission for clarification of the Directive's provisions concerning separate waste collection (Article 11). It also advised to reconsider the implications of the transposition of the record keeping requirement (Article 35) and to add further explanations to the explanatory memorandum of the transposition measure regarding the issue of transitional periods connected to the repeal of EU waste directives (Article 41). See *Parliamentary Papers II* 2009/10, 32392, nr. 4.

43 NRVD stands for 'Koninklijke Vereniging voor afval- en reinigingsmanagement'. See Letter of NRVD to Dutch House of Representatives, N/10/388/ MG, 6 July 2010.

Member States were allowed to depart from EU waste management procedures.[44] This should make the continuation of national practices possible (*Parliamentary Papers II* 2009/10, 32392, no. 6, p. 7, p. 4-5).

Another point in the debate referred to the aspect of waste treatment by municipalities. Members of the Dutch Christian Union (CU), for instance, pointed out that national legislation on this matter did not provide for sufficient legal certainty and that a solution could be found by transposing the Waste Framework Directive in a way that would take this aspect into account. To this end, an amendment to the transposition measure was submitted (*Parliamentary Papers II* 2009/10, 32392, no. 9). It advocated making waste treatment, alongside the collection of waste, a matter of exclusive competence for municipalities. This should bring an end to the ongoing legal disputes between municipalities and waste companies. The Minister, however, preferred to exclude this topic from the transposition measure discussed and recommended to include it in other measures not related to the formal implementation of the Waste Framework Directive (*Parliamentary Papers II* 2009/10, 32392, no. 14). Arguably the Minister wished to avoid the addition of national extras to the transposition measure which might have delayed formal implementation and / or increased chances of legal incorrectness in converting EU rules into the national legal framework. All in all, the debate in Parliament led only to little changes of the proposed transposition measure. Amendments were confined to the transposition of the principle of producer responsibility which was brought more in line with the relevant requirement of the Directive.[45] Other changes were geared merely towards improving the legibility of the act.[46]

11.6.1 Transposition legislation

With its 28 pages, 49 recitals, 43 articles and Annex divided into five parts the revised Framework Directive represented a relatively comprehensive piece of EU environmental law. The articles are divided into seven chapters dealing in turn with: the subject matter, scope and definitions of the main terms used in the Directive (chapter I, articles 1-7), general requirements

44 Article 4(2) includes this permission. The provision has been transposed by means of Article 10.29 of the Environmental Management Act which stays close to the text of the Directive.

45 See Article 8 'Extended producer responsibility'. By means of this Article, the Directive gives more weight to the principle of producer responsibility, making producers fully and not partly responsible for the organisational and financial aspects of managing waste resulting from the manufacturing process of their products.

46 To avoid overlap and improve the quality of the amended Environmental Management Act, all criteria applying to the Dutch waste management plan were merged into one article. Finally, the separate collection of wastes from fruit, vegetables and other organic waste was shifted from the Act to lower-level regulation as the Parliament considered this to better match the Dutch system of waste legislation (*Parliamentary Papers II* 2009/10, 32392, no.7, pp. 14-15).

pertaining to environmental principles and treatment operations (chapter II, articles 8-14), waste management including the treatment of hazardous waste (chapter III, articles 15-22), permits and registrations regarding establishments and undertakings dealing with waste (chapter IV, articles 23-27), waste plans and programmes (chapter V, articles 28-33), inspections and records (chapter VI, articles 34-36) and the final provisions fixing a deadline for transposition and other issues related to the completion of the process (chapter VII, articles 37-43). The Directive also provides for an Annex: Annex I up to IV deal with details concerning waste disposal, waste recovery, hazardous waste, and waste prevention. Annex V is made up of a correlation table showing the relationship between the various articles and Annexes in each of the three Directives repealed and the new Directive.

The Dutch Environmental Management Act (Wet Milieubeheer, Wm) was one of the statutes that had to be amended for the purpose of transposing the revised Waste Framework Directive.[47] Having been established in 1993, the Environmental Management Act integrated the Act on Chemical Waste and the Act on Waste Products which were the first legislative instruments governing waste in the Netherlands, dating back to the 1970s (Seerden and Heldeweg, 2002). Comparable to the position of the Waste Framework Directive for EU waste legislation, the Environmental Management Act is a central piece of national waste legislation in particular, but also Dutch environmental legislation as a whole (Backes et al., 2006) addressing various aspects such as quality standards (chap. 5), environmental impact assessments (chap. 7), enforcement of environmental law (chap. 18), public openness (chap. 19), to mention a few. A great part of the Dutch waste legislation is covered by Article 1.1 and chapter 10 of the Act. Article 1.1 includes all definitions of key terms and provisions pertinent to the application of the Environmental Management Act as a whole. Chapter 10 titled 'waste products' focuses on various categories of waste and includes aspects such as the removal of different waste streams and waste matters with cross-border implications as exemplified by waste transport within the EU. The treatment of waste more specifically is largely addressed by framework legislation and hence, particular aspects are further spelled out by subordinate legislation (e.g. orders of council, ministerial decisions, environmental regulations of municipalities or provinces). This feature may account for the fact that, to cover all implications for national waste legislation flowing from the revised EU Waste Framework Directive, several pieces of Dutch legislation had to be amended, including next to statutory amendments, also amendments of orders in council and ministerial orders. The specific structure of Dutch environmental law results from the fact that due to the decentralised unitary system which characterises the political and administrative landscape of the Netherlands, Dutch administrative law

47 Alongside the Dutch Environmental Management Act, the Act on the Environmental Protection Tax (Wet Belastingen op Milieugrondslag) and the Economic Offences Act (Wet op de Economische Delicten) were subjected to amendments.

is described as 'stratified regulation'.[48] To give a concrete example: Chapter 10.4 of the Act lays down rules on the management of household waste and other (commercial) waste. Minimum standards concerning the collection of this type of waste are, however, determined by lower-level regulation[49] which may also further specify the rules on this subject.[50]

To begin with, in the explanatory memorandum to the amendment regarding the Environmental Management Act the Ministry of Infrastructure and the Environment noted that in conformity with the ministerial instructions for the formal implementation of European Directives,[51] the transposition measure contained no other rules than those laid down by the Directive (*Parliamentary Papers II* 2009/10, 32392, no. 3, p. 2). This reflects the general Dutch approach to transposition which is geared towards avoiding delay – not only can the incorporation of additional rules be in conflict with EU rules, it can also run the risk of being too time-consuming. Additionally, focusing on saving up time made all the more sense in the present case given the tight timeframe. A closer look at the transposition measure indicates that the so-called one-to-one transposition technique was applied in order to stay as close as possible to the provisions of the Directive. This transposition technique shall guarantee that national transposition remains confined to taking over the Directive text without adding any other requirements or terms or formulations of national law to the transposition measure.[52]

Alongside the wish to achieve timely transposition, the transposing Ministry intended to closely attune the transposition measure to the content of the EU Directive, especially regarding the additional and revised definitions included by it. This should guarantee the proper formal and, at a later stage, also the proper practical implementation and enforcement of the Directive's requirements by the Dutch authorities. Additionally, it should contribute to the overall objective of the Directive to achieve a level-playing field for economic operators in the internal market on waste management (*Parliamentary Papers II* 2009/10, 32392, no.3, p. 4).

From the interviews with the civil servants involved in the transposition of the Directive, it became obvious that the Directive, in spite of the discretionary provisions it includes, was understood as a strict piece of EU legislation, leaving no considerable high degree of discretion. This observation contrasts with earlier findings resulting from the analysis of the negotiations on the Directive and the coding exercise which indicate that the

48 In Dutch this phenomena is referred to as 'gelede normstelling'.

49 The Dutch 'Waste Regulation' (in Dutch: 'Afvalstoffenverordening') which is an order in council.

50 Cf. Article 10.24.

51 Cf. Instructions for drafting legislation, no. 331. This transposition technique is referred to in Dutch as 'implementatie sec' with 'sec' standing for 'secuur' meaning 'precise', describing the fact that the wording of EU rules is precisely taken over without adding any national extras.

52 Such an approach is characteristic of the re-word or re-writing method. Cf. Steunenberg and Voermans, 2006, p. 205.

Directive grants a rather larger than smaller margin of discretion to Member States.[53] The narrow interpretation of the Directive, including its discretionary provisions, can be explained by the fact that it resulted from the particular Dutch approach to transposition (one-to-one transposition technique) and, more generally, from the Ministry's adherence to particular ministerial instructions for the (formal) implementation of EU directives.[54]

11.6.2 By-products and end-of-waste status

A central idea underlying the revised Waste Framework Directive is that to achieve proper waste management – one of the Directive's major concerns – certain aspects of the definition of waste need to be clarified to avoid confusion in the identification and treatment of waste. As set out in the preamble of the Directive, this includes the specification of those materials or substances that under certain conditions can be considered waste or cease to be waste.[55] Such a conception finds its concrete expression in Articles 5 and 6 on by-products and end-of-waste status. The two Articles have been incorporated into Article 1.1 of the Environmental Management Act except for those aspects that were delegated to the Commission.[56] The extracts of the corresponding paragraph of the transposition measure read as follows:

> *Substances or objects are not regarded as waste if they are 'by-products' in the sense of Article 5 of the Waste Framework Directive if these by-products meet the criteria laid down in that Article (…)*.[57] Furthermore, with regard to the determination of the end-of-waste status Article 1.1 provides that: *If waste that has undergone a recovery meets the criteria as established by Articles 6(1) and 6(2) of the Waste Framework Directive and makes part of the category of waste to which these criteria apply, it shall cease to be waste* [italics added].[58]

---

53 This discrepancy seems to illustrate what was referred to in the theoretical chapter of the dissertation as the difference between 'legislative discretion' and 'executive discretion'. While the former refers to the scope of discretion being established by the analysis of the legislative text, the latter denotes the scope of discretion left when specific circumstances of the national transposition context have been taken into account. These circumstances can reduce the scope of legislative discretion originally granted by the Directive.

54 Cf. Instructions for drafting legislation [Aanwijzingen voor de regelgeving], available at: http://wetten.overheid.nl/BWBR0005730/geldigheidsdatum_07-12-2015 (accessed 7 December 2015).

55 Cf. Recital (22) of the Directive.

56 See the transposition rules laid down in Article 1.1 under paragraphs 6 and 12 of the amended Environmental Management Act.

57 The exact wording is: 'Als afvalstoffen worden in elk geval niet aangemerkt stoffen, mengsels of voorwerpen die bijproducten zijn in de zin van artikel 5 van de kaderrichtlijn afvalstoffen, indien deze bijproducten voldoen aan de in dat artikel gestelde voorwaarden (...).' Cf. Article 1(1) paragraph 6 of the amended Environmental Management Act (translation into English by myself).

58 The exact wording is: Indien afvalstoffen die een behandeling voor nuttige toepassing hebben ondergaan, voldoen aan de ingevolge artikel 6, eerste en tweede lid, van de kaderrichtlijn afvalstoffen vastgestelde criteria en tevens behoren tot het soort afvalstoffen waarop die criteria van toepassing zijn, worden zij niet langer als afvalstoffen aangemerkt (translation by myself).

The formulation of the transposition measure reflects the one-to-one transposition technique but also the method of referring directly to the Directive, which, once again, shows the efforts of the transposing Ministry to stay as close as possible to the Directive text. There is, however, more to say about the way the Directive was transposed especially with a view to legislative discretion.

First of all, the condition that substances or objects shall only be considered as by-products if they meet all criteria listed by the Directive provides for a strict framework to assess whether or not a substance or object is a by-product or must be counted as waste. In other words, no discretion for transposition is left, at least not to the national authorities, since criteria to identify more specific substances or objects as by-products are to be determined by means of a Commission implementing measure (committee procedure).[59] In the words of the Ministry of Infrastructure and the Environment, the Directive did not provide for any decision-making competence to the national authorities for identifying other substances or objects as by-products or to formulate specific conditions beyond those defined by the EU legislature in Article 5(1) (*Parliamentary Papers II* 2009/10, 32392, no. 3, p. 5).

Likewise, with regard to Article 6, the competence to establish criteria for determining whether or not waste ceases to be waste, was not vested in the hands of the national transposing authorities, such as the Ministry of Infrastructure and the Environment, but made subject to the committee procedure, and hence left to be determined at the EU-level. Only in the absence of any EU criteria and under the condition that applicable case law was taken into consideration, Member States were allowed to decide on a case-by-case basis whether or not the end-of-waste status applied (Article 6(4)). Under these conditions, the availability of discretion for the national authorities remained limited. In this regard, the Ministry of Infrastructure and the Environment noted that discretion was not used because already existing national legislation was deemed sufficient.[60] From the interview, however, it emerged that the Ministry's policy and legal units held diverging views about the use of discretion granted by this provision. Apparently, the legal unit wanted to stick to a narrow reading of the Directive provision. The policy unit, by contrast, having participated in the negotiations in Brussels, took the view that the provision provided for a broader interpretation of the competence granted, especially in respect of the term 'case': 'Member States may decide *case by case* whether certain waste has ceased to be waste' [italics added].[61] Accordingly, it was argued that the permission should be

59 Cf. Article 5(2) of the Directive and the corresponding rules in Article 1.1 under paragraphs 6 and 12 of the amendment.

60 See comments made in the transposition table referring to the formal implementation of Article 6(4). Cf. *Parliamentary Papers II* 2009/10, 32392, no. 3 p. 10. The Ministry indicates that the national Waste Management Plan (LAP) as well as Article 10.14 (paragraph 1) provide for sufficient possibilities to cover EU rules as laid down in Article 6(4).

61 See Article 6(4) of the Directive.

understood as allowing Member States to determine the end-of-waste criteria not only for a single waste product but for entire types of waste streams (i.e. the entire flow of waste materials from generation to disposition). The legal unit, however, preferred to stick to a strict interpretation of the EU rules and therefore wished to confine the determination of criteria to a single waste product. The issue was eventually settled, once the Commission guidelines were published which supported the broad interpretation by the policy unit, leading the legal unit to adjust Dutch transposition legislation accordingly (European Commission, 2012, pp. 24-25).[62]

11.6.3 Discretionary provisions

The Directive includes other discretionary provisions. As already established, these provsions do not only address the Member States. Next to Article 5(2), discretionary decision-making competence is delegated to the Commission under Article 27(1-3) and Article 29(4-5) on minimum standards for treatment activities and the determination of indicators for waste prevention measures, respectively. While these examples certainly indicate the increased scope of harmonisation implied by the Directive, the remaining discretionary provisions are largely addressed at the Member States. Therefore it should be asked whether the Ministry of Infrastructure and the Environment, when transposing the Directive, made use of discretion provided by these provisions.

Taking a closer look at the transposition table included in the amendment, it becomes obvious that in the majority of cases, discretion was not used. National legislation in force[63] was considered to already cover the content of the corresponding Directive requirements. This concerns the options regarding the deviation from the waste hierarchy (under Article 4), the determination of hazardous waste (under Article 7), the costs of waste management (under Article 14), the conditions and decisions specifying responsibility for waste management (under Article 15), the limitation of waste shipments from other Member States destined for recovery (under Article 16), the granting of permits for treatment operations (under Article 23) and the obligations concerning record-keeping (under Article 35). In the remaining few cases discretion was used by supplementing certain lower-level regulations already in place (exemptions from permit requirements; options in the treatment of waste oils with specific regard for national conditions). To provide for the permissions under Article 8 and 18 (extending

62 The competence to determine, by means of ministerial decision, the end-of-waste status for waste streams – meaning a single waste product within this stream or the entire stream under the conditions mentioned in Article 6(4) of the Waste Framework Directive – had been delegated to the Ministry of Infrastructure and the Environment. See Article 1 paragraph 6 of the amendment to the Environmental Management Act, *Parliamentary Papers II* 2013/14, 33919, no. 2, p. 1 and no. 3, pp. 4-5.

63 National legislation has to be understood broadly in this context. Next to national laws, it concerns here lower regulation as well as national waste plans.

producer responsibility, derogation from the ban on mixing hazardous waste), new articles were added to chapter ten of the Environmental Management Act, providing for corresponding EU rules.

11.7 Analysis

Based on the descriptive analysis offered in the preceding sections, transposition shall be further examined by assessing the expectations concerning the role of discretion and other relevant factors that possibly came into play once the Directive had to be converted into national law.

11.7.1 Discretion-in-national-law

Regarding the process of transposition, characteristics of European directives such as discretion have been found to slow down the pace of transposition, contributing, in particular, to a short-term delay of up to six months (Kaeding, 2008). While corresponding evidence is based on the analysis of directives from another area than examined here – EU transport legislation – this does not diminish the relevance of such a claim for the present case. After all, the focus of the analysis is on the role of discretion within transposition. In addition to that, the Dutch transposition of the revised Waste Framework Directive was finalised two months after the deadline revealing a short-term delay. Having said that, the question rises if discretion contributed to the delayed transposition of the Directive?

This question shall be answered, by taking a different path than the one chosen by others highlighting the purported negative effects of discretion on transposition. Seeking, in this dissertation, to put emphasis on a different, more positive viewpoint on discretion, the analysis starts out with the expectation that if more discretion is available to transposition actors, the better the directive granting it, is incorporated into national law (expectation 5). First of all, and as reflected by the Directive text, discretion was indeed available for national transposition. The analysis of the amendment to the Environmental Management Act – the main measure of Dutch transposition legislation – however, shows that discretion remained largely unused. As can be derived from the considerations and decisions of the Ministry of Infrastructure and the Environment in transposing the Directive, hardly any use was made of discretion because national legislation was already found to meet EU requirements and to provide for the (discretionary) options included by these requirements. Only a few discretionary provisions were used in the formal implementation of the Directive. But in general, the transposition of these provisions does not provide any conclusive evidence of the fact that discretion facilitated transposition. In fact, discretion did not seem to have played a relevant role in the Dutch transposition of the revised Waste Framework Directive.

11.7.2 Discretion, compatibility and disagreement

Another factor that may, alongside discretion, affect national transposition is the compatibility between the Directive and national legal arrangements. It is expected, according to the *compatibility interaction expectation* (E7), that if there is a good match between EU and national rules, more discretion being available to national actors can have a further strengthening effect on compatibility and therefore facilitate transposition. Does this claim have any relevance for the present transposition case?

Starting with the compatibility between the Directive and Dutch legislation, one may assume a high legal misfit. This seems to be implied by the relatively high number of transposition measures (five in total) and the fact that they did not only pertain to lower-level instruments but also included a parliamentary act (Steunenberg and Toshkov, 2009: 960). And yet, taking into account the mere number of instruments obscures the fact that the amendments, in the present case, did not reflect a high incompatibility. The fact that several transposition measures were necessary relates to the fact that the terminology in a number of national measures had to be adjusted due to the revised Directive. The descriptive analysis shows, however, that these adjustments were manageable and did not cause fundamental changes. What's more, the high number of measures can be explained by the specific structure of Dutch environmental legislation, where rules on waste are spread over different legal instruments. Finally, legal incompatibility is rendered unlikely owing to the fact that empirical evidence points to a rather high compatibility between EU and Dutch rules. This becomes obvious, first, from the fact that the use of discretion was not necessary in the absence of any meaningful incongruence between the Directive and national rules. Second, seen from the viewpoint of the Dutch waste management system, the Directive did not entail many novelties. On the contrary, it contained elements of previous EU legislation on waste and was largely compatible with already established Dutch practice (waste hierarchy, management plans, and environmental principles etc.), as noted by the interviewees. It is true that, nevertheless, already existing legislation had to be amended. But, in consideration of the previous points, these amendments did not substantially change Dutch legislation. Hence, on the whole, misfit between the EU Directive and relevant national law seems to have been small, if not negligible. But in spite of the seemingly high compatibility between EU and national rules being conducive to the proper transposition of EU directives, this positive effect was not enforced by discretion since flexible arrangements provided by the Directive remained unused. Therefore the *compatibility interaction expectation* (E7) is not found to carry any relevance in the transposition of the Waste Framework Directive.

In spite of the compatibility of the Directive and relevant Dutch law, proper transposition was not achieved because the Netherlands did not meet the transposition deadline. Was the short-term delay resulting from this failure due to a combination of domestic disagreement with the con-

tent of EU requirements and little discretion available for transposing the Directive into Dutch law? The descriptive analysis does not suggest this. Disagreement with the requirements of the Directive was not found to have played a role – neither at the negotiation nor transposition stage. This already precludes any possibility of a joint effect of disagreement and discretion impeding transposition. The applicability of the *disagreement interaction expectation* (E6) can therefore be ruled out.

11.7.3 Discretion, administrative capacity and transposition actors

Two other factors that are linked to discretion and serve to explain transposition outcomes are administrative capacity and the number of actors in charge of transposition. It is claimed that administrative capacity raises the likelihood of proper transposition but that more discretion available in transposition undermines this positive effect (expectation 8). Based on the empirical results, it is safe to say that in the present case delay did not result from a problem with administrative capacity. From both the document analysis and interviews, the picture emerges that those civil servants involved in the EU- and national-level processes, happened to have profound knowledge on the Directive dossier. Administrative capacity can, however, also be at stake if there are problems occurring within the transposing authority. In particular, this can be the case if there is a conflict or miscommunication between the policy and legal units of the ministry relating to the interpretation and application of EU rules. In the case at hand, preference divergence was found to play a role with regard to the determination of the end-of-waste status and the permission granted to Member States under the corresponding provision (Article 6(4)). And yet, in the interview with the civil servants in charge of transposition, the different interpretation of this provision was not identified as a reason for the delay in formally implementing the Directive. Instead, and as confirmed by the interview partners and findings derived from the analysis of the Directive dossier, the transition to a new Government and Parliament were considered as major reasons for why timely transposition had not been achieved.[64] As to discretion, it is rather unlikely that it enforced the positive influence of administrative capacity on transposition. First, it should be recalled from the descriptive analysis that the Directive was not considered to be highly discretionary by the civil servants in charge of transposition. Second, discretionary provisions were not used. It can therefore be concluded that the *capacity interaction expectation* is without relevance for this transposition case.

Last but not least, transposition is expected to be influenced by a joint effect of discretion and the number of actors involved in carrying out transposition (expectation 9). To be more precise, it is claimed that with more actors involved, transposition is likely to be deficient and that this impeding

64 It was agreed with the Ministry of Infrastructure and the Environment to treat the information obtained from the dossier as confidential.

effect becomes stronger as the degree of discretion increases. The case study findings do not provide evidence in support of such a scenario because the Ministry of Infrastructure and the Environment was mainly in charge of transposing the Directive. Besides, the analysis of the transposition process does not bring into view any conflicts between the Ministry and other actors relating to the formal implementation of the Directive. The debate between the Minister and Parliament on this subject did not lead to any controversy and substantial amendments which could have caused further delay. At the ministerial level, the Ministry of Infrastructure and the Environment was chiefly in charge of transposition which precluded that coordination problems between Ministries could give rise to difficulties contributing to deficient transposition. These considerations already rule out any relevance of the expectation being considered here.

11.8 Conclusion

In contrast to the analysis of the negotiation process, a more conclusive answer can be provided as to the role of discretion in the national transposition of the revised Waste Framework Directive. In short, discretion did not come into play. First of all, it was hardly used to transpose the Directive into the corpus of national waste legislation. The reasons for this are, first, that owing to a high fit between the Directive and national law, discretion was not necessary to smooth out differences between EU and national legal arrangements. Second, the analysis has not provided proof of any interaction of discretion and other national-level factors such as compatibility, administrative capacity and number of transposition actors which affected transposition in a relevant way. In other words, while there is no evidence for the claim that discretion facilitated national transposition, there is also no substantial evidence in support of the contrary claim, namely that discretion impeded transposition. While one instance was brought to light where the use of discretion was subject of intra-ministerial preference divergence about the way the Directive should be transposed, this instance was not found to have contributed to slowing down transposition. Instead, the empirical analysis brought to light another more decisive reason for the delay in transposition. Delay was caused in the present case by the political situation in the Netherlands, the change of government and parliament in particular. In the words of Kaeding delayed transposition resulted from 'situational changes of the external environment' (2007: 77) against which the Dutch transposition of the Waste Framework Directive was carried out.

12 Toy Safety Directive

12.1 Introduction

In 2003, as part of the simplification and better regulation process, the European Commission announced the revision of particular pieces of its regulation on products (European Commission, 2003). This revision exercise included the Toy Safety Directive[1] which had been adopted by the end of the 1980s in the context of the achievement of the internal market. The discussion in this chapter maps the content and history (purpose and background) of the succeeding Directive which revises EU rules on the safety of toys. The evolution of EU consumer law has previously been addressed in greater detail[2] and for this reason only some fundamental points are reiterated. More attention is paid to the sub-domain of toy safety legislation. Next, this chapter traces the EU negotiations relating to the Directive with specific regard to the Dutch position on the Directive proposal. Finally, the transposition of the Directive in the Netherlands is addressed. Reconstructing the EU negotiations and national transposition of the Directive aims at illuminating the role of discretion in both these processes.

12.2 The directive

The first EU Directive regarding the safety of toys was adopted by the Council in the late 1980s.[3] By that time, the Directive was the first piece of sector-specific legislation regarding toys. It also represented one of the first measures applying the new approach legislative technique to harmonisation and standardisation which has since 1985 characterised the EU's way of drafting directives proposed in application of Article 95 TEU (ex. 100A TEC).[4] As mentioned earlier, directives entailing the 'new approach' establish essential safety requirements for products while leaving the technical specifications of these requirements concerning technical standards to standardisation bodies mandated by the European Commission. Also the 2009 Toy Safety Directive implies the new approach. Like its predecessor

1 Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ L 170, 30 June 2009, pp. 1-37.
2 See chapter 10, case study on the Pyrotechnic Articles Directive.
3 See Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys, OJ L 187, 16 July 1988, pp. 1-13.
4 See Council Resolution on a new approach to technical harmonisation and standards, OJ C 136, 4 June 1985, pp. 1-9.

it furthermore acts on the principle that toys may only be placed on the market if they comply with the essential safety requirements to ensure that the use of these toys is not jeopardising the health and safety of those getting in contact with them. From the Commission's consultation of experts and the impact assessment conducted in the preparation of the Directive proposal, revising the 1988 Directive had emerged as the preferred option, as opposed to merely repealing the Directive or improving its application by means of soft law such as for instance Commission guidelines or recommendations (European Commission, 2008, p. 3). The revised Directive, albeit being in formal terms a new basic act, is based on the same idea than the first Toy Safety Directive: it aims to realise both the market integration and safety of toys. Additionally, it is intended to revise and especially clarify but not extend or substantially change already established EU rules. Two decades after the first Directive proposal had been launched, the Commission considered it high time to update EU toy safety legislation, following the wishes of both the experts and the wider public (European Commission, 2007a). This eventually led to the adoption of the revised Directive in 2009 which repealed and replaced the 1988 Directive. The latter had only been modified once, by an amendment confined to the CE marking of toys.[5] Either Directives are based on Article 95 TEC (now 114 TFEU), covering the internal market provisions, and reflect the strong connection between consumer protection and market integration.[6] As put in the words of Garde, '[t]he proper functioning of the internal market requires that goods in free circulation are safe' (Garde, 2012: 182). Likewise, the 2009 Directive pursues a two-fold aim: improving the internal market for toys and the safety of health of consumers, above all children, as the most sensitive amongst them. To this end the Directive lays down 'rules on the safety of toys and on their free movement in the Community'.[7] In revising virtually all safety aspects, it however differs from earlier legislation. It was intended to update and complete the essential safety requirements, including rules on electrical properties and requirements on suffocation and choking hazards. Furthermore, it determines additional hazards leading to requirements for noise, for laser, for activity toys, for speed limit, and for chemicals (Garde, 2012: 183). Hence, the preparation, formulation and negotiations regarding the Commission proposal eventually brought about a Directive which represents a more elaborated, comprehensive and lengthier piece of legislation than the previous one.

5 See CE Marking Directive (Council Directive 93/68/EEC of 22 July 1993, OJ L 220, 30 August 1993, pp. 1-22).

6 In a nutshell, EU measures for the approximation of national law are adopted with the objective to contribute to the establishment and functioning of the internal market thereby ensuring that legislative proposals provide for a high level of protection of health, safety, the environment and consumers. See especially Article 95(1) and 95(3) TEC.

7 See Article 1 of the Toy Safety Directive.

Toys are products that are designed for use in play by children under 14 years.[8] The Directive establishes obligations for Member States as well as economic operators. Its provisions are divided into nine chapters. The most relevant provisions are set out here in brief and listed in the overview below (table 14). To begin with, the safety of toys shall be guaranteed by all relevant economic operators: manufacturers shall ensure that toy products meet all applicable safety requirements; importers shall only place on the market compliant toys and distributors and retailers shall act with due regard to the essential safety requirements (chapter 2). Toys which meet these requirements are entitled to an 'EC' declaration of conformity, must bear the CE marking and may be sold throughout the EU. Compliance with harmonised standards provides a presumption of conformity. For the safe use of toy products, general warnings shall be displayed on toys or their packaging (chapter 3).

Table 14: Key elements of the Toy Safety Directive

Chapter	Requirements
2	Obligations of economic operators (Art. 4-9)
	Ensuring compliance with the essential safety requirements
3	Conformity of toys (Art. 10-17)
	Presumption of conformity
	General warnings for safe use
4	Conformity assessment (Art. 18-21)
	Conformity assessment: self-verification or EC-type examination
5	Notification of conformity assessment bodies (Art. 22-38)
	Conformity assessment procedures by notified bodies & national notifying authorities
6	Obligations & powers of Member States (Art. 39-45)
	Market surveillance by national competent authorities
7	Committee Procedures (Art. 46-47)
	Updates and use of chemicals and other substances in toys by Commission committees
8	Specific administrative provisions (Art. 48-51)
	The Commission shall provide a summary of the national reports on the Directive's application
	Member States shall provide for rules on penalties of economic operators

8 See Article 2(2) of the Directive.

Conformity assessments shall be carried out to establish the product's compliance with the applicable safety provisions. This can be done by means of self-verification or third-party verification (EC-type examination). Self-verification is used in cases where harmonised standards cover all pertinent safety aspects of a toy. In such instances, the manufacturer must apply the existing harmonised standards and ensure that the toy is in conformity therewith. EC-type examination shall be carried out in case of lacking harmonised standards or where the manufacturer believes that the nature, design, construction or purpose of the toy necessitates third party verification (chapter 4). Notified bodies have the obligation to carry out the conformity assessments; Member States have to guarantee that they work independently. National notifying authorities, on the other hand, are obliged to carry out the assessment, notification and monitoring of the notified bodies / conformity assessment bodies (chapter 5). The so-called 'national competent authorities' have to perform market surveillance including the evaluation of toys assumed to present a health and safety risk. Market surveillance authorities shall take appropriate provisional measures to remove non-compliant toy products from the market (chapter 6). The Commission is obliged to review these measures. It may update and decide upon the use of chemicals and other substances in toys by means of the committee procedure. Member States shall provide for rules on penalties of economic operators that do not comply with the Directive requirements (chapter 7).

Not only the content but also formal aspects indicate the increased complexity of the Directive compared to its predecessor: the revised Directive comprises 37 pages, 48 recitals, 57 Articles, and an Annex of five parts which contrasts with the 13 pages, 21 recitals, 16 Articles and shorter Annex of the previous Toy Safety Directive. Like the latter, the revised Directive grants very little discretion. While it is not devoid of discretionary provisions, in fact very few of them are directly addressed at the Member States. Discretion is only conferred upon Member States where they decide upon the language of warnings and safety instructions to be used by the manufacturer within their territories. Discretion is furthermore granted with regard to the designation of the national authority assessing and monitoring the conformity assessment bodies (notifying authorities) and finally Member States have discretion in shaping rules on penalties to be imposed on economic operators for infringements of safety rules.[9] Several other discretionary provisions are directed at economic operators and the Commission.[10] Finally, a few discretionary provisions are addressed at national authorities acting on behalf of the Member States (notifying authorities, market surveillance authorities).[11] It is noteworthy that in these latter cases, may-clauses seem to indicate discretion but, in fact, they are interpreted as imposing obliga-

9 Cf. Articles 11(3), 23(2), and 51.
10 See for instance Article 5 (manufacturer) and Article 46 (Commission).
11 See for example Articles 31 and 41.

tions on Member States. This was established in the interviews with the Dutch civil servants involved in the dossier of the Toy Safety Directive.[12] To give an example, the permission addressed at market surveillance authorities to request a notified body to provide information relating to any EC-type examination certificate which that body has issued or withdrawn,[13] is understood as obliging Member States to ensure that market surveillance authorities may make that request. This case, in fact, illustrates the difference between legislative discretion granted by the Directive text and the actual discretion margin identified by national civil servants during the transposition process, previously referred to as administrative discretion (see chapter 2).

The Toy Safety Directive represents only one but an illustrative example of the EU's product safety legislation which is a core part of EU consumer (protection) law.

12.2.1 The area of EU consumer protection law

As pointed out earlier, soft law measures in the form of Commission papers and Council Resolutions paved the way for the development of EU rules on consumer protection and product safety before any significant treaty changes such as the Single European Act (1987) or the Maastricht Treaty (1993) came into the picture. These soft law measures strengthened the position of the EU as an actor in the realm of consumer law-making. Hence, prior to the anchoring of an explicit legislative competence regarding consumer protection in EU primary legislation, the role of the EU in this field had not been a marginal one. By means of soft law, later key concepts of consumer law such as the 'consumer', 'consumer rights' and 'consumer protection' were elaborated. Furthermore, by means of soft law, the foundation for more concrete EU action was established which, in the absence of any explicit legal basis, was mostly justified in connection with the operation of the internal market and the argument that negative repercussions for consumers from economic expansion should be avoided. In reality, repercussions for both consumers and internal market projects were considered to be the result of the diversity of the various national legislations and the issue of toy safety was not an exception to this. In fact, the 1988 Toy Safety Directive was adopted to overcome the twofold problem of national safety systems: first of all, these systems entailed market barriers to the free movement of toy products. Second, the different safety regimes reduced the effi-

12 In the coding exercise, by contrast, these provisions were identified as permissions granted to the Member States (for national authorities are considered as acting on their behalf).

13 See Article 41(1) of the Directive.

ciency of consumer protection against unsafe toys and revealed the general lack of toy safety throughout the EU (RPA, 2004).[14]

Meanwhile, EU consumer protection law has grown out of its infancy and continues to develop. Only recently, the European Commission has announced new objectives and strategies for 'A European Consumer Agenda – Boosting confidence and growth'. It floats the Commission's idea of enhancing consumer participation and trust in the market by adapting its policies and proposals to economic developments and novelties such as the 'digital single market' as well as the increase in online trading (European Commission, 2012).[15] In addition to that, it calls for the better application of EU consumer protection legislation in the Member States to make consumer rights fully come into play (European Commission, 2012).

Regarding the development of EU consumer protection law, the instance of the Toy Safety Directive is a case in point. The 1988 Directive should bring about improvements concerning the marketing of toys manufactured in or imported into the EU, aiming to minimise the risk of toy-related dangers and achieving long-term health benefits. But its standards had meanwhile become outdated against the backdrop of technical developments and further market expansion. The proposed revision leading to the adoption of the Toy Safety Directive in 2009 was a direct response to this, showing the particular importance that the EU attached to this issue. Apparently, the need was felt on the part of the EU, to act given the fact that toys repeatedly headed the list of notifications of dangerous goods submitted through the EU's RAPEX system[16] (Garde, 2012: 182; Weatherill, 2013: 274-75). Still in 2013, toys were the second most notified product category surpassed only by clothing (RAPEX, 2013).[17]

The revision of the Toy Safety Directive pursued another objective: it should be brought in proper alignment with other legislation related to the safety of products (European Commission, 2008).[18] This, again, draws attention to the development of the wider framework of EU safety legislation.

14 RPA stands for 'Risk and policy analysts' and includes a report on the situation of the safety of toy products within the EU issued by the European Commission Enterprise Directorate General. Cf. Risks & Policy Analysts Ltd. (2004) *Study on the Impact of the Council Directive 88/378/EEC on the Safety of Toys. Final Report Prepared for the European Commission*.

15 See also Cf. Weatherill, 2013, p. 254.

16 RAPEX is the rapid alert system for non-food dangerous products set up to promote rapid exchange of information between Member States and the European Commission about measures taken for the prevention or restriction of the marketing or use of products that are supposed to jeopardise consumers' health and safety.

17 See 2013 'RAPEX report', available at: http://ec.europa.eu/consumers/safety/rapex/alerts/main/index.cfm?event=main.listNotifications (accessed 8 June 2015).

18 Regarding chemicals in toys, compliance was for instance sought with the EU's general chemicals legislation, including Regulation EC No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency.

A case in point is the General Product Safety Regulation,[19] adopted by the European Parliament and the Council in 2001. It is based on a similar operating principle than the revised Toy Safety Directive. The General Product Safety Regulation introduces general safety requirements that apply to all consumer products which are placed on the EU market. It prohibits all those products from being marketed which entail a risk for the health and safety of EU consumers, either caused by dangerous substances or unsafe construction. Another example of EU product safety legislation is the new legislative framework for the marketing of products and corresponding instruments, its fundaments being established by means of a legislative package. This new legislative framework particularly aims to improve the working of the internal market for products. Amongst others, this shall be achieved by advancing already existing systems of market surveillance and conformity assessments within the EU.

The previous measures aim to further harmonise relevant national laws and the revision of the Toy Safety Directive should also be seen in this light. As was mentioned above, enhanced legislative harmonisation represents the third route adopted by the Commission to further integration in the area of consumer law, alongside the application of soft law and the justification of consumer protection measures in the light of internal market. Higher levels of legislative harmonisation are reflected by both the old and revised Toy Safety Directives, since they include total harmonisation requirements. Moreover, and with respect to the revised Toy Safety Directive, by introducing additional common definitions and minimum requirements for enforcement activities this Directive entails a still larger degree of legislative harmonisation than its predecessor. In fact, the modification of the initial Toy Safety Directive reflects the trend of positive integration through stronger market regulation. This is expressed by the shift from minimum harmonisation to full harmonisation of EU toy safety measures which was prompted by the Commission's wish to achieve better national implementation records and quality of EU toy safety legislation implemented and applied within the Member States (European Commission, 2008, p. 2).

12.2.2 Purpose and background to the directive

The revision of the 1988 Toy Safety Directive was already announced by the European Commission in its Consumer Policy Strategy covering the period of 2002 to 2006 (European Commission, 2002). In reviewing EU toy safety regulation, the Commission sought input from experts and the wider public and consultation rounds were carried out in 2003 and 2007, respectively.

19 See Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15 January 2002, pp. 4-17.

An Expert Group on Toys[20] safety was set up in which national authorities and stakeholders from industry, consumer- and standardisation organisations were asked to exchange views about the functioning of the Directive within Member States. The outcomes of the consultation process confirmed the Commission's view that the Directive needed some modification (European Commission, 2008, pp. 3-4).

The subsequent legislative proposal was drawn up along the lines of the Commission's policy for better regulation and simplification being targeted at EU legislation in several regulatory areas. In a nutshell, EU legislation should be codified, modernised and recast (European Commission, 2003, p. 25). By launching the better regulation and simplification programme, the Commission intended to facilitate the understanding and use of EU legislation for European businesses and citizens in areas closely related to the internal market, including the safety of toys (European Commission, 2008). A number of shortcomings had emerged during the application of EU toy safety legislation. First of all, technical progress had brought into view potential safety gaps owing to outdated EU safety rules concerning the use of toys triggering increased concern amongst consumers. Hence, the identified need to update and complete the safety requirements, in particular in areas such as noise and chemicals in toys (European Commission, 2008). Commission preparations for a legislative proposal were paralleled by external events which seemed to underline the urgency of the envisaged revision. In 2007 toy products manufactured in China were identified as posing a risk to human health and the safety of children in particular. Toxic chemical substances in dangerous quantities such as excessive lead levels as well as too loose pieces of metals getting detached from toys, entering the respiratory tract and causing suffocation had been identified as the biggest risks (Garde, 2012: 186). These events prompted the Commission to urge the Chinese authorities to improve the safety of consumer products, toys in particular. Moreover, it pressed for better domestic enforcement of toy safety legislation in the Member States (European Commission, 2007b). In its view, coherent and effective enforcement and market surveillance had only been insufficiently realised by Member States, making the introduction of common EU minimum requirements all the more necessary (European Commission, 2008, p. 7). Differences in the national implementation of EU safety rules were also found problematic and seen as posing obstacles to the internal market, causing high administrative costs and legal uncertainty. In addition, diverging application of EU safety rules was considered to put the proper health and safety protection of consumers at risk. Next to these acute deficiencies relating to the implementation of toy safety legislation, the Toy Safety Directive was found to lack clarity regarding, for instance, the responsibilities of each economic operator in the entire toy production

20 The Expert Group has been operating since 2003 and officially being registered since 2006. It has been working under the direction of the European Commission's Enterprise and Industry Directorate-General.

chain (production, supply, and distribution) (Coumans, 2010: 35; Garde, 2012: 183). In fact, critique came from an arguably unexpected side: some linguists had used the Directive as a prime example to draw attention to what they considered to be a more general problem of EU legislation: the insufficient clarity of EU directives caused by their poor linguistic quality (Cutts, 2001; Cutts and Wagner, 2002).

Deficiencies of toy safety legislation and its improper application by Member States thus formed the background for the formulation of a number of concrete goals presented by the Commission in its proposal for a revised Toy Safety Directive. Put in a nutshell, revising the previous Toy Safety Directive should be targeted, in particular, at the essential safety requirements on certain hazards pertaining to chemicals in toys. It should clarify the Directive's scope (completing the product list by toys not yet covered), definitions and concepts (such as 'toys', 'economic operators', responsibilities of manufacturers and importers, market surveillance obligations of Member States and others) and improve its practical implementation and enforcement by means of common minimum standards to facilitate the application of EU rules (by economic operators and national authorities). Finally, the revision of the Directive should serve to achieve greater consistency with other consumer-related legislation. In short, the revised Toy Safety Directive should improve the enforcement and efficiency of the Directive (European Commission, 2008). The Commission's plan according to which all these objectives should have been reached by the year 2004 could not be realised.[21] The preparation of a corresponding legislative proposal took longer than expected and was only concluded in 2008. One year later, on 18 June 2009, the revised Toy Safety Directive was adopted at first reading and under the co-decision procedure. The Austrian and German delegations abstained from voting.

12.3 Negotiations

Even if the Directive was adopted later than the Commission had wished for, it seems that its proposal did not lead to protracted negotiations. After all, negotiations were concluded within less than one year and a half. The proposal was negotiated as an A-item throughout the entire period[22] and agreement on it reached at lower levels of the Council (within the working party on technical harmonisation and the Permanent Representatives Com-

21 Finalising the codification, modernisation and recast of Council Directive 88/378/EEC on the safety of toys had been scheduled for 2004 as mentioned in the Commission's communication about its simplification programme just mentioned.

22 As earlier explained, 'A-items' are directive dossiers which are not controversial and usually treated at lower levels of the Council, at working party level or in Coreper, in contrast to B-items that are politically sensitive and require discussion by the Ministers in the Council.

mittee (Coreper)), suggesting the absence of debates on politically sensitive issues. Whereas the first Toy Safety Directive was adopted by the Council acting alone, the revised draft Directive was negotiated under the co-decision procedure (Article 251 TEC) putting the European Parliament into the position of co-legislator and thus on an equal footing with the Council. Against the background of large imports of unsafe products from China, the European Parliament had already stressed the importance of stricter requirements for industrial products such as toys prior to the submission of the Commission proposal (European Parliament, 2007).

The proposal for the revised Toy Safety Directive was further examined and amendments proposed by the European Parliament's Committee on Internal Market in collaboration with the Consumer Protection Committee on the Environment, Public Health and Food Safety. As a result, a legislative resolution and common position of the European Parliament on the Commission proposal was adopted by mid-December 2008 (see table 15). The European Parliament recognised the need for modernising outdated EU rules on toy safety and agreed with the Commission's aims to modernise and clarify the safety requirements and enforcement regime. At the same time, it urged to bring the Commission proposal still more in line with the aforementioned new legislative framework on the marketing of goods. To this end it forwarded 79 amendments which it considered to be 'technical adjustments', pertaining to both the substantial and procedural aspects of the proposal as well as the key elements of the new approach technique it implied. More concrete, the European Parliament submitted amendments concerning the Directive's definitions, the obligations for market players and conformity assessment bodies, the presumption of conformity rules on the CE marking, the notification procedures, and the envisaged procedure for formal objection to harmonised standards (European Parliament, 2008, pp. 79-80).

Table 15: Timeline for negotiations on the Toy Safety Directive

25 Jan 08	Adoption by Commission proposal
18 Jun 08	Committee of Regions opinion
17 Sep 08	European Economic and Social Committee opinion
18 Dec 08	European Parliament opinion on 1st reading
11 May 08	Approval by the Council of the European Parliament position at 1st reading
18 Jun 08	Formal adoption by Council and European Parliament

What may have contributed to the relatively swift negotiations was that the draft Directive built on already existing rules. Hence, it did not imply a fundamental change to EU safety legislation but aimed to improve it. In addi-

tion to that, the Directive proposal seemed to entail a number of advantages for the Member States, not only in economic terms but especially as regards the safety of toys. To this end, the proposal introduced a few novelties (Garde, 2012: 184). To begin with, and as set out in the recitals and Annex to the draft Directive,[23] substances classified as carcinogenic, mutagenic or toxic for reproduction (CMR) were made subject to limitations, even bans – provided that amounts of these substances, considered to be dangerous for consumers, were included in components of toys accessible to children. Moreover, stricter rules in the form of labelling requirements and prohibitions were foreseen in the proposed Directive with respect to allergenic substances and certain fragrances.[24] Finally, the revised Directive sought to remove the risk of choking by tightening up rules concerning toys put in the mouth and by extending them to the use of children above 36 months.[25]

In a letter to the House of Representatives of the Dutch Parliament, the Dutch Government supported the Commission's initiative, being joined by other Member States (*Parliamentary Papers II* 2008/09, 21501-30, no. 196, p. 15). In its detailed assessment of the legislative proposal the Dutch Government recognised the benefits of the proposed Directive, pointing itself to the twin advantage for both industry and citizens (*Parliamentary Papers II* 2007/08, 22112, no. 623, p. 12-13). To start with, it agreed with the aim to ensure a common level of consumer protection on EU territory (*Parliamentary Papers II* 2007/08, 22112, no. 623, p. 14). Apparently, the Dutch Government was aware of the need for more (EU) action to tackle the problem of unsafe toys circulating on the European market. The occurrence of safety issues was certainly not to its surprise. Already prior to the 2007 incident with Chinese toys, Dutch enforcement authorities had noted an increase of toy-related accidents from 119 (in 1999) to 3,681 (in 2000) and 5,428 (in 2001) (RAP, 2004, p. 28).[26] Furthermore, alongside improvements of the safety of toys, the Dutch Government expected higher quality and safety standards to strengthen the market position of the European toy industry, thus including its own (*Parliamentary Papers II* 2007/08, 22112, no. 623, pp. 13-14). The Government therefore endorsed the envisaged minimum harmonisation entailed by the Directive's enforcement requirements (*Parliamentary Papers II* 2007/08, 22112, no. 623, p. 15).

23 See the proposed recitals (16), (32), and Annex II on particular safety requirements regarding chemical properties.

24 This is in tune with Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ L 262, 27 September 1976, pp. 169-200.

25 As pointed out in recital (18) of the proposal.

26 These figures come from a 2004 report on the impact of the revision of EU toy safety legislation issued by the European Commission. It addresses, amongst others, toy-related accidents in Member States, including, alongside the Netherlands, also Belgium, Denmark, Sweden, and the United Kingdom.

The potential benefits of the Commission proposal, did, however, not blind the Government to the production costs and administrative burdens that stricter and additional safety requirements would incur, especially for small and medium-sized enterprises (SMEs) (Garde, 2012: 185-186), representing virtually the totality of toy companies within the European Union (RAP, 2004, p. 12). Corresponding concerns were indeed voiced by representatives from the Dutch toy industry during a consultation meeting in June 2008 which was organised by the Ministry of Health, Welfare and Sport. The Government urged to seek the input from relevant national stakeholders regarding the Commission initiative (*Parliamentary Papers II* 2007/08, 22112, no. 623, p. 13; 18). To this end, the Ministry made use of the so-called Regular Consult Food and Non-Food Law,[27] a discussion panel for the exchange of views on new legislation between the stakeholders and the Ministry, including proposals for EU law. The panel consisted of members of business and consumer organisations, as well as representatives of the Netherlands Food and Consumer Product Safety Authority[28] – in charge of supervising and enforcing toy safety rules. Issues raised in this context concerned the costs expected to arise from the implementation of the Directive and, in order to ensure the better practical application of EU safety rules, the clarification of the relationship of the revised Directive with other consumer-related legislation. From the stakeholder feedback it becomes obvious that the proposal met with agreement (Ministry of Health, Welfare and Sport, 2008).[29]

The positive domestic reaction to the proposal and the positive implications it seemed to imply for the Netherlands and other Member States, do not remove the fact that it also raised discussions revealing the different views of Member States on certain aspects of the Directive during the 2008 negotiations under the Slovenian and French presidencies. On closer examination, it seems that the Dutch delegation did not have many objections to the content of the Directive, in contrast, for instance, to the delegation of Germany. This seems to imply that the Dutch delegation took a more reserved role in the negotiations on the Directive. Its comments, which very rarely included own suggestions but rather aimed to support other delegations, were mostly confined to the technical aspects of the Annex to the Directive and hardly addressed its substantive provisions.

27 In Dutch referred to as 'Regulier Overleg Warenwet', ROW (Regular Consult Food and Non-Food Law). ROW is a discussion panel for examining, together with stakeholders, EU legislative proposals related to food and non-food matters. Also otherwise proposed legislation within the ambit of the Dutch Commodities Act is discussed in its framework.

28 In Dutch referred to as Netherlandse Voedsel en Waren Autoriteit.

29 See Ministry of Health, Welfare and Sport, 'Report of the stakeholder (ROW) meeting', 2 June 2008; provided to me by the Ministry civil servants.

12.3.1 Definitions

The proposed definitions of the key terms used in the Directive caused further debates and revealed different views held by the Member States. Whereas the old Directive hardly offered any clarifications of key terms and concepts, except for the term '(functional) toys',[30] the Commission proposed the inclusion of fifteen new definitions under Article 2. These definitions were, however, substantially amended and more definitions added during the negotiations (Council of the European Union, 2008a, pp. 15-21) not only on the initiative of the Member States but also at the request of the European Parliament (European Parliament, 2008, pp. 14-18). Obviously, the technical changes and the increased diversity of products required not only an update of the product safety requirements but also revealed the need expressed by the Member States (and Members of Parliament) to introduce and clarify new terminology. It was therefore suggested in the Council to include additional definitions of relevant terms into the draft Directive: 'CE-marking' – according to the proposal of France, Hungary, Portugal and Romania, 'conformity assessment procedure' and 'market surveillance' at the request of Hungary. Furthermore, suggestions were made for the definition of the term 'manufacturer' by the United Kingdom and Portugal.[31] Germany, again, preferred to further specify the sort of toys, suggesting that definitions for 'oral contact toys' and 'dermal contact toys' should be included. Eventually, these suggestions were not followed but other distinctions between toys introduced instead.[32]

What about the Dutch preferences regarding the definitions provided by Article 2? Except for one suggestion being forwarded, no further requests for amendments were made by the Dutch delegation. The exception to this relates to the concept of toys. Article 2(1) in combination with the product list provided by Annex I to the draft Directive excluded several products from the scope of the Directive, not considering them as 'toys'. Falling under these exclusions were 'decorative objects for festivities and celebrations' which implied that balloons were not conceived of as toys. Under Dutch law, by contrast, 'balloons' are counted as toys. In addition, Dutch law provides for certain safety rules relating to the use of certain chemi-

30 See Article 1 and Annex IV on further specifications of, amongst others, warnings.

31 Agreement was finally reached on the Portuguese proposal. See definition under point 3, Article 2 of the revised Directive: '"manufacturer" means any natural or legal person who manufactures a toy or has a toy designed or manufactured, and markets that toy under his name or trademark'.

32 The revised Directive takes other aspects as distinctive features to differentiate between different sorts of toys. This is indicated by the definitions of functional, aquatic, activity, and chemical toys. See Article 2.

cal substances in balloons.[33] For the sake of ensuring that own legislation and therefore safety standards could be preserved, the Dutch delegation requested to include balloons into the scope of the Directive (*Parliamentary Papers II* 2007/08, 22112, no. 623, p. 17).[34] The final product list was, however, not adjusted to the wishes of the Dutch delegation. On the other hand, the product list does also not explicitly exclude 'balloons' from the Directive's scope. What's more, it seems that the Dutch request was not completely ignored. This follows from the fact that safety rules were strengthened by the introduction of a prohibition into Annex II addressing the particular safety requirements for chemical properties of toys. It forbids the use of harmful amounts of nitrosamines and nitrosable substances which previously used to be applied in products such as rubber toy balloons.[35]

12.3.2 Essential safety requirements

The preamble of the draft directive underlined the need to update EU safety requirements for toys by taking due account of the technical developments having emerged since the adoption of the first Directive in 1988.[36] The revision of the essential safety requirements fell within the exclusive competence of the Commission and boiled down to a more detailed treatment of the requirements which were not only addressed in the Annex, as had previously been the case, but also in Article 9 of the proposed revision.[37]

---

33 Based on Article 3 of the Commodities Act, conferring particular powers of rule-making to the Minister, the latter had issued a policy rule concerning standards for the safety of balloons (Beleidsregel inzake normen ten aanzien van veiligheid van ballonnen, *Government Gazette*, 2006, 62).
As stated by the Minister when updating this measure, this policy was intended to warn against the use of balloons containing hazardous quantities of cancer-causing substances, in particular nitrosamines or nitrosatable substances. See *Government Gazette*, 2010, 5934.

34 Given the earlier request issued by the Netherlands and Germany, the Commission referred the issue to the European scientific committee which delivered an opinion in December 2007. See Scientific Committee on Consumer Products (SCCP) (2007), *Opinion on the presence and release of nitrosamines and nitrosatable compounds from rubber balloons*, SCCP/1132/07, Brussels: European Commission.

35 Hazards are caused from placing toy products in the mouth. Hence, it is the migration limit of these nitrosamines and nitrosable substances that is further specified to indicate potential harmful effects. The relevant rule laid down in the Annex to the revised Directive is in line with the opinion of the European scientific committee (see previous footnote) as pointed out by the Minister of Health, Welfare and Sport. Dutch policy rules were brought in line with the migration limits of the revised EU Directive. Cf. *Government Gazette*, 2010, 5934.

36 See recital (3).

37 In fact, according to the legislative technique of the new approach, the technical specifications of products meeting the essential requirements in harmonised standards are determined by European standardisation bodies, the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC) mandated by the European Commission. See recital 2, Articles 45, and 46 of the Directive proposal.

Most importantly, the safety requirements should ensure that toys did not 'jeopardize the safety or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind behaviour of children.'[38] Member States were to guarantee that only those toys would be placed on the market that complied with the essential safety requirements during the period of their use.[39] In this regard, the envisaged elaboration of the requirements listed in the Annex 2 of the draft directive triggered debate, especially on the chemical properties of toys (Council of the European Union, 2008b, pp. 72-81). A major issue was the question of how to deal with fragrances in toys (Council of the European Union, 2008b). Member States were divided as to the questions of how to distinguish between natural and artificial fragrances, whether or not fragrances should be banned from the inclusion in toys, and if banning of fragrances should be exhaustive or only apply to particular fragrances (Council of the European Union, 2008b, pp. 72-80)? The Dutch delegation advocated adopting a stricter approach to fragrances in toys. Like Austria and France, it favoured the introduction of a ban not only on artificial fragrances – as envisaged by the proposal – but also on natural substances seen as causing allergy (Council of the European Union, 2008b, p. 77). Furthermore, enhancing the essential safety requirements for toys should not only be confined to fragrances. It should, additionally, take into account other allergy-causing substances such as colouring agents, preservatives, stabilizers (*Parliamentary Papers II* 2007/08, 22112, no. 623, p. 17). Finally, the Dutch delegation wished to amend the Directive's preamble by adding an explanation concerning the criteria used for setting migration limits of chemical elements in toys. This request was probably prompted by the wish to provide for more transparency and clarity of EU legislation (Council of the European Union, 2008b, p. 81). The final Directive provides for such an explanation,[40] demonstrating that the Dutch request was apparently taken into account.

Raising the safety standards of toys was at the heart of the European Parliament's resolution and chemical properties therefore also a key matter looked into during the European Parliament's discussions on the proposal. This is expressed by a number of the forwarded amendments. For instance, migration limits for chemicals from toys which are expected to be frequently put in the mouth were among the concerns addressed by the European Parliament. In this regard, the European Parliament supported a strict application of these limits in line with EU rules on materials and arti-

38 Cf. Article 9(2).

39 See Article 9(1) and 9(3) of the proposal.

40 Recital (22) of its preamble states that '[l]imit values for arsenic, cadmium, chromium VI, lead, mercury and organic tin, which are particularly toxic, and which should therefore not be intentionally used in those parts of toys that are accessible to children, should be set at levels that are half of those considered safe according to the criteria of the relevant Scientific Committee, in order to ensure that only traces that are compatible with good manufacturing practice will be present.'

cles intended to come into contact with food.[41] This request was met.[42] Furthermore, in line with the wishes of the European Parliament, the final draft Directive puts more emphasis on the need to update and adopt new essential safety requirements in the face of risks posed by certain chemical substances (CMR[43] compounds, allergens and metals).[44] With a view to CMR substances, the European Parliament welcomed the measures envisaged by the draft directive but proposed to tighten them up, especially regarding the conditions for the exceptional authorisation of their use. These conditions should be equally strict for all categories of CMR substances identified[45] and the use of these substances only granted upon evaluation by the relevant Scientific Committee mandated by the Commission (European Parliament, 2008, pp. 66-67; 81). In addition to that, and in line with requests by some Member States, including the Netherlands, the European Parliament favoured a stricter approach to allergenic substances, supporting the banning of them (European Parliament, 2008, pp. 70-72; 81). Its suggestion to exclude more allergenic fragrances from the use in toys than included in the initial Commission proposal was taken up, as reflected by the final Annex to the Directive.[46]

12.3.3 Warnings

The proposed provisions on warnings also called for a broader debate (Council of the European Union, 2008b, pp. 28-29; 86-89). In contrast to previous legislation[47] the issue was given more weight in the proposed text for the revised Directive. Next to the Annex, the proposal also addressed this issue in Article 10. In line with the Commission's aim to minimise hazards resulting from the use of toys, new and more stringent requirements were introduced in the Article and further substantiated in Annex 5 to the Directive, including categories of general and specific warnings relating to particular sorts of toys. Member States were given discretion in obliging manufacturers to present warnings and safety instructions in their own official language(s) when placing toy products on their market.[48] Most importantly,

41 These EU rules are laid down in Regulation (EC) No 1935/2004 of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food and repealing Directives 80/590/EEC and 89/109/EEC, OJ L 338, 13 November 2004, pp. 4-17.

42 Cf. recitals (23), (24), Article 46(2), and Annex II, chemical properties under point 7.

43 To recall from above, CMR stands for 'carcinogenic, mutagenic or toxic to reproduction'.

44 See the European Parliament's amendment no. 5 concerning recital (16) of the Directive proposal. European Parliament, 2008, p. 8. This amendment was taken over in the final agreement. See recital (21) of the revised Directive.

45 Depending on their expected risk potential three categories of CMR substances were identified. CF. European Commission, 2008, p. 4.

46 Cf. Annex II regarding particular safety requirements, point 11, under 'chemical properties'.

47 See Annex IV of the 1988 Directive on toy safety.

48 See Article 10(3).

as stipulated by the proposal, warnings should specify user limitations (e.g. minimum and maximum ages for users) and manufacturers should mark these limitations on the toy in a clearly legible and accurate way. Regarding this latter aspect, Sweden supported by the Netherlands, Germany, Finland, Malta and Romania pointed to the need of defining the minimum size of the letters in the wording of warnings. The European Parliament made corresponding amendments as reflected in its common position on the proposal (European Parliament, 2008, p. 106). Other Member States, like Malta, criticised the proposed requirements as inefficient for not drawing users' attention to residual risks inherent in toys.[49] Next to the obligation of indicating age limits provided for by the proposal, Poland preferred the inclusion of the maximum weight which a toy can stand. France and Hungary wished to see warning requirements included for magnetic toys. Germany, by contrast, rejected the latter proposal (Council of the European Union, 2008b, p. 89). France forwarded a proposal for another warning requirement concerning balloons stipulating that a pump should be used to inflate balloons in order to preclude harmful exposure to cancer-causing chemical substances such as nitrosamines included in rubber balloons. Interestingly, it based its proposal on similar legislation in the Netherlands[50] and Germany providing for corresponding rules. Even though the French request for amendment was not followed to the letter, the final Directive imposes a ban on products containing the substances referred to in its request, provided that certain conditions are met.[51]

The Dutch delegation had a specific request regarding EU rules on particular warnings specified in the Annex to the draft directive. The Commission proposal introduced certain warning requirements regarding the use of toys by children less than three years of age, excluding from this requirement, those toys that 'on account of their function, dimensions, characteris-

49 It seems that this request was somewhat taken into account. In contrast to the Commission proposal which remained silent on this issue, recital (29) of the revised Directive refers to residual hazards in toys: 'Where a hazard cannot be sufficiently minimised by design or safeguards, the *residual risk* [italics added] could be addressed by product-related information directed at the supervisors, taking into account their capacity to cope with the residual risk.'

50 This refers to the aforementioned policy rule, see footnote 33. The 2006 policy rule also provided for the requirement to place, in all cases, warnings on the packaging of balloons, including the recommendation addressed at consumers to avoid contact with the mouth, and instead, to use a pump for inflating balloons. For the 2010 update of the policy rule, resulting from the transposition of the Directive, agreement was reached with domestic industry during another ROW meeting. The updated policy rule was issued by the Ministry of Health, Welfare and Sport to ensure complete conformity with EU rules on nitrosamines and nitrosable substances had to be notified to the European Commission under Directive 98/34/EC (on procedures concerning information on technical standards and regulations). It should be noted that the Ministry did not remove the recommendation from the text of the warnings despite the Commission's comment that it would not be necessary to have it displayed on all packages containing balloons. See *Government Gazette*, 2010, 5934.

51 See Annex II and under point 8 of the section on chemical properties of toys.

tics, properties or other cogent grounds, are manifestly unsuitable for children under 36 months'. The Dutch Government, by contrast, preferred an explicit prohibition on the placing of corresponding warning requirements (*Parliamentary Papers II* 2007/08, 22112, no. 623, p. 17) and put forward a corresponding suggestion for the sake of this (Council of the European Union, 2008a, p. 30). The European Parliament took a similar position on this matter. Being dissatisfied with the rules proposed by the Commission, in particular regarding warnings against toys 'obviously designed or intended for children of a certain age group', it pointed out that '[all] too often toys that are obviously intended for babies and very young children are marked with a warning that they are unsuitable for children under 36 months. By doing this, the manufacturer is trying to sidestep strict safety rules and to evade any possible liability. This is irresponsible and must be forbidden' (European Parliament, 2008, p. 81). For that purpose, the Dutch delegation suggested amending Article 10 accordingly (European Parliament, 2008, p. 104). However, in spite of the wishes of the Dutch delegation and the European Parliament, the final Directive does not introduce such a ban, possibly due to Member States' objection to it, being prompted by fears that it would impose too much of a burden on national enforcement authorities. Finally, another request of the European Parliament was made in the light of the subsidiarity principle. The European Parliament underlined the need to provide warnings and instructions for the use of toys in a language understandable by the consumers (European Parliament, 2008, p. 32; 82; 84). As a result, the final Directive allows Member States to impose such a requirement on manufacturers.[52]

12.3.4 Obligations for economic operators

EU directives in the area of consumer law and the internal market typically establish obligations for economic operators. Chapter two of the proposal laid down those obligations that should fall under the framework of the new Toy Safety Directive (Articles 3 through 8). Article 8, for instance, obliges economic operators to notify the market surveillance authorities about other economic operators in the toy supply chain. More concrete, they shall indicate from whom they have been supplied with toys and to whom they themselves have supplied toys. Furthermore, the relevant provision stipulated that 'economic operators should ensure to have in place appropriate systems and procedures which allow for this information to be made available to the market surveillance authorities on request, for a period of 10 years'. This provision was one of the very few which the Dutch delegation sought to amend. Whereas it had initially agreed with the ten-year commitment of availability, it changed course in the later negotiation rounds, advocating together with Hungary, Malta and Italy, a shorter period of five years

52 See Article 11(3) of the final Directive.

(Council of the European Union, 2008b, p. 26). It is possible that the Dutch efforts to change the proposal accordingly were geared towards achieving a more frequent identification and documentation of responsible market players in toy supply in order to uphold own high safety standards. It seems that a common agreement on this issue did not swiftly materialise, leading the Dutch and Irish delegation to suggest that 'documentation should be available from first placing on the market and then 7 years after a toy has ceased production' (Council of the European Union, 2008c, p. 30). The final directive includes, however, the original proposal (ten-year availability).

12.4 Analysis

The foregoing descriptive analysis has mapped out the negotiation process on the proposal for a revised Toy Safety Directive seeking to draw particular attention to the position of the Netherlands on the latter. The focus now shifts to the explanatory analysis and the role of discretion in the negotiations.

12.4.1 Discretion and policy area

To start with the first expectation, it implies that the less a policy area is influenced by the EU in institutional and legal terms, the more discretion is granted to Member States. This does not seem to match the case of the Toy Safety Directive. After all and as established earlier, integration of consumer protection law with the EU is well advanced. It shows in the progressive approximation of national legislation to the EU acquis in the field of consumer protection. It is also expressed by an increasingly stronger pull towards full harmonisation exerted by the Commission, not least by means of the new approach which realises the full harmonisation of product standards as well as the new legislative framework on the marketing of products which is largely implemented by EU regulations and hence, rules which are directly applicable in the Member States. All this points to a high density of EU rules in the area of consumer law and the (revised) Toy Safety Directive seems to exemplify this, being a complex and detailed Directive with references embedded in the context of other EU consumer-related legislation. In addition to that, its own history illustrates the strong influence which the EU exerts in the area of product safety legislation. After all, introducing and revising the essential safety requirements falls within the exclusive competence of the EU. As a result, both the first and the revised Toy Safety Directives establish full harmonisation requirements. In addition to that, the revised Directive also introduces common requirements in the realm of enforcement, which traditionally is an area resting in the hands of the Member States. Taking all these points into account, the reverse of the *policy area expectation* appears to be much closer to the facts of the present case: high EU influence leading to very little discretion left for the Direc-

tive's formal implementation. Indeed, and as confirmed by the results of the coding exercise: the Directive grants a small margin of discretion. Having said this, it seems plausible to assume that the role of discretion in the negotiations was marginal. But before jumping to conclusions, the other expectations of the analytical framework are addressed one by one for the sake of providing a consistent and complete analysis.

12.4.2 Discretion and political sensitivity

Where the content of a Directive includes politically sensitive issues, more discretion is incorporated into the Directive (expectation 2). The Directive, however, grants hardly any discretion which already points to the little relevance of this expectation for the present context. Furthermore, the Commission proposal included EU rules that built upon already existing ones and were proposed with the intention to update but not fundamentally change previous legislation. Such modifications are in general associated with less resistance from and controversy among Member States than the introduction of a new subject matter for regulation (Kaeding, 2007; Mastenbroek, 2007: 36-37). Besides the fact that Member States' attempts to find a common position on the terminology used in the Directive as well as the essential safety requirements (especially the chemical properties of toys) led to some discussion revealing different views, the analysis does not deliver any indicators that preference divergence and / or disagreement, among Member States, for instance, about the level of harmonisation stirred up hot debates stalling the negotiations on the Directive. What's more, it should be born in mind that the aspects addressed in the negotiations were mostly not about new substantial requirements but rather related to technical requirements. Hence, in political terms, there was very little at stake. At least this can be said with some certainty from the viewpoint of the Netherlands and due to the overall smooth progress of the negotiations it is likely that it also applies in the case of other Member States. Indicators of a relatively unproblematic EU decision-making process are the short length of negotiations and the adoption of a final agreement at first reading, alongside the fact that the dossier was officially not identified in the Council negotiations as being controversial (A-item). All this seems to confirm the view that political sensitivity, controversy and more discretion resulting from the previous two did not carry any relevance in the negotiations on the revised Toy Safety Directive.

12.4.3 Discretion and compatibility

The proposal for the revision of EU toy safety rules built on earlier EU legislation on this subject matter. Hence, Member States were already familiar with the EU toy safety requirements, having them already implemented into their national legal orders. This makes it less likely that compatibility between EU and national rules represented a problematic issue (expectation

3). At least, and confined to the position of the Netherlands on the Directive proposal, no fundamental discrepancies were brought to light as regards the EU and Dutch safety rules on toys. There certainly were a few minor issues that the Dutch delegation sought to change to its own benefit, trying to uphold (own) high safety standards. This was, for instance, reflected by its requests concerning the use of fragrances in toys, its wish to introduce a ban on the placing of specific warning requirements on toys, and its position on the obligation for market players to identify economic operators (more) frequently. But even if the Dutch Government wished to (slightly) change a few technical aspects of the Directive proposal, this does not provide any evidence for legal incompatibility between the EU Directive and national law. What's more, it seems safe to assume that, if EU and Dutch rules had considerably differed, the Dutch delegation had presumably been more proactive in forwarding requests and proposing amendments. As confirmed by the interview partners, there was no reason for disapproval with the proposed revision of EU safety rules. Neither did they include fundamentally new issues, nor did they seem to incur high implementation efforts – except for costs to be borne by the toy industry which, on the longer run, were, however, expected to be compensated by market gains owing to the availability of safer and high-quality standard products for the market. As noted by the interviewee of the Ministry of Health, Welfare and Sport involved in the negotiations, a few aspects for improvement were brought up by the Dutch delegation during the negotiations on the proposal. But only to demonstrate that Dutch interests were adequately identified and represented in Brussels. What's more, as noted by another interviewee, a senior civil servant at the same Ministry, in the light of the fact that, at the Ministry, the overall acceptance with safety rules concerning products 'made in Brussels' is high, especially as regards toy safety legislation, seeking more discretion for the national implementation of EU law has become a void issue. This may also explain why the Dutch delegation took a seemingly reserved role in the negotiations, submitting hardly any requests for amendments.

12.4.4 Discretion and European Parliament

Turning from the Dutch delegation, finally, to the European Parliament and its role within the negotiations and its perspective on discretion, the following findings can be presented. For sure, if compared to the negotiations on the first Toy Safety Directive where the European Parliament had no say in the matter given the fact that its role was confined to deliver a (non-binding) opinion on the proposal according to the applicable consultation procedure, it had a stronger position in the case of the negotiations on the revised 2009 Toy Safety Directive. Here it acted as co-legislator in the corresponding decision-making process. In addition, its influence in the formulation of EU legislation seems to have left its traces in the text for the revised Directive. A cursory, comparative look at both – the proposed changes mentioned within the European Parliament's legislative resolution and the final deci-

sion-making outcome – brings to light that most amendments found their way into the revised Directive by being entirely taken over or slightly adjusted. At the same time, these amendments do not point to any attempts of the European Parliament to reduce the already limited margin of legislative discretion (expectation 4). In fact, the European Parliament suggested the granting of discretion to Member States to ensure compliance with the subsidiarity principle as regards the determination of the language of warnings on toys. Taking an overall view, based on the previous descriptive analysis and the considerations just made, leads to the conclusion that the European Parliament played a relevant role in the legislative process on the Directive, presenting itself therein as a supporter of stricter safety requirements – a role that it had already taken in its 2007 resolution to the Commission prompted by the incident with unsafe toys from China. The analysis, however, does not provide any evidence that the European Parliament used its influential position in the negotiations to alter the already meagre margin of discretion entailed by the Directive proposal. Being a proponent of legislative harmonisation in matters relating to the internal market, there was also no need for the European Parliament to advocate the conferral of more discretion upon Member States.

12.5 Conclusion

The facilitating role of legislative discretion in EU decision-making on directives does not come into play in the present case. In fact, the negotiations on the Toy Safety Directive illustrate well under which circumstances legislative discretion does not seem to hold great significance. First of all, in a political area where particular issues are already largely determined by EU law, seeking discretion has ceased to be among Member States' preferences. This is especially the case if Commission proposals introduce updates of already established rules instead of novel matters that require more implementation efforts in the Member States and may therefore trigger more debate in the Council. Moreover, if aspects of the Directive under negotiation pertain to technical matters which exclude the likeliness of political sensitivity and resulting controversy among Member States, discretion is not needed to facilitate reconciling divergent national interests. Finally, it seems reasonable to assume that the acceptance of EU rules expressed by the Netherlands and, possibly, other Member States, is higher where EU objectives include establishing common (high) levels of product safety standards. These standards determine the marketing success of products, especially if they are used primarily by children which are, after all, the most sensible group of consumers. Having looked into the negotiation process on the Toy Safety Directive, the transposition of the Directive into Dutch law shall receive specific attention hereafter.

12.6 Transposition

While the formal implementation of the revised Toy Safety Directive was due to 20 January 2011, the deadline for the practical application of EU safety rules for toys was set at 20 July 2011.[53] Hence, the Directive provided for a transitional period, taking into account that the toy industry needed time to adjust to the new safety rules. Additionally, the deadline for the application of the Directive's chemical safety requirements (part three of Annex 2) was set at 20 July 2013. By that time the European standardisation bodies were supposed to have finalised developing harmonised standards. Meanwhile, toys complying with the corresponding parts of Directive 88/378/EEC were still allowed to be placed on the market.

The Directive was transposed in the Netherlands by virtue of the 2011 Toys Commodities Act Decree, and hence, without any intensive participation of the Dutch Parliament.[54] Likewise, the first Toy Safety Directive had been formally implemented by means of subordinated legislation. But the latter's transposition had required five transposition measures instead of one.[55] Since the adoption of the revised 2009 Toy Safety Directive, the Commission and its Expert Group on Toys have sought to assist Member States in the implementation of the Directive – by means of roadshows and explanatory guidance documents, which are partly drawn up in the Chinese language since many toy products are manufacturer in and imported from China (e.g. European Commission, 2013).[56]Assistance pertains in particular to the application of those EU rules that cause uncertainty among economic operators, such as for instance the technical documentation requirements, as noted by Coumans with regard to the Directive's application by the Dutch toy industry (2010: 35).

In any case, and with regard to the Directive's formal implementation in the Netherlands, so far it has not prompted any objections from the Commission. This contrasts with, for instance, Germany, which has only recently

53 See Article 54 of the Directive.

54 'Besluit van 21 januari 2011, houdende vaststelling van het Warenwetbesluit speelgoed 2011'. Cf. *Offical Bulletin*, 57, 2011. As noted earlier, the adoption of orders of council (or governmental decrees) does not require the involvement of the Dutch Parliament.

55 These measures included new and amending lower-level instruments.

56 In line with the Commission's overall aim to improve the effectiveness of warnings in preventing accidence, this document provides guidance regarding the Directive's warning requirements aiming to ensure that the information on instructions and warnings is understandable and accessible to consumers of toys.

received a reasoned opinion for not complying with the chemical requirements of the revised Directive (European Commission, 2014).[57,58]

12.6.1 Transposition measure

As in the case of the first Toy Safety Directive, the revised Directive was incorporated into the legal framework of the Dutch Commodities Act (see table 16).[59] The Dutch Commodities Act has since 1935 provided a legal framework for ensuring that products (food, electronic, games, toys etc.) do not pose risks for the safety of consumers. Meanwhile, the Act has been modified several times. Within this legal framework rule-making by means of secondary legislation is allowed and the regulatory power established to transpose European directives concerning product safety.[60]

Table 16: Fact sheet transposition Toy Safety Directive

Transposition deadline:	20 Jan 11
Publication transposition legislation:	17 Feb 11
Sort transposition measure (and number):	Order in council (1)
In charge:	Ministry of Health
Legal Framework:	Dutch Food and Non-Food Law, 1935 Commodities Act Decree on Toys 1991

In so doing, the Dutch Commodities Act represents the basis for a number of sectoral decrees including those that serve to transpose EU legislation such as the Commodities Act Decree on Toys adopted in 1991,[61] transposing the first Toy Safety Directive. This Decree covered safety rules for both toys and other goods for kids. The new Toys (Commodities Act) Decree, adopted

57 In May 2014 the General Court of the European Union had already largely confirmed the Commission's decision by which Germany was requested to change its national legislation concerning limit values for certain metals which were found not to be consistent with the chemical requirements of the revised Directive. Meanwhile the case has been closed. Cf. Case T-198/12 Germany v Commission.

58 More details on Member States' implementation performances were not available. The relevant Commission report was not yet published by the time this part of the dissertation was written.

59 Commodities Act (Warenwet), *Official Bulletin*, 1935, 793.

60 See Article 13 in conjunction with Article 3 of the Commodities Act.

61 The Decree is also referred to in the following as 'Toys (Commodities Act) Decree', or just 'Toys Decree'. In Dutch it is known as 'Warenwetbesluit Speelgoed' and published in the *Official Bulletin*, 1991, 269.

to transpose the 2009 Toy Safety Directive, repeals its 1991 predecessor.[62] Albeit including more Articles than the previous Decree (19 vs. 12), the new Decree does not anymore contain provisions pertaining to goods for kids other than toys. This is due to the fact that these rules do not fall within the remit of the revised Toy Safety Directive and were therefore incorporated by the transposing Ministry of Health, Welfare and Sport into another Decree under the framework of the Dutch Commodities Act which relates to the general safety of products.[63] This transposition approach illustrates the Ministry's efforts to remain in line with the Directive and to avoid the inclusion of any national extras into the transposition measure, adhering strictly, to the corresponding ministerial instructions for the transposition of EU law into Dutch law.[64]

Since the Toy Safety Directive is a comprehensive piece of EU legislation, the following sections are used to map out, by means of a few examples, how the Directive was transposed into Dutch law. Such an approach is preferred to a long and detailed description of the transposition measure. It ensures better readability of the analysis and, in addition, brings out the most important aspects, providing an insight into the methods and techniques applied by the Ministry to transpose the Directive into the national legal framework.

12.6.1.1 Terms and scope

The definitions of the Directive's key terms and rules concerning its scope were transposed into Article 1 of the Toys Decree. Reference is thereby largely made to the corresponding explanations provided by the Toy Safety Directive.

12.6.1.2 Obligations of economic operators

The obligations for manufacturers were translated into Article 3 and 4 of the new Toys Decree. In fact, the two Articles merely list the relevant Directive provisions as well as the Annex that manufacturers are supposed to take into account (see Article 3.1 Toys Decree). The same approach, i.e. direct

62 The repeal of the previous Decree resulted in the ipso jure termination of a few ministerial decrees and instructions that the Ministry had issued under the previous Toys Decree, including the instructions concerning standards for toys as developed by the Netherlands Standardisation Institute (NEN). These standards would, however, continue to be published in the *Government Gazette* or could be obtained from NEN. Furthermore, since harmonised standards were to be determined by EU standardisation bodies, it was no longer deemed necessary by the Ministry of Health, Welfare and Sport to introduce them within the framework of the Toys Decree. Cf. *Official Bulletin*, 2011, 57.

63 This Decree incorporates rules of the EU Product Safety Directive (2001/95/EC) into Dutch law. In contrast to the EU Toy Safety Directive, Directive 2001/95/EC covers rules concerning goods for kids.

64 This refers to the earlier-mentioned Instructions for drafting legislation, no. 331 in particular.

referencing to the relevant Directive provisions, was applied regarding the obligations for importers and distributors (see Article 5 and 6 Toys Decree).

12.6.1.3 Safety Instructions and warnings

The Directive's requirements relating to the safety instructions and warnings for the use of toys are transposed by means of Article 7 of the Toys Decree. The Ministry made use of discretion provided by the Directive in establishing that information on the safety of toys and warnings has to be provided in the Dutch language.

12.6.1.4 Presumption of conformity and CE marking

Article 8 of the Decree is almost a literal translation of the Directive's Article 13, setting out the presumption of conformity with the essential safety requirements (harmonised standards) as laid down in Article 10 and Annex II to the Directive. According to Article 9 of the Decree, toys being placed on the market have to be affixed with a CE mark indicating compliance with EU safety standards. The general principles of the CE marking and rules and conditions for affixing it to toys are laid down in Article 9 of the Decree which establishes that toys being placed on the market have to bear a CE marking in correspondence with Article 16(1) and (2) as well as Article 17 of the Directive.

12.6.1.5 Conformity assessment procedure

Article 12 of the Decree transposes the EU rules concerning the conformity assessment procedure and bodies involved therein. Article 12.2 requires from conformity assessment bodies compliance with the Directive's Articles 26(2) to 26(11), Article 31(5), and Article 36 (performance and condition requirements as well as information obligations). Article 12.3 of the Dutch Toy Decree literally translates the Directive's presumption of conformity requirement for national conformity assessment bodies.[65]

12.6.1.6 Market surveillance

Article 13 of the Decree relates to the Directive's rules on market surveillance. Officials, in the meaning of Article 25 of the Commodities Act those that are appointed by national ministers to carry out market surveillance tasks,[66] together with conformity assessment bodies as well as economic operators shall act in accordance with Articles 41, 42 and 45 of the Directive (laying down the obligations concerning market surveillance).

The description of the transposition measure clearly illustrates that the Ministry of Health, Welfare and Sport closely followed the structure and wording of the Directive while transposing it into the Dutch legal frame-

65 Cf. Article 27 of the Toy Safety Directive.

66 They are appointed by the Minister of Health, Welfare and Sport, the Minister of Economic Affairs or the Ministry of Agriculture, Nature and Food Quality. Cf. Article 25 of the Act.

work. While incorporating the revised EU safety rules into Dutch law (including those established in the Annexes to the Directive), one-to-one transposition was accompanied by the method of direct referencing. Nearly all Articles of the Decree cite the relevant Directive provision or literally translate the rules contained by them. In fact, to properly understand transposition legislation of the Toy Safety Directive requires reading the former in conjunction with the latter. This corresponds to already established practice as was noted by the Ministry. Owing to the international dimension of the toy sector, economic operators involved in the toys business regularly consult the Directive's safety rules (*Official Bulletin*, 2011, 57). While largely staying close to the Directive text when transposing its requirements into Dutch law, additional wording was added to the new Toys Decree, only in a few cases, namely where national peculiarities had to be taken into account, such as for instance with respect to the language requirements concerning safety instructions and warnings. Last but not least, it becomes evident from the Dutch transposition measure that the Ministry applied the method of dynamic referencing, meaning that the transposition measure directly refers to the directive, including its future amendments. The application of this method is reflected by Article 14 of the new Toys Decree: any amendment to the Directive shall apply to the application of precisely this transposition measure.

12.6.2 Reactions to the measure

In August 2010, prior to the publication of the new Toys Decree, another meeting was held between the Ministry of Health, Welfare and Sport and representatives from the toy sector and consumer organisations. This meeting took place under the already-mentioned framework of the Regular Consult Food and Non-Food Law (ROW). The issues discussed pertained to the costs caused by the implementation of the Directive and the removal of the provisions concerning goods for kids from the scope of the Toys Decree resulting from the Directive's formal implementation into Dutch law. The participants of this meeting opined that the proposal lacked clarity with regard to the question of costs: while it was obvious to all of them that the Directive's enforcement requirements entailed administrative and financial burdens, the exact amounts of the implementation costs turned out to be hard to predict and remained unclear.[67] The revised EU rules and, in particular the way they were transposed by means of the new Toys Decree, nevertheless met with broad approval by stakeholders (Ministry of Health, Welfare and Sport, 2010).[68] The content of the transposition measure was only

67 While later on, in the explanatory memorandum to the Decree, attempts were made to calculate costs, the Ministry, however, acknowledged that figures could not be provided with certainty. *Official Bulletin*, 2011, 57, p. 8.

68 Ministry of Health, Welfare and Sport, 'Report of the stakeholder (ROW) meeting', 2 August 2010, provided to me by the Ministry.

slightly amended at the request of the Dutch association of toy suppliers and with regard to Article 10.3 of the Decree: to avoid further administrative burdens for the toy industry sector, it was agreed with the Ministry that the Decree would provide for the possibility to draw up technical documentation and correspondence in English as an alternative to Dutch.[69] While one participant expressed the view that having to consult two legal documents might cause inconvenience in the application of EU safety rules, the majority of stakeholders shared the opinion that directly referring to the relevant provisions of the Directive, would help to avoid misinterpretation and misapplication of EU rules (Ministry of Health, Welfare and Sport, 2010). Be it as it may, the discussion did not lead to any fundamental amendments to the Toys Decree.

In the Netherlands, as with any adoption of governmental decrees (as well as parliamentary acts), the draft transposition measure was submitted to the Council of State to obtain its non-binding opinion. While stakeholders agreed with the draft Decree, the Council of State did not approve of the transposition technique the Ministry had applied in formally implementing the Directive (Council of State, 2010).[70] The Council of State held the view that the method of direct referencing was flawed in that it did not provide for sufficient legal certainty for economic operators, and consumers, in particular, to whom the Directive was also directed. It therefore advised the Ministry to review the measure and to provide for clear and legible transposition legislation. The Ministry took a different view by rejecting, first, that the Directive was directed at consumers, and second, by arguing, to the contrary, that transposition legislation provided for sufficient clarity. With a view to consumers, it additionally pointed out that they would gain certainty about the safety of products by means of the CE marking affixed to toy products. Based on this argumentation, the Ministry did not follow the opinion of the Council in this particular respect.

The Decree was published in the Dutch *Official Bulletin* by mid-February 2011 and therefore a few weeks after the transposition deadline.[71] Transposition occurred, thus, with a very short delay. Nevertheless, the question may be asked why there was a time lag after all. The government originally proceeded from the assumption that transposition would be timely (*Parliamentary Papers II* 2010/11, 21109, no. 197, p. 7). This was also confirmed in

69 This was in line with the Directive. According to Article 20(5) of the Directive technical documentation and correspondence 'shall be drawn up in an official language of the Member State in which the notified body is established or in a language acceptable to that body.'

70 Cf. Council of State, 'Advice W13.10.0541/III', 23 December 2010; available at: https://www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=9573 (accessed 22 June 2015).

71 It became effective on 20 July 2011. General practice of ministries in the Netherlands is to let legal acts enter into force only twice annually - usually on 1 January and 1 July (known as common commencement days). This approach is applied to prevent citizens from being confronted with new legislation too frequently.

the interview with the civil servants involved in the transposition process. The interview partners could not identify any specific grounds for why timely transposition was not achieved. They were convinced that transposition was delayed for minor reasons. Explaining such a brief delay may be less intriguing and complex than in case of longer delays. In the words of the interviewees, 'it might have been a rather trivial reason which caused delay in the transposition of the revised Toy Safety Directive, such as a delayed signature or a misplaced document on a wrong pile that eventually retarded the process.' This is certainly not far-fetched to think given the fact that processes such as the transposition of European directives by national civil servants are not automated. Hence, human errors can occur and therefore not be ruled out as one of the reasons for deficient transposition. This, however, does not answer the question concerning the role of discretion and other factors in the transposition of the revised Toy Safety Directive. The subsequent explanatory analysis therefore tackles this question.

12.7 Analysis

This section builds upon the previous discussion of the Dutch transposition of the revised Toy Safety Directive. Factors that are assumed to influence transposition are addressed, including discretion, and examined in respect of their relevance in the present transposition case.

12.7.1 Discretion-in-national-law

It seems that, on the basis of the above-made observations, there is much to be said for the point that expectations about the role of discretion in the transposition process seem to carry little relevance in the present context.

As established before, the Toy Safety Directive grants hardly any discretion which already makes redundant to consider whether with more discretion available, the Directive was better (timely and / or legally correct) transposed into national law (expectation 1). The reasons for the meagre levels of discretion shall be briefly recalled: harmonisation of EU toy safety legislation is well-advanced. Safety rules are 'made in Brussels' leaving hardly any discretion for transposition. Additionally, harmonisation is preferred by the Member States, and arguably also by business and consumer organisations due to the advantages it entails for all of these groups: common standards and legal clarity, alongside the free circulation of toys as well as high safety and consumer protection throughout the EU. In this context, seeking discretion for own policies, certainly within the Directive's limits, in order to give transposition a truly 'national touch', loses all relevance. Where it is accepted by national actors that Brussels 'sets the tone' like in the case of the Dutch transposition (and negotiations) regarding the Toy Safety Directive, considerations relating to the preservation of national peculiarities while incorporating the Directive into national law, have

ceased to be relevant. If little discretion is available after all, as shown by the present transposition case, it is used for pragmatic reasons: providing safety and warning instructions that are easy for the consumer to understand. Taking the foregoing into consideration, the *discretion-in-national-law expectation* does not carry much relevance in the present case. It is, in this context, however, interesting to note that the discretionary choice of transposition forms and methods by the Ministry of Health, Welfare and Sport reflects a certain approach to transposition. Whereas the first Toy Safety Directive was transposed by copying out EU rules, this technique has meanwhile been replaced by direct and dynamic referencing – as evidenced by the transposition of the revised Directive. Thus, it seems that, in the course of time, the Dutch transposition of EU safety rules on products, at least concerning toys, has become a matter of routine and acceptance: EU rules are 'simply' taken over in the transposition measure.[72]

12.7.2 Discretion, administrative capacity and transposition actors

With the certainty that the Directive afforded very little discretion to Member States for transposing its provisions into Dutch law, those expectations evidently become irrelevant that predict certain effects resulting from more discretion being available for transposition. More concrete, it can be ruled out that transposition was facilitated by an interaction effect from more discretion and administrative capacity (expectation 8). Nor did the combination of more discretion, and the number of actors transposing the Directive, lead to a negative interaction effect contributing to deficient transposition (expectation 9). Considering each national-level factor on its own furthermore does not offer much explanatory power with a view to the transposition outcome. To begin with, administrative capacity was not a problematic issue. The analysis of the transposition documents and the information obtained from the interviews do not provide any meaningful indicators of lacking knowledge or administrative coordination problems in transposition. The Ministry of Health, Welfare and Sport acted alone in transposing the Directive, and on the basis of the analysis no serious disagreements or conflict between the political units involved in the negotiations and the legal units transposing the Directive, could be established. Having one Ministry in charge of transposition, also excludes controversy as a cause for delay, resulting from divergent views among the transposition authorities on how to incorporate the Directive into national law.

72 In this regard it is interesting to note that with the most recent amendment to the Dutch Commodities Act a legal basis was introduced (Article 13c) which establishes that for all EU directives transposed within the framework of the Dutch Commodities Act, dynamic referencing shall apply. See *Official Bulletin,* 2015, 235. This was mentioned to me by one of the interviewees.

12.7.3 Discretion, compatibility and disagreement

Discretion and compatibility between EU and national rules are not only considered to be relevant factors that are linked with each other in EU negotiations on directives. They can also be connected in the national transposition of directives according to the *compatibility interaction expectation* (E7). It is expected that compatibility between the EU directive and national rules raises the likelihood of proper transposition, and that this effect becomes more positive with increasing degrees of discretion available for transposition. In the present case, the Toy Safety Directive and relevant Dutch legislation were, indeed, largely compatible. The analyses of both the negotiation and the transposition processes do not provide for any pertinent indicators of lacking compatibility between EU and Dutch rules. It is possible that the situation was different with respect to the first EU Toy Safety Directive adopted in 1988 which required five transposition measures to be incorporated into national law. The revised Directive, by contrast, was transposed by means of one Decree, its rules being incorporated relatively easily into already firmly established national legislation: the Dutch Commodities Act. Assessing the compatibility between EU safety rules and Dutch legal arrangements on the basis of the four-fold classification of misfit, provided by Steunenberg and Toshkov (2009), allows concluding that the legal misfit between the Directive and national law was small. It is therefore likely that low incompatibility, and therefore a rather good compatibility between EU and national rules, contributed to a relatively smooth transposition of the Directive. What about the role of discretion which is the second factor, alongside compatibility, addressed by the expectation? The Directive text leaves no doubt that the Toy Safety Directive is not a discretionary piece of EU legislation. This being said, it becomes evident that a facilitating joint effect resulting from compatibility and discretion can be excluded as having affected the transposition of the Directive. And yet, it cannot be said that discretion is completely irrelevant in the present case. The simple fact that it is inherent in directives, due to the choice of implementation forms and methods offered by them to transposition actors, is a relevant point. The descriptive analysis shows that the methods and techniques chosen in transposing the Directive, have contributed to the fact that the Directive was smoothly incorporated into national legislation – even in the absence of high levels of discretion. As pointed out in the explanatory memorandum to the Toys Safety Decree, and as confirmed by the interviewees, the method of direct referencing made it relatively unproblematic to transpose EU rules while at the same time misinterpretation (and later misapplication) could be avoided. In addition to that, using this technique, and especially the method of dynamic referencing, ensures the swift adjustment of safety rules whenever future amendments of the Directive are required.

Finally, another expectation that carries little relevance in the present case refers to both the negotiation and transposition stages, and implies that disagreement between the EU directive and national rules raises the likeli-

hood of deficient transposition, an effect which becomes more pronounced if the degree of discretion decreases (expectation 6). First of all, and as noted when analysing the EU decision-making process, the content of the Directive was largely in line with the Dutch preferences. It is true that Dutch requests were not always accommodated such as in respect of the introduction of a ban regarding the placing of particular warnings on toys, to mention one example. On the other hand, the Dutch Government was, on the whole, satisfied with the proposal, as was also confirmed in the interviews conducted.

12.8 Conclusion

The relevance of discretion in the case of the Toy Safety Directive is very limited but, on the other hand, also not entirely negligible. Discretion was not necessary for ironing out disparities between EU and national rules, neither at the negotiation nor transposition stage. It can, however, not be denied that discretion through the choice of implementation forms and methods, comes to bear in the present case. It made it possible for the Ministry of Health, Welfare and Sport to use a well-proven approach to transposition, involving certain techniques and methods as well as the consultation of national stakeholders. Stakeholder involvement in transposition may enhance national compliance at later implementation stages: when the Directive has to be practically applied and enforced, entailing that stakeholders take an active role in the implementation of the Directive. In a nutshell, transposition could be shaped in a way that, in the eyes of the actors concerned, would ensure the proper formal implementation of the Directive into national law. Discretion was not a deciding but a supporting factor in this process, ensuring that the Directive requirements could be incorporated into the Dutch legal system without much difficulty.

13 Return Directive

13.1 Introduction

This chapter deals with the EU Return Directive which seeks to establish a common approach towards returning illegally staying third-country nationals within the European Union. The negotiations and transposition of the Directive are analysed to examine the role of discretion in these processes.

Illegal or irregular immigration from non-EU countries is one of the biggest challenges the EU currently has to tackle. How to deal with the wave of immigrants that embark on the journey to Europe where they enter the territory illegitimately, being determined to stay at all costs but with little or no chance that this plan comes true? Today more than ever, it seems, this question is at the heart of the European integration process. Arguably, irregular migration and the general question of how to cope with all the people that like to enter and stay on EU territory, is one of the biggest crises the European Union faces, now and in the future. But the question of irregular immigration had been a pressing topic for some years already. For the year 2007, estimates by the European Commission concerning irregular third-country nationals staying in the European Union amounted to between 4 and 8 Million whereas more modest figures, between 2 and 4 Million (roundabout 0,4 and 0,8 percent of the whole EU population) – have been presented in academic research (Düvell and Volmer, 2011). Whether there are less or more irregular residents, the fact remains that the European Union is an economically and politically attractive destination for many who have no legal right to stay. Far from staying inactive, the EU has taken measures in response to this development, arresting 200.000 irregular immigrants in the first half of 2007, of which nearly 90.000 of them were subjected to return measures (Hanna, 2008).[1] And yet, in 2014, still 276.113 migrants entered the EU irregularly. This represents an increase of 138% compared to the same period in 2013.[2]

1 P. Hanna 'EU illegal immigration law faces knife-edge vote', in Reuters 17 June 2008.

2 Cf. 'Irregular Migration & Return', available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm (accessed 6 July 2015).

13.2 The directive

In fact, return policy has been promoted for more than a decade as a cornerstone of EU immigration policy and, in particular, as an essential part of an integrated return management system entailing the uniform application of relevant EU legislation. Such a system has been a primary aim of the EU, at least on paper, ever since.[3] The first decisive step towards realising this aim was the EU's 2008 Return Directive which seeks to establish a common approach to terminating illegal stays.[4] While the Directive has been characterised as an instrument of 'more vigorous action against illegal immigration' (Schieffer, 2010: 1507), it shows at the same time the efforts of the EU, to avoid forced returns and facilitate the voluntary departure of irregular residents. What exactly does the Return Directive entail?

The Directive is a comprehensive piece of legislation, comprising 30 recitals and 23 Articles which are divided into five chapters. The Directive lays down detailed arrangements for the various aspects related to the return of third-country nationals found to be illegally present in the territory of a Member State. Chapters 2 through 5 address the key elements of the EU return procedure, consisting of the 'termination of illegal stay', 'procedural safeguards' and 'detention for the purpose of removal'. The overall objective of the Directive is to establish EU-wide common standards and procedures for returning illegally staying third-country nationals,[5] while at the same time observing fundamental human rights throughout this procedure (Article 1). The Directive is applicable to third-country nationals whose stay on the territory of a Member State is illegal while those enjoying the Community right of free movement[6] are not part of its scope (Article 2). 'Illegal stay' applies when immigrants do not or have ceased to fulfil the requirements of Article 5 of the Schengen Borders Code or other conditions for entry (Article 3). The Directive lays down common minimum standards and allows Member States to provide for more favourable provisions as long as they are compatible with the Directive (Article 4). In any event, Member States have to comply with the principles of non-refoulement[7] as well as the best interests of the child, family life and state of health (Article 5). The return of irregular migrants is established as a phased process. Ille-

3 Cf. Council conclusions - Laeken (2001) and Seville (2002).

4 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24 December 2008, pp. 98-107.

5 Third-country nationals are hereafter also referred to as 'non-EU nationals'.

6 As defined in Article 2(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13 April 2006, pp. 1-32.

7 The principle entails that no (true) victim of persecution may be extradited to their persecutor, to respect the best interest of children, family life and the health of the person concerned.

gal stays are ended by means of a return decision (Article 6). Any return decision shall provide for a voluntary departure period of between seven and thirty days, which under certain conditions, may be modified (Article 7). Only under particular circumstances, stricter measures against irregular migrants shall be applied. They shall be removed (Article 8), subjected to an entry ban (Article 11) or a detention order (Article 15-17). Member States are obliged to provide for decisions related to return in written form as well as to offer appeal and review procedures for non-EU nationals (Articles 12 and 13). In emergency situations, Member States may derogate from the judicial review and detention requirements (Article 18). The Directive affords Member States a relatively wide margin of discretion, in particular through chapter II which includes the most important operational and discretionary provisions.

13.2.1 Immigration law and return[8]

The Return Directive is the first legal measure in the area of irregular immigration falling under the co-decision procedure and application of qualified majority voting in the Council. This new decision-making regime marked a turning-point in the development of EU immigration policies and the wider scope of the justice and home affairs area (JHA). While the intergovernmental legal nature of asylum and migration remained unaltered by the Maastricht Treaty (1993), a new institutional and legislative framework for this area was established by the Amsterdam and Nice treaty revisions (1999; 2003), together with the aim of creating an Area of Freedom, Security and Justice (Hailbronner, 2010: 2-3).[9] The corresponding legal arrangements confirmed that the EU was about to become an active player in the formulation and coordination of policies in justice and home affairs, which previously representing the third pillar of the EU treaty framework, had mainly been shaped by intergovernmental cooperation. But these changes happened at a very gradual pace since a number of JHA matters continued to be subject of unanimity and consultation of the European Parliament and were therefore still largely decided by the Member States.[10] Evidently, this was not the case with illegal immigration, at least not to the same extent as in other

8 Due to the earlier, more detailed outline in chapter 9 concerning the Blue Card Directive, the treatment of the justice and home affairs area shall be brief but complemented by insights into the evolution of EU immigration, and in particular return policy.

9 To this end a new title was entered into the Treaty establishing the European Community headed 'Visas, asylum, immigration and other policies related to free movement of persons'. The aim of an Area of Freedom, Security and Justice is thus to guarantee that the European Union is firmly grounded on security, rights and free movement realised by a set of home affairs and justice policies designed to achieve this goal. Its establishment proceeded gradually, shaped by various programmes adopted by the Council of the European Union in the period 1999-2014.

10 The transitional arrangements should grant both the Member States and the Commission an adequate time frame for preparing necessary changes in law. Cf. Article 63 TEC.

sub-domains of the JHA area, since the Council of the European Union eventually established that matters related to illegal immigration should be decided by qualified-majority voting and co-decision with the Parliament.[11] It, thus, seems that Member States acknowledged the particular urgency of the matter and need for a common strategy in tackling irregular migration.

Nonetheless, asylum and migration as matters of common interest appeared relatively late on the EU's agenda. This was mainly due to the persistent unwillingness of Member States to share their sovereign powers, resulting in a prevalence of loose intergovernmental arrangements and measures adopted by simple cooperation, common positions or actions – all of which were, in any case, decided without much influence of the EU. Only the establishment of the Schengen area and a more advanced cooperation since the late 1980s moved this development in another direction (Hailbronner, 2010: 1). It was at that time that both the upsides and the downsides of the abolition of checks at internal borders and the free movement of persons (confined to EU citizens) became obvious. In dealing with one of these downsides, illegal immigration was addressed since 1986 within the framework of the ad hoc working group on immigration that had been founded to combat illegal immigration. In fact, this ad hoc working group showed the first definite outlines of a more intensive collaboration between Member States at the EU level and it exceeded the narrow confines of inter-state dialogue. Decision-making under its framework, however, was mainly in the hands of EU and Member State officials and took place at a great distance from the public. This form of supranational cooperation was therefore perceived as lacking both transparency and legitimacy (Guild, 1999; Lavenex and Wallace; 2005; Kostakopoulou, 2007).

Another ten years passed until Member States agreed on a more serious commitment which exceeded short-term perspectives and ad hoc programmes, and included policies addressing illegal immigration and the managing of returning immigrants. The 1999 European Council in Tampere marked the starting signal for a coherent approach in the field of immigration and asylum. As was signalled by the summit, common efforts should be geared towards the establishment of a comprehensive Community Immigration and Asylum Policy. Within its framework the voluntary return of (illegal) immigrants should be promoted.[12] Since then, various ideas and programmes have been elaborated and presented to put such an approach into practice, showing the determination of both the Commission and the Council to make return policy an integral part of EU immigration policy.

11 As followed from the Council's 2004 passerelle decision the old decision-making regime applied to matters of legal migration but not to illegal migration. See Recital (7) and Article 1(2) of Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (2004/927/EC), OJ L 153M, 7 June 2006, pp. 485-486.

12 Cf. Council conclusions – Tampere (1999).

Based on a 2001 Commission action plan (European Commission, 2001), the Council developed and agreed on a common approach to combat illegal immigration and human trafficking which includes return as well as readmission policies as integral and vital elements in fighting illegal immigration. The plan of the Council, in turn, provided ground for a Commission Green paper which further explored various issues linked to the return of non-EU nationals (European Commission, 2002a). Regarding the management of return, the Commission gave consideration to both voluntary and forced return options and addressed aspects that were later on addressed by the Return Directive such as appeal and review options for irregular migrants in return procedures. The Commission paper did not represent a fully-fledged proposal but, instead, invited reactions from stakeholders (European Commission, 2005)[13] which were used for mapping out more concrete steps towards a Community Return Policy on Illegal Residents (European Commission, 2002b) leading eventually to the adoption of the Council Return Action Programme (Council of the European Union, 2002). The Return Action Programme emphasised the need for Member States to advance mutual collaboration and cooperation with third countries for facilitating return and readmission of illegal immigrants. Further Council programmes were inspired by it: At Stockholm (2001),[14] the notion of a fair and voluntary return and aim of ensuring fundamental rights protection in asylum and migration policies was re-endorsed, drawing on the content of the earlier adopted The Hague programme (2005).[15] During the European Council meeting at The Hague the aim was set to have in place an instrument on common standards and procedures for returning illegally staying third-country nationals, which at the same time guaranteed respects for human rights and dignity.

This latter goal was sought to be realised by the adoption of the Return Directive which had been preceded by other legal measures addressing certain aspects of cooperation in the field of return (see table 17).

13 As noted in the proposal for the Return Directive, the group of stakeholders participating in the consultation process included representatives of the Member States, candidate countries, countries of origin and transit of illegal migratory movements, other countries of destination, international organisations, regional and municipal authorities, non-governmental organisations, and academic institutions. See COM(2005) 391 final.

14 See Council conclusions - Stockholm (2001).

15 The Hague programme (2005/C 53/01).

Table 17: Development of EU return procedure

2010	European Council, The Stockholm Programme (2010-2014) - An open and secure Europe serving and protecting the citizens
2008	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
	Council European Pact on Immigration and Asylum
2005	European Council, The Hague Programme (2005-2010): Strengthening Freedom, Security and Justice in the European Union
2004	Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals represent first important legal milestones
	Council Decision 2004/191/EC setting out the criteria and Council adopted its Return Action Programme of 28 November 2002
2003	Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit
2002	Green Paper of the European Commission on a Community Return Policy
2001	Directive 2001/40/EC on mutual recognition of decisions on the expulsion of third-country
	Common policy on illegal immigration
1999	European Council, The Tampere Programme (2000-2005): Member States decide to set up a common European asylum system and a joint European immigration policy

Not being the first legislative act in this context, the Return Directive was nevertheless a decisive one. As a measure which should not only complement already existing EU instruments, the Directive stood out because of its 'horizontal application dimension': its requirements should be applied horizontally and therefore to *any* third-country national not or no longer fulfilling the conditions for entry, stay or residence in a Member State.[16] What's more, the Directive represented the first step towards harmonisation of different national standards and procedures in the area of return.

Return and readmission are nowadays key components of EU immigration policies.[17] Since the adoption of the Return Directive, the EU has steadily continued its legislative activity in this field. The adoption of not only further

16 Cf. recital (5) of the Directive's preamble.

17 Cf. 'Return and Readmission', available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm (accessed 6 July 2015).

directives but also regulations[18] seems to illustrate the deepening of collaboration of Member States as well as the rising influence of the EU. Greater EU impact, however, does not remain undisputed in an area not belonging to the traditional fields of EU action. This is a fact which has repeatedly been illustrated, not least through the negotiations on the Return Directive but also more recently by debates about systematic external border checks and the reintroduction of border controls in the Schengen area as requested by several Member States to combat terrorist acts and cope with immigration (Barigazzi, 2015; Hasselbach, 2015).[19]

13.2.2 Purpose and background to the directive

The proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals was submitted as part of a package of measures in the field of immigration and asylum (European Commission, 2005).[20] By tabling this proposal the European Commission sought to respond to the call from the European Council's declaration of The Hague summit meeting. Member States had agreed on the need for concrete measures to realise the common objective of an effective, fair and human policy on removal and return of irregular migrants.[21] Moreover, the Commission justified the need for a common EU-wide approach to returning non-EU nationals, by pointing to the cross-border dimension of irregular immigration, becoming particularly evident in cases of apprehension and return. The Commission proposal took special account of Member States' wishes to introduce minimum standards to guide them in procedures, geared towards the removal of illegally staying residents. It addressed a range of crucial components that should become part of an EU immigrant-return policy. Starting out with provisions on the return decision and removal order, it contained rules on the use of coercive measures, the application of temporary custody and issuing of re-entry ban, thereby providing for a common minimum set of legal and procedural safeguards to warrant effective protection of the interests of the individuals concerned. Provisions regarding family relationships and the best interest of the child as well as judicial remedies for third-country nationals[22] furthermore

18 See for instance the Schengen Borders Code Regulation (EU) No 610/2013, the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council.

19 J. Barigazzi, 'EU to tighten border controls in wake of attacks. Commission asked to propose new Schengen rules by end of year', in Politico 20 November 2015. C. Hasselbach, 'Migration: A new age of isolation for Europe?', in Deutsche Welle 13 June 2015.

20 The other measures concerned three Commission Communications, on Integration, on Regional Protection Programmes, and on Migration and Development.

21 The terms 'migrants' and 'immigrants' are used interchangeably. The same applies to the terms 'irregular' and 'illegal' stay.

22 See Articles 5 and 12.

underlined the Commission's intention to achieve an adequate treatment of returnees, one which should respect human rights and international law. To this end, the proposal conceptualised return as a two-phase process, including a return decision providing irregular migrants with the option of voluntary departure which, only, in a next step, should be followed by an act ordering their removal.

Not in all respects did the proposal fully realise what had been envisaged in the run-up to its submission. It did not include rules on the safeguarding of public order and security by means of expulsion or removal of irregular migrants, for the reason that, amongst others, this aspect was already covered by other EU legislation (European Commission, 2005, pp. 4-5). This does not change the fact that the Commission proposal, nevertheless, foresaw the use of coercive measures, temporary custody and entry bans.[23] The proposal also stayed behind the original expectation that it would provide for full harmonisation by means of a common legal framework. It is true that the proposal's long-term objective was to achieve adequate and similar treatment of irregular migrants throughout the EU, including the additional objective of facilitating the work of national authorities, allowing enhanced co-operation among Member States in matters of return. It, additionally, strived for, and eventually realised, the possibility for Member States to apply more favourable provisions to third-country nationals falling under its scope (Schieffer, 2010: 1507).[24] But exactly this latter aspect shows that the Directive did not imply the full harmonisation of national return procedures but, instead, established a minimum harmonisation approach to return management which precluded the entire alignment of national rules, implying, instead, the continuation of national, albeit limited, legal divergence throughout the EU.

13.3 Negotiations

The Commission proposal was submitted on the basis of Article 63(3)(b) TEC (now Article 79(2)(c) TFEU) and examined at length at lower and higher levels[25] within the Council and under successive Presidencies.[26] Finding a common position on the proposal was apparently difficult and only achieved after more than three years of negotiations (see table 18).

23 Cf. Articles 9 and 14.

24 See Article 4 of the proposal.

25 Including amongst others: working Party on Migration and Expulsion, Working Party: Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) involving senior level officials and the Permanent Representatives Committee (Coreper).

26 Negotiations started in 2006 under the Presidency of Austria, followed by Finland, Germany and Portugal in 2007 as well as Slovenia and France in 2008.

Table 18: Timeline for negotiations on the Return Directive

01 Sep 05	Adoption by Commission proposal
27 Apr 07	Committee of Regions opinion
18 Jun 08	Adoption of the directive at first reading by European Parliament
08 Dec 08	Approval by the Council of the European Parliament position at 1st reading
16 Dec 08	Formal adoption by Council and European Parliament

It was certainly not facilitated by the fact that a compromise had to be struck not only among EU Member States. Also the Schengen associates (non-EU Members) Iceland, Norway, Switzerland and Liechtenstein had to be taken on board.[27] Additionally, negotiations were more protracted due to disagreements between the Council and the European Parliament which, acting as co-legislator, had a relevant role to play at the negotiation table (Baldaccini, 2009; 2011; Lutz, 2010). Due attention was paid to the Commission proposal by three of its Committees: the Committee on Civil Liberties, Justice and Home being chiefly responsible for formulating the European Parliament's position on the proposal which was adopted in September 2007. The Committee was herein supported by the Committee on Foreign Affairs and the Committee on Development. According to Baldaccini, it was evident from the outset of the negotiations that the positions between the Council and the European Parliament differed considerably which precluded the possibility of an early compromise between the two:

> For Member States the objective was that common standards could facilitate the work of national authorities handling return operations […]. The European Parliament, on the other hand, was more concerned with the situation of persons who may be the subject of a return decision and removals taking place within a legal framework that respects fundamental rights and contains adequate safeguards and procedural guarantees (Baldaccini, 2009: 125).

In addition to preference divergence, communication and interaction between the co-legislators was lacking which hardened their respective positions and furthermore obstructed finding a common agreement. Finally, disagreements between Members of the European Parliament had further, retarding effects on the progress of negotiations. While some Members of Parliament took a pragmatic approach by seeking realistic solutions, others

27 Their participation in the negotiations and implementation of the Directive was required given the fact that the Directive entailed a development of provisions of the Schengen acquis within the meaning of the respective association agreements of these countries with the EU. More concrete, the Directive is applicable to third-country nationals who do not or do not anymore meet the entry conditions established by the Schengen Borders Code (Regulation (EC) No 562/2006).

seemed to pursue a more ambitious agenda, underestimating or ignoring, however, the uncompromising stance of the Council on aspects of their concern (Lutz, 2010: 19-20).[28]

Shifting the focus to the Council, the negotiations were marked by the demands of Member States for more flexible arrangements. The arrangements proposed by the Commission were found too rigid to be embedded into national legal structures (Council of the European Union, 2006a; 2006b). While the subject matter of the Directive was in everyone's interest, the way the Commission had given substance to it was hardly to the satisfaction of the Member States and drew their criticism in a number of respects. How did in particular the Dutch Government react to the Commission proposal? In fact, the Dutch Government was among its sharp critics. While subscribing to the need for common rules to more efficiently manage the return of non-EU nationals staying illegally on EU territory, the Government considered the proposal to be flawed due to its lack of sufficient discretionary room for the Member States. Given the fact that the proposal did not entirely match corresponding legislation applicable in the Netherlands and, additionally, proposed new elements, which hence would have to be introduced into national legislation (return decision and entry ban requirements), discretion was apparently seen as an important means to cope with the (formal) implementation of the Directive (*Parliamentary Papers II* 2005/06, 22112, no. 397, pp. 16-18).

For this reason, the Dutch delegation did not hesitate to frequently interfere in the negotiations on the proposed Directive by forwarding numerous requests for amendments, and by explaining its position on the Commission proposal in more detail in a paper addressed at all other Member State delegations in the Council. This position paper reflected its wish to bring the Commission proposal more in line with own legislation (Council of the European Union, 2006c). Viewed from the outside, the Dutch delegation seemed to take a relatively hard stance, at times. This becomes, for instance, obvious from the fact that it objected to the idea that measures for return should not be applied in cases of illness of the third-country national concerned or for humanitarian reasons (Council of the European Union, 2006b, p. 2).[29] According to its own statement, this approach was not motivated by the desire to impair the safeguards proposed for third-country nationals. It was, instead, motivated by the concern of the Dutch Government that the Directive would have far-reaching consequences for the statutory procedure in the Netherlands. The Dutch delegation therefore wished to focus

28 The different positions of Members of the European Parliament on the Commission proposal are also reflected by the fact that the Parliament's report included a minority opinion rejecting the report as a whole. This rejection was mainly caused by the Directive's provisions concerning detention which were viewed as incompatible with a fair and human approach to irregular third-country nationals in return procedures. See European Parliament, 2007, p. 29.

29 In spite of the Dutch opposition, the Article remained virtually unchanged. See Article 6(4) of the final Directive.

on the technical design of the Directive (Council of the European Union, 2006c, p. 2), arguably to bring the latter more in line with own legislation. During the negotiations, the Dutch delegation succeeded in asserting not all but some national preferences. For instance, along the lines of a proposal it had forwarded, EU rules concerning the issuing of return decisions in case of pending procedures were reformulated. This resulted in a better match between EU and national rules on this matter (Council of the European Union, 2006b, p. 4).

13.3.1 Scope and definitions

The criticism voiced by the Dutch delegation was mostly targeted at issues that more generally triggered intensive debates in the Council, relating to the key operational provisions of the Directive's chapter two and three. But there were also some general issues with which Member States did not entirely agree.

At the first meeting of the Working Party on Migration and Expulsion in November 2005, several Member States expressed the view that the draft Directive offered 'excessive rights and guarantees', indicating that it went too far in respect of the envisaged (favourable) conditions for irregular immigrants staying on their territories (Council of the European Union, 2006d, p. 2). In particular, Member States were not willing to grant these rights and guarantees to those third-country nationals that had been refused entry in a transit zone of a Member State but who should nevertheless be treated according to standards laid down by the Directive proposal.[30] The Netherlands, Czech Republic, and Germany were amongst those Member States which objected to this requirement. As a result, the provisions regarding the Directive's application area were considerably changed in the course of the negotiations. According to the final Directive, Member States are allowed to entirely exclude certain categories of irregular migrants from the Directive's scope of applicability, including those that are subject to criminal law cases. This way, Member States ensured that the Directive would not harmonise matters of criminal law or extradition (Schieffer, 2010: 1511-1513).[31] Hence, Member States adopted a minimalist approach towards harmonisation, seeking to avoid closer alignment with EU law. Being on the one hand keen to have in place harmonised return conditions for the efficient removal of irregular migrants, Member States seemed, on the other hand, unwilling to accept too far-reaching harmonisation, even though this might ensure better legal and procedural safeguards for the protection of particular groups of irregular migrants (Baldaccini, 2009; 2011). In any case it can be considered as detrimental to the Directive's objectives that the agreed exclusions from the Directive's scope allowed for different application possibilities by Member States. This was likely to cause legal diversity,

30 See Article 2(2) of the Directive proposal.
31 See Article 2(2) of the final Directive.

and was therefore not conducive to the result to be achieved: the introduction of common standards and procedures for the return of irregular third-country nationals (Schieffer, 2010: 1512). Owing to the interference of the European Parliament, however, the Directive eventually provided for some level of protection of those irregular migrants that were excluded from its remit. In this regard, the Directive establishes that protection shall become effective in a number of aspects pertaining to the return procedure: with a view to Member States' application of coercive measures, as well as under circumstances concerning the postponement of removal, and in respect of pending return procedures and requirements concerning detention.[32]

Several Member States also questioned the use of the concept of 'illegal stay'. The Dutch, Polish, and Swedish delegation wondered whether asylum seekers whose application was rejected, could be considered as falling under the Directive's scope (Council of the European Union, 2006d, p. 3). Especially the Netherlands made no secret of the fact that they disapproved of the horizontal dimension of the Directive which made EU rules applicable to any illegal immigrant (Council of the European Union, 2006d, p. 2). The Commission, on the other hand, argued that alongside some general standards that were applicable to all returnees, the Directive's substantive provisions would imply differentiation in treatment (Council of the European Union, 2006d, p. 2). Nonetheless, the envisaged horizontal application of the Directive was repeatedly criticised by the Dutch delegation. This, however, did not result in any changes being made to the Directive in this respect.

13.3.2 Return decision

The Dutch delegation forwarded several suggestions for amendments, especially during the debates about the return decision (Article 6). The proposed return decision represented one of the more controversial issues and the corresponding provisions were considerably redrafted during the negotiations. First of all, many Member States criticised the Article on the return decision for its lack of flexibility. It appeared that issuing a return decision for any illegally staying immigrant as envisaged by Article 6(1) was not compatible with a number of national legal frameworks. From the Dutch perspective, national rules and practices worked differently compared to the system laid down by the Directive proposal. The Directive proposal foresaw that illegal residence should be terminated by issuing a decision entailing the return of migrants with irregular status. But applicable legislation in the Netherlands did not provide for a separate act ordering the return of this group of migrants. For this reason the Dutch delegation sought to relax this requirement. To this end it forwarded an amendment to Article 6(1) which put emphasis on the applicability of already existing national legal arrange-

32 The relevant requirements are set out in Articles 8(4), 8(5), 9(2)(a), 14(1)(b) and (d) as well as in the Articles 16 and 17.

ments. Accordingly, the obligation to issue a return decision to any illegal immigrant as envisaged by the proposal should apply 'unless the illegality and / or the obligation to leave the territory and / or the authority to remove *arise from national legislation* [italics added]' (Council of the European Union, 2006e, p. 5). Furthermore, in the context of the debates on the provisions concerning the return decision, the Dutch delegation repeated its request for differentiation in treating irregular migrants and forwarded a proposal to this end. The proposal suggested distinguishing between three categories of returnees: non-EU nationals that illegally entered a Member State's territory (illegal entrants), unsuccessful asylum seekers, and third-country nationals that legally entered but whose stay had ceased to be legal (so-called 'overstayers'). The Directive's legal and procedural safeguards should only apply to the latter category of migrants. Illegal entrants should not be granted a voluntary departure period at all. In addition, and to guarantee an efficient procedure involving less administrative burdens, neither overstayers nor illegal entrants should receive a decision related to residence, return and / or removal (Council of the European Union, 2006c: 4). The Dutch request for treating groups of illegal immigrants differently was shared by other delegations such as the Estonian, Italian, Polish and Swedish delegations (Council of the European Union, 2006d, p. 7; see also 2006a). Germany shared the view that it should be possible to directly implement the return decision as well as to require the immediate departure of illegal residents in particular cases (Council of the European Union, 2006a, p. 2). Views differed, among the Member States, on the length of the voluntary departure period. While Poland favoured a period of two weeks, the Netherlands, Germany and Belgium agreed with the proposed maximum of four weeks. In the view of the Dutch delegation this would promote voluntary return (Council of the European Union, 2006a, p. 2).

The proposed two-step approach which consisted in the first step, to issue a return decision and, in a second step, a removal order (Article 6(3)), met with strong criticism. Member States criticised that this requirement was not compatible with national rules and practices, and that it caused too much red tape, eventually leading to delay in the return of irregular migrants (Schieffer, 2010: 1522). For the Netherlands the proposed EU rules were highly inconvenient. A few years before the negotiations, the Dutch law on aliens had undergone a fundamental reform which had resulted in concentrating the three separate decisions on residence, return and removal in one, the so-called 'decision with multiple consequences', in order to accelerate asylum and return procedures (Winter and Bolt, 2007: 4-5). The Dutch efforts had been geared towards streamlining the activities related to return, with the result that the procedure as a whole had become simpler and more efficient. This apparently led to a decrease of the total number of procedures, while at the same time it increased the clarity of rules for their application. This was confirmed by a 2000 evaluation report on the Dutch

Aliens Act.[33] Seeking to preserve its own system and being convinced of its efficiency, the Dutch delegation sought to amend EU rules, by suggesting an additional, new Article which would allow Member States to retain regulations similar to those applicable in the Netherlands, in cases where the rejection or withdrawal of a residence permit included both decisions on return and removal. Acknowledging the existing differences between Member States in managing the return of irregular non-EU nationals, the Netherlands, additionally, suggested that Member States applying a system similar to that proposed by the Directive, should be able to retain their national rules (Council of the European Union, 2006c, p. 6). Alongside the Netherlands, also other Member States, including Greece, Portugal, and Lichtenstein, wished to maintain their national legal arrangements already in place. The Commission, however, argued that the proposed rules concerning the return of irregular migrants provided for enough flexibility. In this regard it pointed to the permission allowing Member States to decide whether to issue return decisions and removal orders together or by means of separate acts (Council of the European Union, 2006a, p. 4). And yet, concessions were made to the Member States, showing in the fact that the final Directive allows Member States to adopt a separate administrative or judicial decision or act ordering the removal of the third-country national concerned.[34]

13.3.3 Entry ban

The provisions concerning the removal of third-country nationals illegally staying on the territory of a Member State caused intensive debates in the Council and were considerably redrafted as a result (Schieffer, 2010: 1526-1530). But even more controversial was the proposed EU-wide entry ban which reflected a coercive approach to those irregular migrants who disobeyed EU or national immigration rules. National practices appeared to differ considerably from the proposed EU rules. Member States such as the United Kingdom and Sweden criticised the mandatory character of the Article, requesting for the imposition of an entry ban to be an option but no obligation for Member States (Council of the European Union, 2006f, p. 2). The proposal furthermore established that the time frame for an entry ban should not exceed five years.[35] Instead of a maximum duration, Poland, however, preferred to have a minimum length of applicability for entry bans. Germany, on the contrary, was in favour of an unlimited entry ban which should apply by default and only be withdrawn under certain conditions. It was herein supported by Switzerland and several other Member

33 See the report by the Evaluation Committee Aliens Act 2000 [Commissie Evaluatie Vreemdelingenwet 2000] (2006), available at: https://www.wodc.nl/onderzoeksdatabase/voorbereiding-nulmeting-evaluatie-vreemdelingenwet-2000.aspx#publicatiegegevens (accessed 8 July 2015).

34 CF. Article 8(3) of the final Directive.

35 Cf. Article 9(1) of the proposal.

States, including the Netherlands. Moreover, drawing on the ideas of the initial Commission proposal (European Commission, 2005, p. 8), the Netherlands together with Spain, Ireland, Hungary and Poland advocated the automatic issuing of re-entry-bans to facilitate processes and ease burdens in the administration (Council of the European Union, 2006g, p. 2). The Commission followed up on this request. To register entry bans, the second Generation Schengen Information System (SIS II)[36] should be used and the Commission committed itself to propose at the next review of the system a corresponding obligation for Member States. In doing so the Commission sought to accommodate Member States' preferences and to address especially Dutch concerns (Council of the European Union, 2007a, p. 19). These were probably caused by the fear that without using an official EU registration system, there would be only insufficient transparency and exchange of information between the Member States regarding the entry bans already imposed by all of them, reducing the efficiency of the entry ban regime as a result.

Another, persistent concern, of the Dutch delegation was the requirement to issue return decisions in writing.[37] It seemed to imply unnecessary burdens and, above all, did not match the Dutch rules and practices (Council of the European Union, 2007b, p. 32). Besides, it was found incompatible with the proposed definition of the return decision in Article 3(d) which did not imply the obligation for Member States to use a written format. In spite of this critique, the requirement remained in place.[38] Discretion was instead granted to Member States in respect of the obligation to provide all irregular migrants with a translation of the key elements of a decision related to return. Accordingly, Member States were allowed to exclude from this measure migrants that had illegally entered national territory and stayed unauthorised.[39]

13.3.4 Remedies

The proposal foresaw a number of procedural safeguards, amongst them the right for irregular migrants to an effective judicial remedy against decisions related to return and / or removal orders before a court or tribunal. The judicial remedy should either lead to the suspension of the decision or entail the right for non-EU nationals to apply for suspension of the enforcement until the endorsement of the decision or ending of the suspension. Furthermore, Member States were obliged to provide for legal and linguis-

36 By means of SIS II competent national authorities can issue and consult alerts on persons supposed of having been involved in a serious crime or lacking the right to enter or stay in the EU.

37 See Article 11(1) of the proposal.

38 Cf. Article 12(1) of the final Directive.

39 See Article 12(3) of the final Directive.

tic assistance as well as legal aid to those not having the means to afford it.[40] These provisions, and in particular the latter aspect concerning the provision of legal aid to those unable to afford it, represented the most contentious issues between the Council and the European Parliament in the negotiations on the Directive. In fact, it was only due to the persistence of the European Parliament that Member States were eventually obliged to make legal aid available to those irregular migrants lacking sufficient financial means (Baldaccini, 2011: 11-12).

A number of Member States, including the Netherlands, opposed the obligation to provide for judicial remedy against a court or tribunal, arguing that it should be sufficient to lodge an appeal in front of an administrative body and that the proposed EU rules did not match those national legal systems which only allowed Court access in very few cases. Apparently, this objection was taken into account. The final Directive establishes that not only a competent judicial but also administrative authority or competent body can review decisions related to return.[41] In addition, free legal aid would be granted on request but only under certain conditions, one of them being, as requested by the Dutch and Spanish delegations, that the provision of free legal aid would be in accordance with relevant national legislation (Council of the European Union, 2006g, p. 6).[42]

EU requirements regarding remedies were also criticised in the particular case of detention.[43] From the viewpoint of the Netherlands as presented in its position paper (Council of the European Union, 2006c), the Article was in various respects incompatible with national legislation which, for instance, did not include a maximum period for the detention of illegally staying third-country nationals (*Parliamentary Papers II* 2005/06, 22112, no. 397, p. 18). Next to this incongruence between EU and Dutch law, the Netherlands considered the obligation to ensure confirmation of a detention decision within 72 hours by a national court as particularly detrimental and as a 'disproportional burden for the judiciary' (Council of the European Union, 2006c, p. 5). While endorsing the need for judicial review, it brought into consideration the fact that international law, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), merely stipulated to have decisions reviewed within short time, without, however, prescribing any exact period for judicial reviews to be carried out. Still more important, the Dutch delegation argued that EU proposals would undermine recent efforts that had been undertaken to amend national law. These efforts had been carried out upon requests by the

40 See Article 12 of the draft Directive.

41 See Article 13(1) of the final Directive.

42 See Article 13(4).

43 Initially, detention was referred to as 'temporary custody' but it was changed during the negotiations into 'detention' upon the request of the European Parliament who found it a more suitable term to describe the content of the Article. See European Parliament, 2007, p. 7.

Dutch judiciary and with the aim of lifting burdens which previous legislation had imposed.[44] To preserve its own rules seemingly challenged by EU law, the Dutch delegation forwarded an amendment which was, however, worded in rather broad terms, being motivated by the intention to seek the support of other delegations (Council of the European Union, 2006c, p. 6).

The Dutch request had no immediate effect, but was followed by another slightly different suggestion for amendment which was forwarded by the Dutch delegation at a later stage of the negotiations. According to this suggestion, third-country nationals should have, at all times, the possibility to appeal against a detention decision in front of a competent judicial authority. But the time needed to process the appeal should not be determined by the Directive. As put in the words of the Dutch delegation, judicial review should be carried out 'within a reasonable time limit laid down in the national legislation' (Council of the European Union, 2008, p. 25). In this way, the Dutch delegation sought to ease EU rules and make them more compatible with own legislation.

The Dutch suggestion was not directly taken over, but it seems that it had some impact on the reformulations of the relevant provision. For instance, the requirement of having a detention decision issued by an administrative authority reviewed within 72 hours from the start of its application was dropped and reference instead made to a 'speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention'. As an alternative, the third-country national should be informed about and granted the right to take relevant proceedings that should provide for the speedy judicial review of the lawfulness of the detention decision with an outcome shortly after the launch of proceedings.[45] To facilitate a final compromise and to secure a qualified majority in the Council, the Commission assured the Member States of financial support from the European Return Fund to cope with financial burdens flowing from the implementation of the provision on free legal aid (Schieffer, 2010: 1537).

Rules relating to detention were very controversial not only within the Council where Member State disagreement was mostly the result of the highly divergent national rules and practices in this respect (Baldaccini, 2011: 12; Schieffer, 2010: 1542). It was also a matter on which the opinions of the two co-legislators diverged. In contrast to the Council, the European Parliament disapproved of the detention requirement, preferring a less strict approach towards irregular migrants. The European Parliament succeeded in partly asserting corresponding preferences as evidenced by the fact that

44 Taking effect from 1 September 2004, the reviewed procedure put an end to the so-called 'ten-day-review': this former review system implied judicial review of the custodial measure within ten days, which, as it seems, heavily increased the workload for the Dutch judiciary up to a point that it became unbearable and infeasible for the latter to cope with it.

45 Cf. Article 15(2)(a) and (b) of the final Directive.

the obligation to keep irregular migrants in detention was amended: The obligation for Member States to make use of the detention procedure upon having applied all other available and less coercive measures was eventually turned into an optional measure (Baldaccini, 2011: 12).[46]

Despite this successful outcome for the European Parliament, its overall impact has been assessed as limited in scope (Baldaccini, 2009; 2011). And yet, this does not change the fact that it undertook great effort to influence the negotiations on the Return Directive. To this end, it kept on forwarding amendments and sought to assert its preferences in a number of informal trilogue meetings during the 'hot phase of negotiations' between summer 2007 and spring 2008 (Lutz, 2010: 23; see also Schieffer, 2010: 1506). Granted, its efforts to influence the content of the Directive produced mixed results. On the one hand, the European Parliament succeeded in changing the Directive proposal in a way that resulted in more emphasis being put on a fair, human and transparent approach to which Member States had previously committed themselves. In this regard, the Directive obliges Member States to take due account of a number of key principles of international and human rights law[47] in the implementation of the Directive. Additionally, upon the request of the European Parliament new provisions were incorporated including specific obligations for Member States with regard to the return and removal of unaccompanied minors, detention of minors and families as well as effective monitoring requirements regarding forced-return procedures.[48] On the other hand, while the European Parliament's amendments left here and there traces in the operational part of the Directive (chapters 2 and 3), many of its amendments to the substantive provisions were not taken into account. It therefore seems that Member States' interests prevailed. For instance, the European Parliament could not prevent the incorporation of Article 18 which allows Member States in emergency situations – in the presence of an exceptionally large number of irregular migrants and the absence of administrative capacities and facilities – to derogate from the Directive's requirements regarding remedies and detention which imply a rather favourable approach to irregular migrants. The European Parliament also failed in realising its objective to become more involved in the implementation of the Directive. Its request to appoint an Ombudsman from its own ranks, who should ensure that return procedures were carried out in an efficient and human way in collaboration with the Member States, was not incorporated.[49]

46 Compare Article 15 of the Directive proposal with Article 14 of the final Directive.

47 See Article 5 addressing the non-refoulement, best interests of the child, family life and state of health, which was amended along the lines of its proposal. See European Parliament, 2007, p. 11.

48 See Articles 10 and 17 of the final Directive.

49 See Article 16a inserted by amendment 69 of the European Parliament's report on the Commission Proposal. See European Parliament, 2007, p. 25.

Having discussed EU decision-making on the Return Directive, including the Dutch position on the proposal, the following sections aim to shed light on the role of discretion in the negotiation process.

13.4 Analysis

Recital (12) of the Return Directive addresses the situation of those migrants whose illegal stay has officially been established but who have not yet been removed. The recital stipulates that national authorities should provide these migrants with a written confirmation of their situation to prepare them for administrative controls and checks. The Directive continues to stipulate that 'Member States should enjoy wide *discretion* [italics added] concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive'.

The explicit mentioning of discretion in the Directive, as illustrated by this example, very rarely happens.[50] It may give a foretaste of the essential role that discretion played during the negotiations on the Return Directive. The analysis brings to light further insights showing the relevance of discretion in the negotiations. Member States' general assessment of the Directive as providing for too little flexibility and their subsequent search for more discretion – reflected in the change of mandatory into optional requirements or the incorporation of additional may-clauses into key provisions – show that discretion played a vital role in Member States' considerations about the Directive proposal. This was also confirmed by the civil servant involved in the negotiations. The position taken by the Dutch delegation on a number of aspects illustrates this point well.

13.4.1 Discretion and policy area

According to the first expectation addressed, where more discretion is granted to Member States, the association is that the EU has little leverage over decision-making and is institutionally not as firmly anchored as in other more Europeanised areas. This expectation certainly holds true for the present case. The coding exercise and literature on the negotiations confirm that the Directive contains a high margin of discretion. The interviewees, who were involved in the negotiations as well as transposition of the Directive, agreed with this observation but additionally pointed out that some of the Directive's Articles are of more prescriptive nature than may be expected

50 At least that can be said with certainty for the directives which have been closer examined in the framework of this study and which cover more policy areas than those examined in the case studies.

at first sight.[51] In any case, the Return Directive grants a rather wide than narrow scope of discretion to Member States. This may not be too surprising given the fact that EU influence in the area of justice and home affairs, and illegal immigration in particular, remained limited for some time. The history of the policy area illustrates that integration in the area evolved gradually and from small steps, gaining momentum in the late 1990s with the communitarisation of important aspects of immigration and asylum law, including illegal immigration as established by the Treaty of Amsterdam (1999). Only then most matters of justice and home affairs were moved from an area where the EU merely exercised supportive competence to the first pillar, with illegal immigration eventually being subjected to the Community method – albeit under the condition that competence was not exclusively exercised by the EU but in observance of the principle of subsidiarity.

Against this background, the case of the Return Directive emerges as a prime example illustrating the expected link between discretion and policy area. In a nutshell, where more discretion is granted, the influence of the EU in legislative and institutional terms is limited. And yet, at the same time it has to be kept in mind that the negotiations on the Return Directive marked a watershed in the history of EU law-making on irregular migration because of the fact that the Directive was the first measure in this field to be decided by co-decision, giving the European Parliament greater leverage in legislative decision-making. However, since co-decision was applied for the first time, the implications of the increased influence of EU institutions in decision-making on matters of irregular migration may not have immediately become visible. The negotiations on the Return Directive rather suggest that Member States succeeded in retaining considerable decision-making competence regarding the various aspects addressed by the Directive. This does not remove the fact that, in the longer run, legal and institutional influence of the EU is likely to become more important, suggesting that the link between discretion and policy area as it now stands will change: with greater EU leverage in decision-making, less discretion will be made available to Member States for the implementation of EU law where it concerns matters of (irregular) migration.

The present case is furthermore interesting in terms of the relationship between discretion and policy area because it illustrates the sometimes paradox nature of EU integration. The repeated commitments of the Member States to a common approach in the area of return policy in the run-up to the negotiations on the Directive stand in sharp contrast to their attempts to retain as much decision-making competence as possible by seeking more discretion for implementation. This tension was also inherent in the Directive proposal. As Schieffer neatly puts it, providing for the minimum harmonisation clause in Article 4 was based on the 'tacit understanding that, and contrary to the wording of the title and art. 1, the Directive sets out

51 For instance, as regards EU requirements concerning entry bans and detention (Articles 11 and 16).

minimum rather than common standards' (2010: 1519). In this regard, discretion has been assessed negatively, being associated with a strict approach to the interpretation of the Directive's requirements and seen as stimulating efforts to minimise safeguard requirements to the disadvantage of irregular migrants (Baldaccini, 2009; 2011). Whether this critique is justified or not remains to be seen. In any case, the Directive, albeit being discretionary, has also caused a more positive echo. In this context, it has been noted that the Directive has beneficial effects for the status of irregular migrants. Based on European case law relating to the interpretation of certain provisions of the Directive, it is argued that the latter has contributed to strengthening the legal position of third-country nationals and that it has the potential to lead to more equal rights or at least standards of protection before courts (Crosby, 2014: 136-137).

13.4.2 Discretion, political sensitivity and compatibility

Not only discretion's relevance was made explicit during the negotiations on the Return Directive. Also the reasons for why it played a vital role became quite evident. Without doubt, the Directive's subject matter is politically sensitive as shown by the fact that its scope and the proposed elements of the return procedure (return / removal decisions, entry ban, and detention), caused debates and represented one reason for why negotiations dragged on. More concrete, the political sensitivity of the Directive resulted from the fact that it addressed the domain of immigration control and therefore an area that formerly used to entail the exercise of sovereign state power. Guild brings it to the point: The control of the nation state over the admission, residence and expulsion of aliens is a fundamental attribute of national sovereignty which has been affected by the development of the European Union, reaching a crucial (turning) point with the communitarisation of decisive aspects of immigration and asylum law with the entry into force of the Treaty of Amsterdam. In an area of transferred competence, where decision-making competences have been ceded to the EU level, the Member States can no longer adopt rules which are inconsistent with Community law (Guild, 1999: 61-62; 68). What's more, while immigration in general may raise concerns about its consequences for national welfare systems, in the particular case of the Return Directive, Member States feared the administrative and legal burdens of the proposed return procedure, as illustrated especially by their rejection of the two-step approach in managing the return of irregular migrants and their objection to the provisions on legal remedies. Member States were concerned that they would have to change already existing national regimes governing the residence, return and removal of irregular migrants. Against this background discretion was sought as a 'way out' of political sensitivity and controversy (expectation 2). The conflict about the two-step approach in returning irregular migrants was off the table after Member States had been afforded discretion in deciding whether or not to issue two separate orders, removal or return, or one

that combines the removal and the return decisions. Including more discretion into the Directive proposal eased legislative decision-making also in other respects. Discretion granted in the form of may-clauses and derogations from, for instance, judicial review and detention requirements in emergency situations, helped secure the approval of Member States on controversial items of the Directive (legal and procedural safeguards for irregular migrants). The same was achieved by explicitly taking into account national legal orders in the (re-)formulation of Directive provisions. Furthermore, the incorporation of discretion into the Directive mitigated gaps between EU and national rules (expectation 3). It becomes obvious from the negotiations that the proposed EU rules were repeatedly perceived as being incompatible with national rules. Next to the Netherlands many other Member States took this view, seeking therefore, to maintain own national legal arrangements as evidenced, for example, with respect to the provisions regarding the return decision. Member States' input into the negotiations was apparently made with a deliberate view to their domestic rules and practices. The Dutch delegation sought to translate such wishes into action by forwarding a position paper including corresponding amendments drafted in a way that reflected the recognition of the considerable legal diversity of national laws in this respect. At the same time the delegation's written statement promoted the approach, applied in the Netherlands, to the management of returning irregular migrants. This has to be seen, hence, as an attempt to upload or translate national legal arrangements into the Directive text. However, in the end, seeking more discretion and getting it incorporated into the Directive, turned out to be the more effective solution to cope with both incompatibility and legal diversity.

13.4.3 Discretion and European Parliament

Alongside the Council, where compromises had to be struck, also the role of the European Parliament has to be considered, since it was another key actor in the negotiations on the Directive. While a greater role of the European Parliament in legislative decision-making has been linked to the support of legislative harmonisation and, consequently, less discretion being granted to Member States (expectation 4), the present analysis does not deliver conclusive evidence in support of this expectation. According to its own statement, the European Parliament sought to strengthen its role as a 'champion of human rights and humanity' and therefore strongly supported the establishment of mandatory minimum standards to ensure fair and human treatment of returnees and an approach to return that precluded the use of discretion to proceed with a forced return (European Parliament, 2007, p. 27; 31). On the one hand, this shows the European Parliament's determination to fulfil its self-imposed role of being a fighter for human rights. The Directive, on the other hand, 'merely' introduced minimum standards, which were, however, accepted by the European Parliament. Albeit promoting a more ambitious approach regarding harmonisation, the European Parlia-

ment was apparently aware of the fact that a Directive proposal exceeding the minimum harmonisation approach would have had no chance of success in the Council. In other words, the European Parliament in principle agreed with the tacit understanding that the Directive would establish minimum instead of common standards. The amendments forwarded by the European Parliament were geared towards bringing the Commission proposal more in line with the principle of proportionality and respect for human rights (European Parliament, 2007, p. 37) but regarding discretion, there was no clear rationale developed. In other words, the results of the analysis do not show that the European Parliament sought to reduce the margin of discretion granted to Member States for implementation. The lack of a coherent strategy may relate to the fact that the European Parliament made its first appearance on the negotiation scene as co-legislator on issues of irregular migration, which suggests that it had not yet much experience in exercising its new role. But discretion was also not necessarily perceived as negative. Where it served to realise its human rights objectives and its promotion of a case-by-case approach taking into account the specific circumstances of individual cases, the European Parliament even preferred the incorporation of additional discretion into the proposal. This is, for instance, evidenced by its request to leave it to the discretion of the Member States to impose return decisions (European Parliament, 2007, p. 46).

13.5 Conclusion

The analysis has brought to light that discretion played an essential role in the negotiations on the Return Directive. In fact, this case is a good example for illustrating the potential that discretion is expected to unfold in decision-making processes under particular circumstances. With a view to the negotiations on the Directive, discretion facilitated decision-making and striking a compromise on the Commission proposal. Discretion contributed to overcoming political controversy in the Council while at the same time, from the perspective of Member States, and with a view to implementation, it offered the prospect of being able to mitigate effects from a lack of compatibility between EU and national rules as well as to reduce administrative and legal burdens expected to result from the implementation of the Directive into national law. Finally, even though some may consider discretion as encouraging Member States to adopt restrictive measures on matters related to immigration, it should be born in mind that discretion contributed to the adoption of the first harmonisation instrument concerning the return of irregular migrants. Seen in this light, discretion facilitated the introduction of minimum standards in an area, which back then was barely influenced by the EU. Did discretion also have a positive impact on the transposition of the Return Directive in the Netherlands? The subsequent descriptive analysis seeks to provide insights that shall serve to answer this question and help to find out which other factors mattered in the Dutch transposition of the Directive.

13.6 Transposition

Despite the many controversial issues on which the negotiating parties had to agree, the Return Directive was finally approved and adopted at first reading on 9 December 2008 with the Belgian delegation abstaining. The Directive had to be transposed by 24 December 2010, except for the legal aid provision of Article 13(4) for which the deadline had been extended by one year to accommodate Member States' preferences and to ensure their support for the final compromise text (Schieffer, 2010: 1550). The United Kingdom, Ireland and Denmark did not participate in the adoption of the Return Directive and are not subject to its implementation or bound by it. This is in accordance with their respective positions established by the Protocols to the Treaty of Amsterdam.[52]

The Directive was met with strong criticism worldwide, attracting the attention of the media including the Dutch news (BBC News, 2008; Zoon, 2008).[53] Various non-governmental organisations, heads of governments of Latin-American countries, as well as the UN High Commissioner for Human Rights denounced a number of the Directive's measures, especially the conditions and length of detention and entry bans which they criticised as being inhuman and criminalising irregular migrants (Schieffer, 2010: 1506; Baldaccini, 2011: 135; UN Human Rights, 2008).[54] Negative publicity was also caused by the fact that the Directive's transposition was problematic in numerous Member States of which only four notified full transposition before the deadline. Without doubt, national transposition performances left much to be desired (European Commission, 2011), leading to twenty infringement proceedings being issued against Member States,[55] including the Netherlands. Meanwhile nearly all of these proceedings have, however, been closed, (European Commission, 2014). This does not change the fact that deficient transposition undermined the Directive's objectives and the direct effect of certain provisions resulting in action being taken by the European Court of Justice (Rafaelli, 2011).[56]

52 The protocols include their opt-outs from Title IV TEC regarding Visas, asylum, immigration and other policies related to free movement of persons.

53 BBC News, 'Q&A: EU immigration policy', in BBC News 14 October 2008; C. Zoon, 'Latijns-Amerika beraadt zich op sancties vanwege Terugkeerrichtlijn, Europa keert geschiedenis de rug toe en criminaliseert migratie', in De Volkskrant 24 juni 2008.

54 See 'UN experts express concern about proposed EU Return Directive', available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8440&LangID=E (accessed 14 July 2015).

55 This follows from the Commission's powers under Article 258 TFEU.

56 According to the Court, the transposition measures adopted by Italy referring to the provisions on detention were undermining the Directive's objectives. The Court recognised the direct effect of the relevant Articles 15 and 16. See case C-61/11 PPU El Dridi, judgment of 28 April 2011.

13.6.1 Process and measures

The Netherlands notified full transposition in the course of 2012, hence with more than a year delay (European Commission, 2014, p. 12).[57] Additionally, the delay in the formal transposition of the Directive had as a consequence that transposition was also legally incorrect, leading to a number of cases being brought before national courts. This concerned, in particular, infringements of provisions with direct effect and, as a consequence, the relevant cases centred on state liability for breach of EU law (Cornelisse, 2011).[58] Moreover, Dutch courts as well as legal experts questioned the adequacy and legal correctness of the draft transposition measures especially with a view to the formal implementation of the Directive's provisions on detention (Cornelisse, 2011; see also Van Riel, 2012).

Critique at the domestic level was not confined to judiciary and legal circles. The way the requirements of the Return Directive should be incorporated into national law as envisaged by the Minister for Immigration, Integration and Asylum Affairs,[59] Leers, was questioned by national interest groups (Amnesty International the Netherlands, 2011; VluchtelingenWerk Nederland, 2011)[60] and caused political debates between the Minister and Parliament which was involved in the transposition process, since the Directive required for statutory change alongside an amendment to the Alien Decree and some additional measures, including regulation at the lower level (see table 19).

57 By 24 December 2010 when the deadline for transposition ended - except for the legal review provisions of Article 13(4) - the Netherlands had only partially implemented the Directive by means of already existing legislation. The Minister made an official announcement of the Directive's partial implementation Cf. *Government Gazette*, 2011, 4082. By the end of September 2011 the Commission opened an infringement proceeding against the Netherlands due to non-compliance with the Return Directive. Cf. 'EU law monitoring - European Commission – Netherlands', available at: http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_country_netherlands_en.htm (accessed 15 July 2015).

58 Direct applicability of directive provisions, like in the present case, follows if three criteria are met. These criteria were established by case law: the directive's result must entail the granting of individual rights, it must be feasible to detect the content of these rights from the relevant directive provisions and, finally, a causal link must exist between non-compliance of the Member State concerned and the negative implications of it for the individuals affected. See: Van der Burg and Voermans, 2015, pp. 48-50; Hailbronner, 2010, p. 22.

59 Hereafter referred to, in short, as Minister for Immigration and Asylum.

60 Amnesty International (2011), 'Vreemdelingendetentie in Nederland: Het moet en kan anders', available at: https://www.amnesty.nl/sites/default/files/public/1110_vreemdelingendet.pdf and VluchtelingenWerk Nederland (2011) 'Jaarverslag 2011', available at: http://www.vluchtelingenwerk.nl/artikel/jaarverslag-2011 (both accessed 20 July 2015).

The main bone of contention between Parliament[61] and the responsible Ministry was that transposition included the criminalisation of the offence against the prohibition of re-entering the Netherlands.[62] Such an offence should be made punishable by a maximum of six months' imprisonment or a monetary penalty in category three.[63] Even if the Directive allowed for coercive measures to be taken as a last resort in returning irregular migrants,[64] the criminalisation of the offence against the prohibition of re-entering the Netherlands was not seen as justified by it.

Table 19: Fact sheet transposition Return Directive

Transposition deadline:	24 Dec 10
Publication transposition legislation:	10 March 11 *15 Dec 11* 22 Dec 11 30 Dec 11 16 March 12
Sort transposition measure (and number):	*Parliamentary act* (1) Order in council (2), Ministerial decision (1) [Announcement (1)]
In charge:	Ministry of Justice
Legal Framework:	Dutch Alien Act 2000 Dutch Alien Decree 2000

On the contrary, it was considered to be legally incorrect – because the Directive did not include any corresponding obligation. In addition, it was found to conflict with the national approach of one-to-one transposition[65] entailing that no other requirements should be laid down in national law than those provided for by the Directive (*Parliamentary Papers II* 2011/12, 32420, no. 14, p. 86). Not only that, in the light of case law of the Euro-

61 The measure had been subjected to further scrutiny by the General Committee for Immigration and Asylum of the House of Representatives and the Standard Committee for Immigration and Asylum of the Dutch Senate.

62 Cf. Article 66a under paragraph 7 of the Dutch Alien Act in conjunction with Article 197 of the Dutch Penal Code [Wetboek van Strafrecht].

63 Before 1 January 2014 monetary penalty in category three boiled down to an amount of 6.700 Euro which is currently 8100 Euro. Cf. Article 23 of the Dutch Penalty Code. See also Van Riel, 2012, p. 73. It should be noted that these amounts differ from the one that was mentioned in the plenary debates (3800 Euro). See *Parliamentary Papers II* 2011/12, 32420, no. 14.

64 Cf. Article 8(4) of the Return Directive.

65 In Dutch referred to as 'EU-implementatie sec'. Cf. Instructions for drafting legislation no. 331.

pean Court of Justice[66] the envisaged criminalisation of the offence against the prohibition of re-entering was considered to run counter to a fair and human treatment of irregular migrants. What's more, the view was taken that all means provided for by the Directive should be exhausted before such a severe measure was applied. Finally, the added value of the measure was questioned since, in fact, it was expected to prolong the stay of the third-country national arrested given the fact that removal of the person concerned was only possible upon completion of the sentence imposed (*Parliamentary Papers II* 2011/12, 32420, no. 14, p. 68). The Minister, by contrast, held the view that the measure would not undermine but strengthen the Directive's objective to foster effective return (*Parliamentary Papers II* 2011/12, 32420, no. 15, p. 86). To support his argument, the Minister referred to the advice of the Dutch Council of State on a previously submitted transposition measure (*Parliamentary Papers II* 2011/12, 32420, no. 15, p. 86; Leerkes and Boersema, 2014: 12-13). This transposition measure, which represented a draft amendment to the Dutch Alien Act, had been devised under the former Minister Ballin and the Council of State had taken the view that in light of the relevance of the principle of loyal cooperation and the necessity to ensure the effectiveness of the Directive, the measure should provide for sanctioning measures in respect of an offence against the prohibition of re-entering the Netherlands (*Parliamentary Papers II* 2009/10, 32420, no. 4, p. 5; Ederveen, 2011: 17).

One year prior to the debates between the Minister and the Dutch Parliament on the transposition of the Return Directive, in October 2010, a change of government had occurred coinciding with the transposition of the Directive, and including the transfer of the responsibility for asylum and migration matters from the former Ministry of Justice (now Ministry of Security and Justice) to the Ministry of the Interior and Kingdom Relations and, more precisely, to a Minister without portfolio for Immigration, Integration and Asylum (European Migration Network, 2012: 11).[67] After the fall of the former Dutch cabinet the envisaged transposition measure – an amendment to the Dutch Alien Act – was declared controversial and transposition not further pursued. Transposition therefore came to a standstill for virtually two months before being taken up again (Everdeen, 2011: 18). With the change of Ministry also came a change of approach towards transposition. Minister Leers, from the Christian-democratic political party (CDA) interpreted the Return Directive differently and stricter than his predecessor and party colleague Ballin (*Parliamentary Papers II* 2010/11, 32420, no. 9; see Everdeen, 2011; Dörrenbächer et al., 2015). Under Minister Leers, the proposed amendment to the Dutch Alien Act was substantially amended (Advisory Com-

66 Cf. Case El Dridi (footnote 416) and case Achughbabian C-329/11, judgment of 6 December 2011.

67 A study commissioned by the Ministry of the Interior and Kingdom Relations.

mittee on Migration Affairs 2011; Committee Meijers, 2011),[68] the measure for pursuing the offence against the prohibition of re-entering the Netherlands included as well as the imposition of the entry ban made obligatory (whereas the Directive made it optional) (Zwaan, 2011b: 268).

By amending both the Dutch Alien Act and Decree for the purpose of transposing the Return Directive, the Minister sought to use already existing legislation to the most possible extent in order to leave the structure of the Dutch law on aliens largely intact (*Official Bulletin,* 2011, 664, p. 11). The Minister's transposition strategy was targeted at the inclusion of the substantially new elements which the Directive introduced – the return decision and the entry ban – into the Dutch Alien Act. In addition, more detailed rules should be established by means of the Dutch Alien Decree and other lower-level instruments[69] (*Official Bulletin,* 2011, 664, p. 11).

The aim of leaving the national legal framework largely unaltered and implementation costs low while converting EU rules into the body of national legislation becomes obvious in several ways. To begin with, the return decision was merely added to Article 27 of the Alien Act which comprised rules governing the application of the decision of multiple consequences in matters of immigration. As a result, the scope of the decision was extended by an additional consequence: the obligation for migrants identified as having an irregular status, to return to their country of origin. The obligation for the non-EU national to return was established as a consequence of two possible scenarios: if the application for the renewal of the residence permit was refused, or in case that the residence permit would be withdrawn.[70] The entry ban was not merely added to already existing national rules but required the creation of additional rules, established by the new Article 66a of the Dutch Alien Act. In transposing other requirements of the Directive concerning this aspect, use was also made of already established Dutch rules, policy rules in particular, which were considered as being a suitable part of transposition legislation, expected to cover parts of the Directive. To ensure compliance with the general transposition obligation to provide for legally binding transposition measures, these policy rules received the status of general binding rules (*Official Bulletin,* 2011, 664, p. 11).

68 See Commissie Meijers 'Notitie Strafbaarstelling overtreding inreisverbod', CM1018 24, December 2010, and the Advisory Committee on Migration Affairs (ACVZ): 'Briefadvies tweede nota van wijziging implementatie Terugkeerrichtlijn', ACVZ/ADV/2011/002, 17 januari 2011. According to the assessments of the national committees of experts in the area of immigration law on which the Parliament's critique was partly based, the amendments under the new Minister were so far-reaching, that it would have been a more logical course of action if the Minister had tabled a new legislative proposal for the purpose of transposition.

69 This refers to the use of the Dutch Alien Circular and Alien Regulation 2000 for further clarification of rules established in the Dutch Alien Act.

70 Cf. Articles 27 and 45 of the Dutch Alien Act.

The civil servants involved, on behalf of the Netherlands, in the EU negotiations and subsequently transposing the Directive into Dutch law, pointed out in the interview that the transposition of the Directive's requirements was complex. In particular, the issue of how to convert EU rules into the Alien Decree was not considered as having been an easy matter, which may explain the late adoption of the amendment to the Decree by the end of 2011. But also the adoption of the amendment to the Alien Act took some time. Apparently in spite of the achievements made in the EU negotiations by bringing the proposal more into line with the Directive, its transposition turned out to be more complex than initially expected. This was confirmed by the interview partners.

13.6.1.1 Scope

The Directive allows Member States to exclude specific groups of illegally staying third-country nationals from its scope in specific border cases and criminal law cases.[71] Exclusion concerns third-country nationals that have been refused entry into the territories of the Member States based on the Schengen Borders Code[72] – a requirement that affects a larger group of people being excluded from the Directive's remit. Furthermore excluded from the Directive's scope is the group of third-country nationals that have been intercepted and apprehended when irregularly crossing the external border of a Member State by land, air, sea, without subsequently being permitted to stay. Finally, the application of the Directive is not mandatory as regards non-EU nationals who are subject to extradition procedures and expulsions for criminal law reasons. If Member States decide not to apply the rules of the Directive, they are expected to apply their own national legislation. This latter option was applied by the Dutch Government which, thus, made use of discretion in transposing the relevant Directive requirements (*Official Bulletin*, 2012, 103). Applying the Directive in this way was fully in line with the Government's wishes to leave existing national rules and practices unchanged. In this regard, it was pointed out by the transposing Ministry that the possibility to exclude certain groups from the Directive's scope matched with the spirit of the Dutch law on aliens. Hence, discretion

71 See Article 2(2).

72 Article 13 in combination with Article 5 specifies the conditions of entry into the EU's territory and refusal of access.

was apparently used to achieve a good match between the Directive and national law (*Government Gazette*, 2011, 4082).[73]

13.6.1.2 Voluntary departure period

In giving the illegally staying third-country national the possibility to leave the Netherlands within four weeks, Article 62.1 of the Alien Act transposes the Directive's requirement to provide for a voluntary departure period between seven and thirty days once a return decision has been issued.[74] The Directive obliges Member States to extend the voluntary departure period by paying regard to the relevant circumstances of the individual case, including social and family circumstances of irregular migrants.[75] This obligation has been transposed by means of Article 62.3 of the Alien Act but further specifications have been provided by lower-level measures. According to these specifications, extension of the voluntary departure period is only granted if the third-country national provides the authorities with the documents that are necessary to realise the voluntary departure procedure.[76] The EU Directive, however, does not impose such a requirement. For this reason, the corresponding Dutch transposition of EU rules was found to be in disharmony with the Directive (Van Riel, 2012: 71).

The Article affords Member States some discretion which was used by the Ministry by imposing certain conditions on the third-country national for the period of voluntary departure[77] such as the duty to regular reporting to the authorities, to stay at a certain place within the Netherlands and to submit certain documentation including, amongst others, travel and identity documents as well as a deposit of an adequate financial guarantee.[78]

73 The matter of exclusions was subsequently transposed by means of orders in council, which, as underscored by the Administrative Law Division of the Council of State, could only be a temporary solution since the corresponding rules needed to be laid down in statutory law. To this end, the current Minister has submitted a legislative proposal in January 2015. Cf. *Parliamentary Papers II* 2014/15, 34128, no. 2 & 3. Interestingly, in contrast to the previous approach by Minister Leers, this proposal does not foresee the broad use of discretion granted by the Directive. At the same time, like his predecessor, the current Minister takes the view that the way the Directive is transposed is in line with the intention to incorporate EU requirements by staying in tune with Dutch law. Cf. *Parliamentary Papers II* 2014/15, 34128, no. 3, p. 7.

74 See Article 7(1) of the Directive.

75 See Article 7(2) of the Directive.

76 Cf. Article 6.3 of Alien Regulation.

77 See Article 7(3) of the Directive.

78 Article 4.51b Article 5.1 and the new provision 4:52a and 4:52b of the Alien Decree.

Furthermore, the transposing Ministry made use of the option, provided by the Directive, to either shorten the voluntary departure period or to decide that no voluntary departure period should be granted to the third-country national concerned, which according to the Directive, is only possible under specific circumstances: first, in case of risk of absconding – a condition which was further specified in Dutch transposition legislation,[79] second, if an application for legal stay was rejected on the grounds of being unfounded or fraudulent or, third, if the third-country national concerned was found to pose a risk to public policy, public security or national security.[80] These EU rules were transposed by means of already existing legislation as well as by revising provisions of the Dutch Alien Act.[81]

With a view to the transposition of these requirements, two aspects of the way the Dutch Ministry transposed EU rules have been criticised. First, according to Dutch transposition legislation, an application for legal stay is rejected and the period for voluntary departure refused or shortened if the application includes incomplete or faulty information.[82] Faulty or incomplete information, however, has another meaning than the term 'fraudulent' used in the Directive. According to the European Court of Justice 'fraudulent' implies *deliberately* offering wrong or insufficient information (Van Riel, 2012: 70).[83] The provision of incomplete and faulty information, by contrast, does not necessarily result from a deliberate act. Hence, Dutch transposition appears to be disproportionate. The same seems to hold true regarding another ground which Member States can use to justify changes to the requirement of providing irregular migrants with an appropriate period for voluntary departure. The Directive establishes that these changes are possible if the person concerned poses a risk to public policy, public security or national security. The Dutch transposition of this requirement established that departing from the voluntary departure period set out in the Directive, is not only justified for reasons of 'national security' but also where it follows from 'public order' issues. The Directive does not, however, refer to the notion of 'public order' as constituting a ground for departure from EU rules.[84] What's more, the public order criterion is used in Dutch law to justify the shortening of the voluntary departure period, whereby the mere suspicion that a third-country national committed a crime suffices to depart

79 Reasons to believe that a risk of absconding exists have to be based on objective criteria. See Article 3(7) of the Directive. These criteria are established in Article 5.1b Alien Decree whereby, according to the Dutch Minister, considerable discretionary room was used. Cf. *Official Bulletin*, 2011, 664, p. 20.

80 See Article 7(4) of the Directive.

81 Cf. 62.4, 31.2d, e, k and 62.2 (new) of the Alien Act.

82 See Art. 62.2 under b Alien Act.

83 See for instance case C-285/85, Germany v Commission of the European Communities [1987] ECR I-3203.

84 See Article 31.2 under k Alien Act. Additionally, Van Riel points to the fact that the notion of 'public order' has not yet been further clarified by the European Court of Justice. See Van Riel, 2012, p. 70.

from the Directive (Van Riel, 2012: 70).[85] The strict interpretation of EU rules in this respect does not seem to match the Directive's spirit and objective to promote voluntary instead of forced returns.[86]

13.6.1.3 Entry ban

Return decisions shall be issued together with an entry ban in the absence of any period being granted for voluntary departure or in case of non-compliance of the third-country national with a return decision that has already been issued. In all other cases, it is up to the Member States to decide whether or not they wish to impose an entry ban.[87] EU rules have been transposed accordingly by means of the new Article 66a which was added to the Dutch Alien Act. The Directive does not only grant discretion with respect to the circumstances under which entry bans may be issued but also provides for the possibility to refrain from issuing, withdrawing or suspending an entry ban for, amongst others, humanitarian reasons or in individual cases.[88] Discretion has been used by establishing that the Minister can decide to refrain from imposing an entry ban on humanitarian grounds or other reasons.[89] These circumstances were further specified by means of lower-level regulation.[90] The fact that this aspect was not regulated by statutory law drew criticism from the Dutch Parliament (*Parliamentary Papers I* 2011/12, 32420, no. 10, p. 39). Moreover, legal experts in immigration matters questioned[91] whether this way of transposing the entry ban provisions left enough room to take into account the specific circumstances of individual cases to which EU rules would have to be applied[92] (Van Riel, 2012: 72).

13.6.1.4 Detention

The Directive's provisions regarding the detention of irregular migrants for the purpose of removal as well as the conditions of detention[93] have almost entirely been transposed by already existing legislation. As established by the Directive, in the absence of other less coercive measures, detention of irregular migrants is allowed, but only for return / removal purposes and

85 This can be derived from the Dutch Alien Circular 2000, part (A) which further specifies Dutch rules concerning the shortening of the departure period on the basis of Article 62.2 Alien Act.

86 See recital (10) of the Directive.

87 Cf. Article 11(1) of the Directive.

88 See Article 11(3).

89 Cf. Article 68 of the Alien Act.

90 Cf. Article 6.5.2 of the Dutch Alien Decree. This clarification resulted from the debates in Parliament. In a letter to the Dutch Senate the Minister indicated that he would undertake corresponding steps. Cf. *Parliamentary Papers I* 2011/12, 32420, H, p. 2-4.

91 This becomes evident from assessments by the Committee Meijers and the Advisory Committee on Migration Affairs (ACVZ). See footnote 68.

92 See recital (6) underlining that decisions under the framework of the Directive shall be taken on a case-by-case basis as well as recital (22) which refers to the best interests of the child and respect for family life as promoted by international human rights treaties.

93 See Articles 15 and 16.

in particular when there is a risk of the person absconding or if the person hampers the preparation of the return or removal process. In any case, detention shall last as short as possible.[94] Most of the Directive's provisions have been transposed by Article 59 of the Alien Act which was hardly changed, except for the fact that the maximum lengths of detention which the Directive prescribes were added to already established national rules: Detention may last up to six months which may be extended by another twelve months under exceptional circumstances.[95] The conditions under which detention of illegally staying third-country nationals may become applicable (risk of absconding, procedure being hampered) were added to the Dutch Alien Decree.[96] Article 59 of the Alien Act, however, also established that detention of irregular migrants is possible for reasons of public order and national security – circumstances which the Directive does not include. National courts questioned the legal correctness of transposition in this respect also in light of European case law specifying the conditions of detention for illegally staying third-country nationals and clarifying that Member States cannot invoke grounds of public order or public safety for detaining a person under the Return Directive (Cornelisse, 2011: 14).[97] The transposing Ministry seems to have solved the issue by incorporating the Directive's grounds for detention into the Dutch Alien Decree, killing two birds with one stone: Hence, by making use of lower-level instruments such as the Decree, Article 59 of the Alien Act did not need to be changed. At the same time, completeness of transposition was ensured regarding the grounds for detention which have to be made applicable under the framework of the Return Directive.

13.6.2 Parliamentary debates

In conformity with the Dutch legislative process, the proposal for amending the Alien Act for the purpose of transposing the Return Directive was examined by both the House of Representatives and the Senate[98] of the Dutch Parliament and debates with the Minister took place in October and

94 See Article 15(1) of the Directive.
95 See Article 15(5) and 15(6) of the Directive which have been transposed by Article 59.5 and 59.6 of the Alien Decree.
96 Cf. Article 5.1a of the Alien Decree.
97 Cf. Kadzoev case C-357/09 PPU, judgment of 30 November 2009 - [closed].
98 Shortly before the debates the draft transposition measure had been subjected to further scrutiny by the General Committee for Immigration and Asylum of the House of Representatives and the Standard Committee for Immigration and Asylum of the Senate.

December 2011 respectively.[99] Given a delay of meanwhile almost one year that had resulted in a reasoned opinion from the European Commission, the Minister asked for a speedy treatment by Parliament which should be concluded before the Christmas break.[100] In fact, the need for a speedy treatment illustrates the time lag between the adoption of the Directive and the parliamentary consultations. That so much time had lapsed was according to the Minister due to the fact, that transposition was much more complex than was initially thought and that, additionally, adjustments of the transposition measure in light of both the advice of the Council of State (*Government Gazette*, 2012, 1231) and European case law as well as the Minister's responses to parliamentary questions had required additional time (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 87). That a relatively fast parliamentary process was realised in the end does not obscure the fact that Members of Parliament were dissatisfied with some aspects of the proposed measure. The national Parliament was not intensively involved in the EU negotiations on the Directive but it showed great interest once it participated in its transposition (interview). While the government coalition of Christen Democrats (CDA) and Liberal Democrats (VVD) with support of the right-wing PVV (Freedom Party) backed the Minister's proposal, it was criticised by several other parties in Parliament, including the Christen Union (ChristenUnie, CU), the Social Democrats (PvdA) and still more left of the party spectrum, by the Dutch Democrats (D66) and the Greens (GroenLinks). In spite of their different party affiliations, disapproval was based on similar reasons. The common view was that the draft measure was disproportionate and ineffective and therefore counterproductive to the Directive's objective of fostering voluntary departure and a generally fair and human treatment of irregular migrants (*Parliamentary Papers II* 2010/11, 32420, no. 14 & 15).

The criminalisation of the offence against the prohibition of re-entering the Netherlands mentioned above was not the only reason for this view. The Minister was reproached for what seemed to several Members of Parliament a restrictive interpretation of the Directive showing in the

99 Usually the plenary debates in the House of Representatives carry much more political weight. Debates in the Senate, by contrast, are confined to questions of legal technique and quality of draft legislation. In the particular case of immigration, matters are politically sensitive and, as the involvement of the Dutch Senate in the case at hand shows, at times political and legal issues intertwined. That is why the descriptive analysis takes a closer look at the plenary debates not only in the House of Representatives but also the Senate.

100 In a letter to the President of the Senate, the Dutch Minister for Immigration and Asylum informed that on 29 September 2011 the European Commission issued a reasoned opinion against the Netherlands due to the absence of notification of national transposition measures. If non-compliance persisted, the Commission would start an infringement proceeding against the Netherlands before the European Court of Justice and imposing a fine of about 3 925 000 Million Euro. Cf. *Parliamentary Papers I* 2011/12, 32420, A. See European Commission, 'Met reden omkleed advies' (reasoned opinion), 2011/0285, Brussel, 29 September 2011.

Minister's choice to make use of the possible maximum length regarding detention, whereas, in their view, he could have opted for shorter periods in support of the Directive's objective of voluntary return (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 38; 42). Moreover, the fact that according to Dutch transposition legislation detention of irregular migrants was made possible for reasons of national security and public order, and therefore based on more grounds than established by the Directive, made critics in Parliament believe that the Minister gave preference to detention over the speedy return of irregular migrants (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 50-51). Transposition as proposed by the Minister was, however, not only found to hamper an effective return procedure. It was also considered detrimental to the Directive's objective of providing returnees with sufficient procedural safeguards. The view that was held by some Members of Parliament was that the Minister's transposition measure was geared towards a rather coercive return procedure whereas the Directive implied a stepwise approach to voluntary return in line with the principle of proportionality and by taking due account of specific circumstances of individual cases as well as European case law providing further guidance in the application of EU rules on return. It was criticised in Parliament that such an approach was not explicitly laid down in the draft transposition measure and that also other crucial aspects were not established by statutory law but by lower-level instruments which from the viewpoint of legal certainty and democratic control gave grounds for concern (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 41). For instance, according to Parliament the Directive's rules concerning the position of vulnerable groups (e.g. handicapped or elderly people) or those that should for humanitarian reasons be excluded from measures of return should be included into the Alien Act (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 41; *Parliamentary Papers II* 2010/11, 32420, no. 14, p. 69). The Minister rejected all points of criticism by giving the following arguments to justify his approach. First, where the Directive implied choices, these had been used to transpose the Directive while staying in line with the Dutch legislation on aliens. Furthermore, he argued that it was not necessary to follow the Directive's rules to the letter and that his approach was justified by the fact that already existing national legislation and regulations covered large parts of the Directive and could therefore be used to transpose its requirements into Dutch law (*Parliamentary Papers II* 2010/11, 32420, no. 15, p. 97). Where aspects of the Directive were not yet regulated by national law, like in the case of the maximum lengths for detention, transposition remained close to the Directive's text (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 78). Second, the Minister argued that opting to regulate a number of aspects by lower-level instruments, i.e. by means of delegated legislation, instead of statutory law, was compatible with the system and structure of the Dutch Alien Act and would offer sufficient flexibility to transpose future amendments of EU rules on return more efficiently since lower-level regulation (orders of council, ministerial decisions) would be faster adjusted than statutory law (*Parliamentary*

Papers I 2010/11, 32420, no. 10, p. 80-81). While acknowledging the need for efficient government decision-making, Members of the Dutch Parliament requested the Minister to specify transposition law regarding the stages and elements of the return procedure where the Minister intended to make use of the discretion granted by the Directive (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 88). But on the whole, the Minister's explanations and justifications did not take the wind out of the sails of the critics in Parliament who still forwarded several amendments. These suggestions for amendments, however, did not bring about any substantial adjustments to the proposed transposition measure. In addition, the proposed transposition law was supported by a majority of the Dutch House of Representatives[101] as well as by the Senate after consultations between the Minister and the Senate in December 2011 (*Parliamentary Papers I* 2011/12, 32420, no. 12, p. 25).[102]

After having outlined in detail the transposition measures and process, it is considered time to move from description to explanation and to look into the role of discretion and other factors expected to affect the national transposition of directives.

13.7 Analysis

From the viewpoint of discretion the insights into the plenary debates about the draft transposition measure are highly relevant. A number of the issues addressed above, directly relate to the following aspects which are further looked into hereafter: how the Minister intended to use the discretion granted by the Directive, for what reasons and how this use was assessed by Parliament. Addressing these aspects in more detail serves to shed light on the role of discretion in the transposition of the Return Directive.

13.7.1 Discretion-in-national-law

The first and obvious point is that discretion played a relevant role in the transposition of the Return Directive. This point notwithstanding, the matter becomes more complex when considering in more detail the role of all

101 Alongside the coalition government and the PVV, also the Reformed Political Party (SGP) supported the proposal. Most amendments were rejected, some withdrawn. See *Parliamentary Papers II* 2011/12, 32420, letter to the Senate 'Overview of votes in the House of Representatives', 2 November 2011.

102 As mentioned earlier, in the Netherlands the House of Representatives has greater political significance than the Senate. The Senate has to be understood as 'chambre de réflexion', focusing largely on the legal quality of draft legislation. In considering formal law (bills) the House of Representatives has more powers than the Senate which has no right of amendment and can, in principal, only reject or accept a proposal. Due to the different scope of decision-making competences, the Dutch bicameral system is considered as asymmetric Cf. Breeman and Timmermans, 2012, p. 153; p. 166.

relevant factors, above all discretion, in explaining the Dutch transposition performance and its outcome.

To this end, several expectations are addressed, starting with the one linking a smooth transposition process and compliance with EU law to the availability of higher levels of discretion granted by the Directive for the sake of implementation (expectation 5). The Return Directive does include a number of facultative provisions and therefore grants a rather wide scope of discretion which was largely used by the transposing Ministry to incorporate the requirements of the Directive into Dutch law. But does that mean that transposition was facilitated and transposition carried out in a timely and legally correct way? Based on the descriptive analysis the immediate answer is 'no'. After all, the Dutch transposition was not timely and legal correctness challenged by national courts – due to infringements of provisions with direct effect, resulting from belated transposition. What's more, due to the delay in transposition, the Netherlands faced an infringement proceeding by the Commission. This being said, it can be concluded that having a wider scope of discretion available for transposition, did not result in timely transposition as predicted. Did discretion, on the other hand, impede the transposition of the Return Directive? Without intending to exclude too readily this possibility, the analysis of the transposition process brings other factors into play that contributed to slowing down the formal implementation of the Directive. First, there is the change of government in October 2010 and the different course taken by the new Government in transposing the Directive thereafter. This change in the political circumstances led to a turning point in the transposition of the Directive because prior to it, the first steps in transposing the Directive had been made: the draft amendment to the Alien Act had been assessed by the Council of State and preparations for parliamentary debates were under way.[103] With the new Government in place transposition, however, was put on hold for two months, and when the process was 'restarted' the deadline for transposing the Directive had already expired. What's more, transposition was certainly not helped by the fact that the new Minister adopted a different approach in transposing the Directive than his predecessor. Other reasons for the delay were mentioned by the Minister himself: the complexity of transposition had been underestimated – as confirmed in the interviews – and adjustments following from further advice of the Council of State and European case law were time-consuming, and additionally contributed to the delay in transposition.

Whereas discretion does not seem to have played a facilitating role in achieving timely transposition, viewed from another angle, it was nevertheless relevant for the formal implementation of the Return Directive in the

103 Cf. *Parliamentary Papers II* 2011/12, 32420, no. 7. It should, however, be noted that by that time, more than 1.5 years had passed since the adoption of the Directive which points to a slow pace of progression of transposition already prior to the political changes in October 2010.

Netherlands. The analysis shows that in translating the Directive's scope and operational provisions – return decision, entry ban, voluntary departure period and detention of irregular migrants – into the national legal framework, discretion was used to convert EU rules with the lowest possible impact for already existing Dutch legislation on aliens. Maintaining national rules and practices vis-à-vis irregular migrants was a priority of the Minister as can be derived from his line of reasoning presented in Parliament. The approach adopted by the Minister, however, seems to have taken too little account of the Directive's objectives and spirit. Therefore the preservation of national rules – at all costs as it seems – met with criticism, also because it seemed to make Dutch transposition prone to legal incorrectness (Cornelisse, 2011; Everdeen, 2011; Zwaan, 2011b: 272). In this context, discretion was perceived negatively, as shown by the debates in Parliament. From the viewpoint of Parliament discretion was used by the Minister to realise his restrictive approach towards irregular migration being reflected in minimalist choices regarding the Directive's provisions, including those establishing favourable conditions for irregular migrants such as legal and procedural safeguards.

13.7.2 Discretion, transposition actors and disagreement

Does the disagreement of Members in Parliament with the Minister's draft transposition measure, including the Minister's use of discretion, offer evidence in support of the expectation that the involvement of more than one actor in transposition has adverse effects on the process if also more discretion is available (expectation 9)? First of all, it is indisputable that with Parliament being involved in the transposition of the Return Directive, controversy emerged about the way the process should be carried out. This supports the expectation that the process was slowed down as a result of the joint effect of discretion and the number of transposition actors. On the other hand, parliamentary treatment went relatively swift. This was most likely due to the evident time constraints – the deadline of transposition had expired more than half a year earlier – and the fact that the Minister had urged Parliament to rapidly process the Directive dossier. In addition, while voicing criticism regarding the Minister's course in transposition, those Members of Parliament who disapproved of the proposed transposition measure could not put a halt to the process. While several parties in Parliament rejected the proposal in the final vote, they were in the minority. Taking the foregoing into consideration, the adverse effect on transposition resulting from the interaction of parliamentary involvement and availability of a wider scope of discretion is considered to be small. In other words, the *actor interaction expectation* does not fully apply but partially holds true.

Taking a step back to the EU level, disagreement with the content of the Directive, expressed by the Member States during the Council negotiations, is also expected to influence transposition performance under certain conditions. More precisely, the *disagreement interaction expectation* (E6) implies

that Member State disagreement with a directive's requirement raises the likelihood of deficient transposition of corresponding EU rules. This effect becomes more positive as the degree of discretion decreases. As argued in the descriptive analysis of the negotiation process, the initial Commission proposal did not correspond with Dutch preferences in a number of respects due to a lacking match between EU and Dutch rules in the area of return management. Owing to the fact that the Dutch return procedure had been revised only a few years prior to the negotiations and that, additionally, it had proven its worth, the efforts of the Dutch delegation were geared to bringing the proposal closer in line with the legal arrangements on which its own return management system was based. This was crowned with success in a few respects: the two-step approach was abandoned, the legal remedies requirement relaxed. In addition, the Directive includes a number of discretionary provisions which enabled the transposing Ministry to make own choices in transposition. But it is exactly the Directive's high margin of discretion which stands in contrast to the small discretion margin on which the expectation under consideration is based. The conclusion therefore is that the expectation does not have any relevance in explaining the deficient transposition of the Directive.

13.7.3 Discretion and compatibility

A relevant fact remains that despite some changes being made to the Directive during the negotiations, EU and Dutch rules concerning the return of irregular migrants still did not match in a number of respects once the Directive had to be (formally) implemented by the Dutch authorities. This is a relevant aspect given the fact that discretion and compatibility are expected to interact, thereby affecting transposition. To put it in more concrete words: expectation 7 posits that compatibility between the EU directive and national legislation raises the likelihood of proper transposition, and that, additionally, this effect becomes more positive as the degree of discretion increases. Hence, discretion may facilitate transposition if there also is a good match between EU and national law. As earlier established, during the EU negotiations the Dutch Government achieved to bring the Directive proposal more in line with the Dutch legal system. In spite of this achievement, transposition did not proceed smoothly. It turned out to be more complex once it got under way at the national level. In addition, in the course of the process, adjustments had to be made to the transposition measures, not only in following up the advice of the Council of State but also due to European case law concerning the (formal) implementation of the Directive. All this seems to indicate that the incompatibility between the Directive and national law was greater than expected by the Dutch Government prior to the actual transposition of the Return Directive.[104] This observation

104 I wish to add that, in my view, complexity does not necessarily imply incompatibility, but in the present case it seems that both are linked to each other.

is supported by the concept of legal fit used in the dissertation to assess the incompatibility between EU and national law. Based on this conceptualisation, EU and national rules show a mismatch of a moderate to high scope:[105] transposition made it necessary to adopt more than two legislative acts of a higher order[106] which did not merely replace existing legislation but required that amendments were made to it, although the Minister was keen to limit the implications from transposition for national legislation. Seeking to keep the Dutch law on aliens intact even if this rather emphasised than minimised the incompatibility between national and EU rules, and the fact that the Minister used discretion to achieve this end, lends support to the idea that low compatibility and discretion taken together impeded timely transposition. These findings, on the other hand, do not square with the core idea of the expectation that proper transposition is achieved through compatibility and discretion interacting and facilitating it. Hence, the expectation, as it stands, is not supported by the empirical evidence.

13.7.4 Discretion and administrative capacity

Finally, in line with expectation 8, the question rises if the Dutch transposition was impeded by lacking administrative capacity, which by interacting with a wide margin of discretion, is expected to have retarding effects on the pace of transposition. The administrative authority mainly responsible for the transposition of the Directive was the Ministry of the Interior and Kingdom Relations, and more in particular the Minister for Immigration and Asylum and the ministerial departments assisting him. Insights gained from the analysis of the transposition documents as well as the interviews with the civil servants involved in both the negotiations and transposition of the Directive delivered no evidence of insufficient knowledge among transposition actors. Nor did the empirical analysis yield any proof of coordination problems between the policy and legal units involved in the Directive dossier. Hence, the expectation linking discretion and administrative capacity is not found to hold true.

105 To recall: 'High misfit is registered when a directive requires the adoption of many (more than two) legislative acts, when these acts are of a higher order (laws and regulations) and when the transposition measures are mostly extensive amendments rather than new acts. A moderate degree of misfit is observed when many, high order acts are adopted but the acts are new and do not replace existing legislation.' Cf. Steunenberg and Toshkov, 2009, p. 960.

106 Alongside the amendment of the Alien Act and Decree, another (temporary) order in council was required to transpose the Directive.

13.8 Conclusion

Discretion played a relevant role in the Dutch transposition of the Return Directive. It was used by the Minister in his attempt to preserve national rules and practices in dealing with third-country nationals staying illegally on the territory of the Netherlands. Preserving the national legal system, and therefore already established rules and practices towards irregular migrants, is apparently not unique to the Netherlands. This kind of approach to the transposition of the Return Directive was also applied in other Member States (Zwaan, 2011a; 2011b). In the Netherlands the use of discretion served to fit the provisions of the Directive into the national legal framework. But how discretion was exercised by the Minister in transposing the Directive was not fully supported by Parliament. The Minister's transposition approach sparked parliamentary debate which, while probably slightly delaying the process, is rather negligible in explaining the long-term delay in the formal implementation of the Directive. What can be established is that with a view to the parliamentary debate, discretion was associated by opposition representatives in Parliament with the imposition of restrictive measures by the Dutch Government. What's more, while discretion did not enter into play by strengthening the positive effects of compatibility between EU and national rules, it seems to have negatively affected the formal implementation of the Directive, contributing to the long-term delay in transposition. Finally, the analysis brought to light that transposition was further slowed down by additional factors which relate to the political circumstances accompanying the incorporation of the Directive into Dutch law. These concern the change of government and the adoption of a different approach to transposition as well as the complexity of the process, which was only fully realised by those in charge once transposition had to be carried out in practice.

14 Stage II Petrol Vapour Recovery Directive

14.1 Introduction

In the following sections the Stage II Petrol Vapour Recovery Directive[1] takes centre stage which has been adopted to combat air pollution in the EU. This chapter begins by briefly tracing the development of EU environmental law-making and policy. The focus then moves on to the processes of negotiations and the transposition in the Netherlands, paying specific attention to the Dutch position towards the Directive. Next to the descriptive analyses of the events, the explanatory analyses shed light on the role of discretion.

14.2 The directive

Environmental pollution is a threat to both human health and the environment. It shows in different ways and environmental sectors (water, air, noise, waste, soil etc.). Pollution can have various reasons. In seeking to identify its causes, experts make a distinction between point sources and diffuse sources of pollution. As regards the pollution of water, for instance, discharges from industry or fish farms are referred to as 'point sources', meaning in plain language, 'stationary locations or fixed facilities from which pollutions are discharged' in contrast to pollution from 'diffuse sources', i.e. pollution which has no specific point of discharge.[2] Agriculture and forestry are examples of diffuse source pollution in the area of water and soil pollution.

Diffuse sources in air pollution have been linked to the storage and distribution of petrol. Petrol is composed of a complex combination of volatile organic compounds (VOCs), including benzene which is known to cause cancer. VOCs easily evaporate into the air where they cause problems of pollution. The EU's Stage I Petrol Vapour Recovery Directive[3] was adopted with

1 Directive 2009/126/EC of the European Parliament and of the Council of 21 October 2009 on Stage II petrol vapour recovery during refuelling of motor vehicles at service stations, OJ L 285, 31 October 2009, pp. 36-39.

2 See the Agency's definition of 'point sources', available at: http://www.eea.europa.eu/themes/water/water-pollution/point-sources and 'diffuse sources', available at: http://www.eea.europa.eu/themes/water/water-pollution/diffuse-sources (both accessed 22 June 2015).

3 See European Parliament and Council Directive 94/63/EC of 20 December 1994 on the control of volatile organic compound (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations.

the aim of reducing petrol and VOC emissions, respectively, during the storage and distribution of petrol between oil terminals and service stations by means of storage installations at terminals to avoid evaporative losses from tanks. Additionally, the Directive establishes measures for the loading and transport of petrol to ensure that any vapours are recovered and returned to the tanker or terminal where they can be redistributed. Very importantly, to achieve a more consistent and efficient application of EU rules, the Directive includes harmonised technical specifications for the design and use of the installations and other equipment referred to in the Directive.

In 2009 a follow-up measure was adopted which should tackle another diffuse source related to petrol: Evaporation during refuelling of passenger cars at service stations. The overall aim of Directive 2009/126/EC, in short, Stage II Petrol Vapour Recovery Directive, is to ensure the recovery of petrol vapour that would otherwise be emitted into the air during the refuelling of vehicles at service stations. Next to the risks of petrol described above, the 2009 Directive draws particular attention to the harmful effects of benzene. Benzene does not only cause cancer but also stimulates the formation of ground-level ozone, popularly known as 'smog', entailing great hazards for human health and the environment. In justifying the legislative proposal for the Stage II Petrol Vapour Recovery Directive, the European Commission underlined that the Directive would contribute to higher air quality standards in limiting emissions of benzene and formation of ground-level ozone. Specific equipment for petrol pumps in service stations were expected to ensure the recovery of at least 85% of petrol vapour (European Commission, 2008a).

The recovery of petrol vapour and corresponding technical issues may possibly lead one to think of the Directive as a comprehensive legal document. Yet, rather the reverse is the case. Including 19 recitals and 12 Articles, the Directive does not appear to be a long or complex document; instead it is a rather short and simply structured piece of legislation. This is in contrast to many other environmental directives which have more complex structures reflected by a high number of articles which are divided into chapters as well as detailed obligations set out in articles, provisions, and points. In addition, these more complex environmental directives often include an Annex with elaborations on particular requirements that Member States have to take into account when implementing the directive.

The Directive's subject matter is the reduction of petrol vapour emitted during refuelling (Article 1). To this end, service stations shall be equipped with stage II petrol vapour recovery systems[4] which, as set out in Article 2, are defined as 'equipment aimed at recovering the petrol vapour displaced from the fuel tank of a motor vehicle during refuelling at a service station and which transfers that petrol vapour to a storage tank at the service station or back to the petrol dispenser for resale'. The obligation for Member

4 Hereafter they are also referred to in short as 'stage II systems' or 'stage II equipment'.

States to ensure that stage II vapour recovery systems are installed at new as well as existing service stations is laid down in Article 3 which also specifies further conditions for installations. Article 4 determines that stage II systems shall recover 85 % of emissions as a minimum, and between 0.95 and 1.05 in case that petrol vapour recovered is transferred to a storage tank at the service station. To guarantee its proper functioning, stage II systems shall be subjected to periodic checks and consumers informed about their use at service stations by means of a sticker, for instance (Article 5). In addition and as established by Article 6, Member States are obliged to provide for rules on penalties applicable when national provisions adopted pursuant to the Directive are violated. They shall notify these rules to the Commission no later than 1 January 2012, coinciding with the deadline for Member State transposition (Article 10). The Commission is obliged to review Member States' implementation of the Directive as laid down in Article 7.

The results of the coding exercise make clear that the Directive does not afford Member States much discretion for implementation. Besides, when asked about the Directive's discretion margin, the Dutch civil servant who was involved in the EU negotiations on the Directive shared the view that the Directive hardly includes discretionary provisions.

One aspect that contributes to the lack of discretion is that the Directive is of a rather technical nature and therefore did not require the granting of a wider scope of discretion. If looking at the actual wording of the Directive, only Article 8 explicitly grants discretion. This Article provides Member States with the possibility to adopt harmonised standards with regard to Article 4 (minimum requirements for efficiency of vapour recovery systems) and Article 5 (periodic checks) and, except for these two Articles, it allows for the technical upgrading of all other Articles to ensure consistency with EU harmonised standards by means of a committee procedure (comitology), which is further determined in Article 9.[5]

14.2.1 The area of environment – air pollution[6]

The EU has been a longstanding active player in the area of environment and shown firm commitment to its protection long before its actions upgraded to policies by means of a legal fundament through the Treaty on the European Union (1993). From early on, air and atmospheric pollution ranked high among its environmental concerns. The EU's strategy has been to control,

5 As earlier explained, the committee procedure, however, implies that Member States share implementing powers with the Commission which in fact curtails their discretionary room.

6 This outline is based on the study of policy documents referred to in the subsequent footnotes and relevant websites of the European Commission, available at: http://ec.europa.eu/environment/air/quality/; http://ec.europa.eu/environment/air/quality/legislation/existing_leg.htm; http://ec.europa.eu/environment/air/legis.htm; http://ec.europa.eu/environment/air/review_air_policy.htm; http://ec.europa.eu/environment/enveco/mbi.htm (all accessed 29 June 2015).

prevent and reduce emissions of harmful substances into the atmosphere. The Stage II Petrol Vapour Recovery Directive together with its preceding counterpart (Stage I) are clear instances of this latter approach, aiming to limit pollutants. In several other ways, the EU has contributed to achieving better ambient air quality, for instance, by improving fuel quality as well as, in line with EU environmental policy integration, by introducing requirements for the protection of the environment in EU policy-making relating to sectors other than the environment (e.g. transport and energy).[7]

Generally speaking, EU measures in the area of environment were initially taken with the primary aim to improve the functioning of the internal market. Hence, EU rules that had the beneficial 'side effect' of countering air pollution, were taken in the first place with an eye to remove potential trade barriers and competitive distortions caused by different air quality standards applicable in the Member States to certain products such as vehicles. In the course of time, awareness of environmental problems, and their transboundary dimension in particular, among both the public and political decision-makers, increased. A series of command-and-control measures, i.e. direct regulation by means of EU directives or regulations instead of economic incentives[8] and market-based instruments[9] used later on – have since the 1970s proven the EU's continuous attention and efforts to ensure better air quality. Applying the so-called 'roadmap approach', EU plans and objectives for fighting air pollution were set out in Commission communications and subsequently translated into EU framework legislation and daughter directives. A case in point is the EU Ambient Air Quality Directive, which prior to its adoption in 1996, had been addressed by the Commission in its fifth and sixth environmental action programmes, where the content and objectives of this Directive were further set out.[10] The Directive, which has meanwhile been revised (2008), sets basic principles and an overall framework for action by introducing quality objectives for ambient air as well as common methods and criteria for the assessment of air quality. Additionally, the Directive has provided a firm basis for a number of directives in the area of air quality which, as substance-specific directives or daughter directives, are closely linked with it.

7 Article 6 TEC (now Article 11 TFEU) lies down that 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.'

8 See for instance Harrington, W. and R. D. Morgenstern (2004), 'Economic Incentives versus Command and Control', *Resources* 152: 13-17.

9 Market-based instruments are also referred to as economic instruments such as environmental taxes, targeted subsidies, or tradable permit systems like the EU trading scheme on greenhouse gas emissions.

10 See COM(92) 23 final and COM(2001) 31 final.

All in all, in the field of air pollution, the EU has dealt with a number of matters ranging from ambient air quality to pollution from emissions from power stations, plants and vehicles.[11] In fact, EU policy on air quality and pollution is still in continuous development. More recently, the EU has started to review its overall approach with the 2005 thematic air pollution strategy (European Commission, 2005). It reflects the EU's determination to ensure that air quality levels do not result in unacceptable impacts on, and risks to, human health (European Commission, 2001). This is an objective which has been re-endorsed in the Commission's currently running seventh environmental action programme.[12] The thematic air pollution strategy defines priorities, its major concern being with the reduction of the most harmful pollutants and with risk prevention to protect the most vulnerable group from the effects of air pollution. More important in the present context, however, is the fact that it focusses on reducing air pollutants such as ozone. By adopting the Stage II Petrol Vapour Recovery Directive, amongst other measures, the EU has sought to put this plan into practice.

While EU legislation on air quality and protection has certainly not remained without results – reductions of emissions from industrial plants, power stations and motor vehicles attest to its success – other problems persist such as the formation and increase of ground-level ozone. Unlike ozone layers in the stratosphere, which function as protective shield against harmful UV radiation, ground-level ozone in high concentrations is a harmful substance to human health and, moreover, to agriculture, vegetation and building materials. Against the background of increasing ozone values exceeding EU limits for health, the Commission identified the need for legislative action. Its proposal for a directive for stage II petrol vapour recovery during the refuelling of petrol cars at service stations was presented to the public as an important step in its fight against air pollution, which the Commission considered as a factor essentially contributing to the shortening of average life expectancy and causing premature deaths (European Commission, 2008a).

14.2.2 Purpose and background to the directive

Hence, reducing ground-level ozone and emissions at source more generally were key motives of the Commission in proposing to make the installation of stage II petrol vapour recovery equipment at service stations a legal requirement. As with most of its proposals, the Commission's initiative did not come out of the blue since corresponding intentions had been revealed

11 Cf. Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, OJ L 365, 31 December 1994, pp. 24-33 and Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11 June 2008, pp. 1-44.

12 COM(2012) 710 final. Supplementing as well as updating already existing legislation, it sets objectives and proposes measures for a timeline of 15 years.

in the thematic strategy on air pollution and the revised directive on ambient air quality.[13] The idea for the EU-wide use of stage II systems was taken in line with the EU's broader objective to tackle the root of the problem: emissions of volatile organic compounds contained in petrol known to contribute to the formation of ozone.

To this end, the EU pursued the approximation of national laws regarding measures against air pollution by emissions from motor vehicles (passenger cars).[14] Another measure was targeted at minimising evaporation losses throughout the process of storage and distribution of motor fuels – the later Stage I Petrol Vapour Recovery Directive – which in turn announced follow-up steps regarding the recovery of petrol vapour related to the refuelling at service stations[15] (Oosterhuis et al., 2011: 621). Such a measure turned out to be necessary – not only to combat ground-level ozone. The envisaged Stage II Petrol Vapour Recovery Directive should help offsetting negative effects from the increase of volatile organic compounds emissions triggered by another directive[16] with which the EU intended to encourage greater use of bioethanol in petrol in order to render petrol and diesel less environmentally damaging (European Commission, 2008b).

Submitting its proposal under the environment procedure laid down by Article 175 TEC (now 192 TFEU), indicates that the matter did not fall within an area of exclusive EU competence. The Commission justified EU action by underlining the cross-border dimension of air pollution problems, and petrol vapour in particular, which could only efficiently be dealt with by a common and coherent approach (European Commission, 2008b, pp. 5-6). This approach should be geared towards petrol vapour recovery during refuelling, and the installation of stage II equipment be realised prior to 2020 to achieve a significant reduction of hazardous substances such as benzene and ground-level ozone. Besides this primary goal, the proposal was also based on economic considerations: In tune with the EU's Lisbon Strategy and general internal market objectives it should stimulate the demand and development of Stage II vapour recovery technologies (European Commission, 2008b, p. 2). While the Commission did not ignore that its proposal entailed costs to be borne by the Member States, it underlined the economic

13 See recital (17) of Directive 2008/50/EC.

14 Council Directive 91/441/EEC of 26 June 1991 amending Directive 70/220/EEC on the approximation of the laws of the Member States relating to measures to be taken against air pollution by emissions from motor vehicles, OJ L 242, 30 August 1991, pp. 1-106.

15 As stated in its preamble: 'Whereas further action will be needed to reduce the vapour emissions during refueling operations at service stations (…)'.

16 Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC, OJ L 140, 5 June 2009, pp. 88-113.

chances lying in innovation and business opportunities (European Commission, 2008b).

The Commission apparently sought to present a proposal that was based on sound scientific knowledge, economic assessments, and reliable and recent environmental information. For this purpose consultation rounds were held involving stakeholders from a range of organisations, including oil industry associations, Stage II PVR equipment manufacturers, independent service station operators and motoring organisations as well as non- governmental organisations representing environmental and transport interests (European Commission, 2008b, pp. 3-4). Moreover, an impact assessment was carried out from which the view emerged that the installation of Stage II vapour recovery systems at service stations was the most suitable means to reach the envisaged objectives, also as regards the feasibility to realise the technical requirements and achieve cost-effectiveness (European Commission, 2008c).

14.3 Negotiations

Not even a year passed between, on the one hand, the submission of the proposal in December 2008 and negotiations kicking off shortly later, and the conclusion of the negotiations, on the other hand. The European Parliament's Committee on the Environment, Public Health and Food Safety voted in favour of the proposal on 31 March 2008 and the proposal's adoption in plenary by the European Parliament soon followed on 5 May 2009. Most of the latter's amendments, 21 in total, were taken into account and a few informal meetings (trilogues) between representatives from the European Parliament, the Council and the Commission advanced interest reconciliation.[17] On 25 September 2009 a final agreement was struck and the Directive adopted at first reading with no Member State abstaining and co-decision and qualified majority voting applying in the Council (Council of the European Union, 2009a). A relatively short negotiation process and compromises already reached in the Council's preparatory bodies – in the working party on the environment and the Permanent Representatives Committee (Coreper) – made further debate at the level of ministers unnecessary, and point to the smooth progress of negotiations (see table 20).

17 These meetings are usually set up with the aim of reaching agreement between the two bodies at a directive's first reading.

Table 20: Timeline for negotiations on the Stage II Petrol Vapour Recovery Directive

04 Dec 08	Adoption by Commission proposal
05 May 09	European Parliament opinion on 1st reading
13 May 09	European Economic and Social Committee opinion
25 Sep 09	European Parliament opinion on 1st reading
21 Oct 09	Formal adoption by Council and European Parliament

For a number of Member States, the Directive proposal did not bring any decisive changes (Oosterhuis et al., 2011). In many Member States petrol vapour recovery equipment was already installed at many service stations for the same purpose as pursued by the proposed Directive.[18] Therefore the Directive did not contain many novelties for the Member States, and certainly not for the Netherlands. Here, stage II systems had already been made obligatory for service stations[19] in 1996 on the basis of two Decrees,[20,21] adopted within the framework of the Dutch regulation on environmental management on sites. The Dutch Government, being aware of the link between emissions of volatile organic compounds at petrol filling stations and the growing amounts of harmful (ground-level) ozone, realised that it was important to tackle the cause(s) of the problem. To this end and prior to the initiatives of the EU, the Government had since the late 1980s taken several measures to get a grip on petrol vapour emissions,[22] including enforcement activities to guarantee the installation of stage II petrol vapour recovery systems by service stations (Oosterhuis et al., 2011: 623-624). This

18 Hereafter the petrol vapour recovery equipment or system is also referred to, in brief, as 'Stage II (PVR) system(s)'.

19 Service stations which have started to operate after 1 juli 1995 and have a throughput greater than 500 m^3 / year.

20 Cf. the Dutch Environmental Management Petrol Stations Decree adopted in 1991 [Besluit tankstations milieubeheer] and the Decree on motor vehicle re-establishments under environmental management [Besluit herstelinrichtingen voor motorvoertuigen milieubeheer]. At the time of negotiations on the Directive proposal regarding Stage II petrol vapour recovery systems this obligation was laid down in Article 3.20 of the Dutch Activities Decree.

21 See Dutch Environmental Management Petrol Stations Decree, especially Annex 2.2, which sets down rules on the 'Dampretour Stage-II' that largely correspond with the EU's Stage II petrol vapour recovery systems. The Decree was adopted within the framework of the Decree on general rules governing the environmental management of sites [Besluit algemene regels voor inrichtingen milieubeheer]. Having been adopted on 19 October 2007 (*Official Bulletin*, 2007, 415), it has undergone a number of amendments and extensions and is, since 1 January 2013, officially referred to as 'Activities Decree' [Activiteitenbesluit milieubeheer].

22 For instance, it had ensured the commitment of a group of tank storage and trans-shipment companies to reduce their VOC emissions. Additionally, it had adopted a control strategy in respect of hydrocarbon emissions increasing the concentration of volatile organic compounds. See Oosterhuis et al., 2011, p. 623.

yielded successful results.[23] Being, however, a transboundary problem – air pollution does not stop at national borders – sound solutions could not be provided by national action alone. Consequently, like other Member States, the Netherlands were convinced that the problem of (transboundary) air pollution would require a common approach within the framework of EU environmental law. Such an approach appeared to be not only acceptable but even desirable from the Dutch point of view.

Due to its strong economic productivity, the Netherlands contributed to the problem of environmental pollution. At the same time, in combination with its small size and central location on the European continent, the Netherlands were also inevitably exposed to an 'import' of air pollution from abroad. While, apparently not for nothing, the Netherlands have been characterised as 'an open economy in the polluted core of the Continent', it has also been viewed as a Member State that is committed to the implementation of EU environmental standards and gives preference to common instead of unilateral action, acting in the belief that supranational collaboration entails both environmental and economic benefits (Liefferink and Andersen, 1998: 267-268).

Against this background, it may not come as a surprise that the Dutch Government took a positive attitude towards the Commission proposal which it found proportionate and in line with the principle of subsidiarity. The proposed measures were not considered exceeding the EU's competences but, instead, viewed as a proper means to tackle the cross-boundary problem of increasing ground-level ozone and carcinogenic benzene, resulting in the refuelling of vehicles at tank stations. Viewed from the perspective of its own national legal framework, the proposal was found to support the line of approach and efforts already undertaken in the Netherlands to cut down volatile organic compounds, and petrol vapour emissions in particular. Since its own legislation provided for requirements in the spirit of the proposal, the central idea of the Government was that national legislation should serve as a blueprint for upcoming EU rules. Otherwise, implementing the Directive could entail higher costs, especially for service station operators, in case that it would become necessary to replace already operating stage II systems on Dutch territory (*Parliamentary Papers II* 2008/09, 22 112, no. 782, p. 5). Since, as set out in the Directive proposal, stage II systems were not expected to yield much better results than already operating ones, and due to the fact that investments had previously been made into already existing stage II systems,[24] this was seen as an unnecessary financial burden

23 To mention one example of VOC emissions reductions, between 1980 and 1998 VOC emissions related to petrol storage and the distribution of petrol dropped by more than 80 percent. This decrease was not only due to national measures but also resulted from the EU's Stage I Petrol Vapour Recovery Directive that had meanwhile been implemented. Cf. Oosterhuis et al., 2011, p. 624.

24 Investment had, for instance, been made in research on the feasibility and efficiency of Stage II petrol vapour recovery systems, including possibilities to achieve certain levels of petrol vapour recovery (interview).

which should be avoided. Against this backdrop, the Dutch Government decided to direct its efforts in the negotiations towards bringing the proposal in closer alignment with corresponding national legislation (*Parliamentary Papers II* 2008/09, 22 112, no. 782, p. 3; 5).

The fact that the Commission proposal became subject to several changes during the negotiations makes evident that not only the Netherlands but also other Member States saw the need for some modification of the proposed Directive.

14.3.1 Service stations

Negotiations mainly took place in the first half of 2009 with the Council presidency being represented by the Czech Republic. Pretty soon broad support for an initial Council position on the proposal was found (Council of the European Union, 2009b) but at the same time, some outstanding issues required further debate.

Article 3 of the Directive proposal addressed Member States' obligation to ensure that service stations are equipped with the stage II vapour recovery system. It further explained under which conditions service stations should be equipped with such a system and distinguished between new and existing service stations: 'any new service station shall be equipped with a stage II petrol vapour recovery system if its actual or intended throughput is greater than 500 m3 per annum. However, all new service stations situated under permanent living quarters or working areas shall be equipped with a stage II petrol vapour recovery system irrespective of their actual or intended throughput.'[25] As for existing service stations, any of them with a throughput greater than 500 m3 per annum, undergoing a major refurbishment, should be equipped with a stage II petrol vapour recovery system at the time of the refurbishment.[26]

These requirements met with different reactions from Member States and underwent some changes during the negotiations. For instance, Bulgaria, Germany, and Austria found that still more service stations should be obliged to install stage II petrol vapour recovery systems. Belgium, Spain and Romania, on the other hand, objected to the introduction of additional minimum thresholds for service stations situated under permanent living quarters or working areas (Council of the European Union, 2009c) but could not prevent their inclusion. By further specifying the group of new as well as existing service stations falling under the obligation to use stage II equipment,[27] the scope of exclusions was actually narrowed down. In addition to that, Article 3(4) was added exempting service stations exclusively used in association with the construction and delivery of new motor

25 Cf. Article 3(1) of the proposal.
26 Cf. Article 3(2).
27 Cf. Article 3(1)(b) and 3(2)(b) of the Directive.

vehicles from the installation requirement (Council of the European Union, 2009d).

Member States also expressed different views on Article 3(3) which foresaw installation by no later than 31 December 2020 at any service station existing on the territory of a Member States, having a throughput in excess of 3000 m3 per annum.[28] The delegation of the United Kingdom preferred a slightly higher threshold of 3500 m3, whereas Belgium, Denmark, Germany, Bulgaria, Lithuania, and Austria sought to get lower thresholds accepted. While the deadline was eventually changed, the throughput rate was not.

Views on the installation deadline differed. Denmark and Lithuania preferred the installation of stage II equipment before 2020. Other Member States, including Greece, Ireland, Finland and the United Kingdom, by contrast, firmly rejected any changes to that date. Also the Netherlands initially disagreed with any changes being made to the deadline, but it finally approved of a more flexible requirement later on in the negotiations, joining those Member States that did not voice any particular preferences in respect of the proposed measures (Council of the European Union, 2009c). The European Parliament was in favour of forwarding the deadline to 31 December 2018 (European Parliament, 2009) and eventually successful in asserting this claim.

14.3.2 Minimum level of petrol vapour recovery

Determining which service stations should – under what conditions and until when – install EU vapour recovery systems, the Commission proposal also laid down minimum levels of petrol vapour recovery. Stage II systems able to achieve a certain petrol vapour capture efficiency were associated with the delivery of a high environmental benefit and facilitation of trade in petrol vapour recovery equipment.[29] According to the rules as proposed in Article 4, recovery should cover 85% of emissions. A higher threshold lying in the range of 95% and 105% was envisaged in case that the recovered vapour petrol was transferred to a storage tank at the service station. These requirements did not spark off much discussion in the Council as evidenced by the fact that the Article did not undergo any substantial changes. However, the requirements did not meet the full approval of the European Parliament which preferred setting the minimum threshold higher, requiring that stage II systems were to achieve a 90% or greater recovery. But the request of the European Parliament was not granted. Its acceptance of the proposed minimum levels was nevertheless assured by accommodating its preference to set earlier deadlines for the installation of stage II systems and overall implementation of the Directive (European Parliament, 2009, p. 11; pp. 14-15; Council of the European Union, 2009e).

28 Cf. Article 3(3).

29 As noted in recital (6) of the proposal.

With regard to the Netherlands, it should be pointed out that Dutch legislation only prescribed a 75 % recovery of petrol vapour emissions.[30] Interestingly enough, the Dutch delegation did not object to the higher threshold, despite its wishes to create greater alignment between EU and national rules. In this context, the civil servant of the Ministry of Infrastructure and the Environment pointed out that the Netherlands benefitted from the fact that two testing methods had been developed on Dutch ground to capture two different points in time during the refuelling process. With these testing methods petrol vapour capture efficiency at both half load and full load could be established, resulting in two minimum levels: 75% for half load and 90% for full load. Taking into account the latter percentage, in practice the stage II systems being operative in the Netherlands already provided for the necessary recovery percentages of petrol vapour emissions. In my view this may be one explanation for why the Dutch delegation did not invest more efforts into changing this aspect of the proposal.

14.3.3 Periodic checks and consumer information

Article 5(1) of the proposal foresaw annual controls of stage II petrol vapour recovery systems, in particular regarding their petrol vapour recovery capacity.[31] For those service stations equipped with an automatic monitoring system, mandatory controls had to be carried out at least once every three years. The Article also laid down requirements for automatic monitoring systems which should include automatic faults detection and automatic mechanism to stop operations of stage II systems after a week in case the fault was not remedied.[32] These requirements were hardly altered during the negotiations but they were nevertheless points of debate. The German delegation, for instance, demanded to make automatic monitoring systems mandatory for all service stations. Austria's proposal did not go as far as that. It wished that automatic monitoring procedures of stage II systems should become mandatory but only for a particular group of service stations, namely those situated under permanent living quarters or working areas (Council of the European Union, 2009b, p. 2). But neither of the two requests was eventually followed, probably because they implied high implementation costs which other Member States would not be able or willing to bear.

From the perspective of Dutch law which provided for periodic checks only once in three years,[33] the proposal implied an increase in enforcement efforts due to higher inspection frequency (*Parliamentary Papers II* 2008/09, 22 112, nr. 782, p. 4). Interestingly enough, however, the Dutch delegation

30 Cf. 2.2.7 of the Annex to the Environmental Management Petrol Stations Decree.
31 At that point it was still referred to as 'hydrocarbon capture efficiency' but later changed into 'petrol vapour recovery capacity'.
32 Cf. Article 5(2).
33 Cf. Annex 2.2.9 of the Dutch Environmental Management Petrol Stations Decree.

did not seem to see this as a reason for seeking to change EU rules. It is conceivable that given the far-reaching demands of other Member States such as Austria and in particular Germany, the requirements as proposed by the Commission were perceived by the Dutch delegation as offering the best solution. While the requirement pertaining to periodic checks was not altered, the scope of the Directive was changed by extending it to include an additional provision following an amendment of the European Parliament.[34] Initially, the Article provided for rules on periodic controls of stage II vapour recovery systems only. To enhance transparency and consumer information, the European Parliament, however, suggested that service stations should display a certificate attesting to its disposal of stage II petrol vapour recovery systems, making the issue more transparent for consumers (European Parliament, 2009, p. 13).

Despite the relatively swift pace of negotiations, the foregoing discussion makes evident that the Commission proposal was modified, resulting from Member States' requests and the intervention of the European Parliament. The European Parliament's amendments included alongside minor also some more substantial changes, advocating greater coherence of legislation on petrol vapour recovery (for instance as regards the definition of the term 'petrol') as well as the extension of the Directive's scope, which initially referring to 'passenger cars' only, eventually included the refuelling of 'motor vehicles'. In addition, its amendments were geared, as noted above, to forwarding the deadlines for installing stage II petrol vapour recovery systems and the (formal) implementation of the Directive.[35] Furthermore, the European Parliament achieved the inclusion of additional requirements for Member States – ensuring the provision of consumer information by service stations and the introduction of review and evaluation requirements to be met by the European Commission regarding Member States' implementation.[36]

14.4 Analysis

Having sketched the negotiation process regarding the Stage II Petrol Vapour Recovery Directive, including the position taken by the Netherlands on the Commission proposal, the question that still needs to be answered is: what does the descriptive analysis reveal about the role of discretion in EU decision-making?

34 See Article 5(3).

35 Whereas the proposal prescribed transposition to be finalised by 30 June 2012, the deadline was eventually forwarded to 1 January 2012. See Article 10.

36 As established by Articles 5(3) and 7 of the final Directive.

14.4.1 Discretion and policy area

The EU's role in the area of air quality and pollution control is – comparable to its overall role in the field of environment – an influential one. This is evidenced by its continuous attention to the problem of air pollution and action since the beginning of its appearance on the environmental stage four decades ago. Since then, the EU has not only re-confirmed but also proved its commitment to fight for better air quality by showing an intense legislative activity. It has developed framework legislation and provided for its elaboration through a number of legal measures, tackling air pollution from different angles. One of these angles has been presented here: the fighting of air pollution by motor vehicles, in particular when they are refuelled at service stations. Furthermore, as shown in the discussion of the purpose and background to the Stage II Petrol Vapour Recovery Directive,[37] and as illustrated by its content, coping with air pollution has become subjected to the discipline of harmonisation resulting in hardly any discretion being granted to Member States. The first expectation under consideration here, therefore, does not apply, at least not if it draws on the idea that the *less* a policy area is influenced by EU legislative competence, the *more* discretion is conferred upon Member States. In fact, the opposite is found to apply in the present case: the *more* the EU is influential in legislative terms the *less* discretion is conferred upon Member States. Hence, as illustrated by the negotiations on the Stage II Petrol Vapour Recovery Directive, discretion did not play any pertinent role. This is due to the fact that the Directive's subject matter implied a high level of legislative harmonisation, which was accepted by the Member States because clear economic and environmental benefits were associated with it.

14.4.2 Discretion, political sensitivity and compatibility

Higher discretion margins of European directives are thought to be connected with political sensitivity and a lack of compatibility between the proposed EU and national rules (expectations 2 and 3). The descriptive analysis of the negotiations on the Stage II Petrol Vapour Recovery Directive does not provide any evidence in support of these expectations. Without wanting to ignore the fact that the Commission proposal triggered debate on the conditions for installing stage II equipment or the question of how efficient such equipment should be in recovering petrol vapour, none of these points was of a sensitive and highly political nature. If this had been the case, the incorporation of discretion to reconcile different interests would have been conceivable. Instead, the Commission proposal offered hardly

37 It was obvious long before its adoption, that the Directive would include EU harmonised methods and standards, also due to the fact that it was intended to supplement the technical specifications for the storage of petrol which had (already) been harmonised at the EU level by the Stage I Petrol Vapour Recovery Directive.

any discretion and did not undergo any changes as to this aspect during the negotiations. Moreover, the analysis does not deliver any indicators of relevant incompatibility between EU rules and those applied in the Netherlands regarding petrol vapour recovery at service stations. This may also explain why the Dutch delegation was not very active in forwarding amendments or supporting suggestions of other delegations. In case that differences between the Directive requirements and own legislation were identified they were apparently viewed as negligible or not crucial (e.g. petrol vapour recovery efficiency, periodic checks). All this suggests, in fact, that the compatibility between the Directive and Dutch law was high which was also confirmed by the civil servant involved in the negotiations. A good match between EU and national legal arrangements has been explained in the literature on EU environmental policy-making as a result of Member States' attempts to influence the Commission by means of contacts at expert level or national position papers that are send to the Commission in the conceptual and preparatory phase of a legislative proposal. Such strategies have, in particular, been ascribed to the 'green' Member States: the Netherlands, Germany and the Nordic countries (Denmark, Finland and Sweden) that are known to have influenced EU environmental decision-making by such means in the 1990s (Liefferink and Andersen, 1998). According to the interviewee, however, the Dutch Government did not embark upon this path in the case of the Stage II Petrol Vapour Recovery Directive. While he confirmed that the Netherlands and the Commission were communicating and exchanging information relating to the Dutch petrol vapour recovery systems at the time the Directive proposal was prepared, he took the view that this was due to the Commission's initiative to seek further input from Member States, including the Netherlands, to develop EU legislation on this subject matter. It seems more important, though, to bear in mind that the compatibility between the EU Directive eventually proposed by the Commission and Dutch legislation was high.

14.4.3 Discretion and European Parliament

Shifting the focus finally to the European Parliament, it is expected to have an impact on the margin of discretion granted to Member States, which it is expected to reduce, at least if acting as co-legislator in decision-making. From the analysis above, it becomes obvious that the European Parliament had an influential role in the negotiations on the Stage II Petrol Vapour Recovery Directive. Nearly all its amendments to the Commission proposal were incorporated into the Directive. Thus, it achieved to repeatedly assert its preferences, i.e. regarding the Directive' scope, and the deadlines of substantial requirements. Despite its seemingly strong position in the negotiations, the analysis does not offer conclusive findings regarding its attitude towards the granting of discretion for implementation. Hence, evidence which supports or rejects the *European-Parliament-matters expectation* is lacking. It can, however, be concluded that the expectation does not carry much

relevance in the present case, since the initial Commission proposal as well as the final Directive hardly grant any discretion. Furthermore, the analysis does not indicate that discretion featured prominently during the negotiations: Member States' positions in the Council debates do not reveal that it was of particular importance to them.

14.5 Conclusion

No need for beating around the bush. The role of discretion in the negotiations on the Stage II Vapour Recovery Directive is irrelevant. It does not come to the fore as facilitating 'glue' to unify differing Member States' positions. This is possibly due to, as the analysis suggests, the absence of both political sensitivity regarding the Directive's content and incompatibility of EU and national rules which are associated with the incorporation of more discretion into EU directives. Additionally, the lack of discretion may result from the fact that legislative harmonisation was preferred for economic reasons. A further outcome is that where there is firm legislative influence exercised by the EU, and technical matters are the primary issues addressed by the directive under negotiation, discretion becomes irrelevant. In other words, it does not come into play as a factor which ensures a smooth progress and successful conclusion of negotiations.

After having looked into the EU decision-making process, the transposition of the Directive in the Netherlands is addressed. How did the incorporation of the Directive's requirements into Dutch law proceed and by which factors was it affected? Was discretion one of the factors that played a role in the transposition of the Directive?

14.6 Transposition

In the Netherlands, the transposition of the Stage II Petrol Vapour Recovery Directive did not require any statutory changes but remained confined to the adjustment of national regulations which was carried out by means of subordinated legislation. The formal implementation of the Directive's requirements was in the hands of the Ministry of Infrastructure and the Environment, which transposed the Directive on time, i.e. prior to the deadline for bringing into force the transposition measures necessary to comply with the Directive, set at 1 January 2012 (see table 21).[38] Due to the fact that the Directive was converted into Dutch law by means of subordi-

38 See Article 10 of the Directive. With the entry into force on 31 December 2011, the Ministry of Infrastructure and the Environment noted, however, that neither the common commencement dates could be observed nor the default period of three months between notification and the entry into force of transposition legislation. CF. *Official Bulletin*, 2011, 552, p. 20.

nated legislation, the Dutch Parliament did not play a decisive role in the national transposition process. Transposition legislation consisted of two amendments, taking the form of an order in council as well as a ministerial decision.[39] These measures included the very few changes that the Directive brought about in Dutch law, and more precisely, for the Dutch Activities Decree and Regulation. In a nutshell, the Activities Decree provides for rules to be observed by companies and relates to various aspects of the environment.[40] It is intended to establish general rules applicable to a broad range of companies and facilities. Its wide application area shall reduce administrative burdens for public authorities and business (interview). The Activities Regulation specifies further details of the general rules established by the Activities Decree. These specifications pertain to definitions and procedural provisions. Furthermore, the Activities Regulation includes rules which shall ensure the proper treatment of air, soil, and water, to mention a few, by companies performing business activities supposed to affect the environment.

Table 21: Fact sheet transposition Stage II Petrol Vapour Recovery Directive

Transposition deadline:	01 Jan 12
Publication transposition legislation:	29 Nov 11 *16 Dec 11*
Sort transposition measure (and number):	*Order in council* (1), ministerial decision (1)
In charge:	Ministry of Justice
Legal Framework:	Dutch Alien Act 2000 Dutch Alien Decree 2000

39 Environmental Management Activities Decree [Activiteitenbesluit milieubeheer] and the Living Environment Law Decree [Besluit omgevingsrecht] (*Official Bulletin*, 2011, 552) and Regulation amending the regulation on general rules for the environmental management of sites, in short referred to as 'Activities Regulation' [Regeling tot wijziging van de Regeling algemene regels voor inrichtingen milieubeheer (delivery of liquid fuels en gecomprimeerd aardgas)] (*Government Gazette*, 21136).

40 This information was obtained from the website Kenniscentrum InfoMil launched by Rijkswaterstaat, the Directorate-General for Public Works and Water Management and part of the Ministry of Infrastructure and the Environment, available at: http://www.infomil.nl/onderwerpen/integrale/activiteitenbesluit/activiteitenbesluit (accessed 1 July 2015).

14.6.1 Transposition measures

According to the transposing Ministry, the Directive requirements were embedded into the national legal framework without fundamentally changing its structure and terminology (*Official Bulletin*, 2011, 552, p. 10).

Drawing on the above discussion of the negotiation process, Dutch legislation differed from EU requirements in three respects: the application area, the minimum level of petrol vapour recovery and the frequency of inspections. Ironing out these differences resulted in modifications of chapter 3 and 4 of the Activities Decree, entailing a few structural and textual but no fundamental amendments. The Directive's substantive provisions[41] were largely transposed by means of Article 3.20 of the Activities Regulation. All in all, it contains, however, only very few substantial changes for Dutch legislation on stage II petrol vapour recovery systems: It provides for the new requirement, addressed at both new and already existing service stations to install stage II systems in case that these stations have an actual or intended throughput greater than 100 m 3 / year and are situated under permanent living quarters or working areas.[42] Article 3.20 furthermore introduces the new minimum level for petrol vapour recovery foreseeing a return of 85% of petrol vapour emissions instead of the previous 75%. The latter measure was, in principle, a simple codification of existing practice: as noted above, the Dutch method applied for testing recovery at full load already ensured compliance with the required minimum level of 85%, prescribed by the Directive. In transposing the relevant Directive provision, the other testing method was dropped, in tune with the wish of the Dutch Government to reduce regulatory pressure and costs incurred so far by the application of two testing methods (interview). Finally, Article 3.20 of the Activities Regulation contains rules for the obligation to provide for periodic checks and consumer information.

14.6.1.1 Scope

Due to differences between the Directive and national legislation resulting from the concepts of petrol and liquid fuels, respectively, as well as the Directive's scope, chapters 3 and 4 of the Activities Decree had to undergo some changes.[43] Both chapters contain, amongst others, rules specifying the conditions regarding the delivery of liquid fuels and natural gas for road transport. The Directive, however, has a smaller scope which is confined to petrol whereas chapters 3 and 4 cover more than one liquid fuel. Equally important to note is that, unlike the Decree, the Directive, in referring to motor vehicles in general, does not distinguish between captive and non-captive uses in the provision of liquid fuels nor does it define differ-

41 This concerns Articles 3 through 5 of the Directive.
42 Cf. Article 3(1)(b) and 3(2)(b) of the Directive.
43 To be more concrete, this concerned chapters 3.3.1 and 4.6 of the Activities Decree.

ent groups of facilities falling under its remit.[44] In this regard, the amendments carried out for the purpose of transposition illustrate the efforts of the transposing Ministry to leave national legislation intact. By merely shifting requirements between chapters and adding a few editorial changes, the differences between EU and national rules were balanced out. The key requirements of the Directive were eventually brought together in chapter 3 of the Directive, regulating henceforth the delivery of fuel liquids and compressed natural gas for motor vehicles whereas chapter 4 addresses the delivery of the same products albeit for purposes of road transport excluding motor vehicles (*Official Bulletin*, 2011, 552, pp. 9-10).

14.6.1.2 Periodic checks

The transposition of Article 5 of the Directive, in particular the requirement to provide for annual inspections of stage II petrol vapour recovery systems, entailed another change to the Dutch legal framework. The EU requirement implied a higher inspection frequency than so far applied in the Netherlands. The relevant requirements were transposed by means of Article 3.20 and 6.22a of the Activities Regulation.[45] The inspection tasks however, remained with the same independent national inspection service previously in charge. Continuing to adhere to national practice was possible due to the discretion granted by the Directive. As explicitly stated by recital (12) of the Directive's preamble, Article 5 implies that Member States may 'decide that checks are to be performed by one or more of the following: official inspection services, the operator itself or a third party'.[46]

A final point to be made relates to the rules specifying the inspection activities. To establish these rules under the framework of the Activities Regulation followed from the consideration that this would be in accordance with the structure of the relevant national legislation to provide for the elaboration of general rules by means of secondary lower-level instruments. Additionally, the chosen approach was expected to contribute to proper transposition, and in particular, to the smooth and swift incorporation of possible future amendments of EU rules concerning stage II petrol vapour recovery systems[47] due to the very few requirements following from amendments to ministerial orders as opposed to decrees or parliamentary acts (*Official Bulletin*, 2011, 552, p. 12).

44 The Activities Decree distinguished between A, B, and C facilities on the basis of different criteria.

45 The relevant requirements were transposed by means of Article 3.20 and 6.22a of the Activities Regulation.

46 Discretion is reflected here by the principle of institutional autonomy. See section 7.3.2.

47 Such as the expected introduction of an EU testing method for period checks of stage II systems.

14.6.2 Reactions to the measures

The transposition of the Stage II Petrol Vapour Recovery Directive in the Netherlands has not given any grounds for complaints so far. The transposition of the Directive proceeded in a timely and legally correct fashion.[48] Furthermore, it should be recalled from the analysis above that the Directive was largely in line with Dutch air pollution policy and law-making, especially regarding the objective to reduce VOC emissions. Interestingly, the transposing Ministry did not link the advantages of EU rules to the fact that the Directive prescribed the installation of stage II vapour recovery systems in certain service stations, as expressed earlier by the Dutch Government, but largely ascribed the benefits of the measure to the likely increase of automatic monitoring systems, expected to ensure that previous and persistent efforts of the Dutch Government to reduce VOC emissions had not been in vain (*Official Bulletin*, 2011, 552, p. 13).

The consultation of national stakeholders during the negotiation and transposition stages did not bring any fundamental changes for the Dutch strategies applied in both processes. The group of stakeholders included representatives of large and small fuel pump companies, technical experts from the Dutch Standardisation Institute (NEN) as well as representatives from the Directorate-General for Public Works and Water Management.[49] These stakeholders largely agreed with the content of the Directive and the proposed transposition measures. As noted in the interview, what may have strengthened domestic support is the fact that the Directive did not contain essential novelties requiring substantial changes of already established Dutch law regarding stage II petrol vapour recovery systems. The only aspect which was not met with great enthusiasm by the owners of small service stations was the requirement to install automatic monitoring systems – even if this was not mandatory for Member States. And yet, despite the fact that their installation would entail costs, automatic monitoring systems were found important, being supposed to help avoid higher inspection frequencies (interview). The Directive's inspection regime eventually did not trigger any severe resistance. Probably, this was because, the Directive implied no structural burdens but one-off costs, which were, additionally, expected to be outweighed by the long-term decrease in administrative burdens – not least as a result of a modernisation of inspection activities. It appeared that the Dutch industry associations were more concerned about the preservation of already established national practices which were considered to work well and should therefore

48 The analysis of the implementation process has not delivered any results giving rise to a contrary conclusion. Member States' implementation of the Directive should have been reviewed by the Commission by 31 December 2014. The implementation report based on this review was, however, not yet available by the time of writing this part of the dissertation.

49 The Directorate-General for Public Works and Water Management (Rijkswaterstaat, RWS) is the executive agency of the Dutch Ministry of Infrastructure and the Environment. It assists in ensuring the proper implementation of environmental rules.

be continued. In this context, the Ministry of Infrastructure and the Environment was requested to keep in place rules allowing for the written documentation of period checks and test results regarding stage II petrol vapour recovery systems.[50] This request being granted, the transposition measure was changed accordingly (*Official Bulletin*, 2011, 552, p. 13; interview).

To conclude, transposition of the Stage II Petrol Vapour Recovery Directive in the Netherlands was carried out without great difficulty. The Directive, however, was not transposed properly everywhere in the EU. 11 infringement cases out of 63 cases initiated by the Commission in the field of the environment in the year 2012 referred to the late transposition of the Stage II Vapour Recovery Directive (European Commission, 2013).

Having outlined how the transposition of the Directive was carried out in the Netherlands has provided a number of relevant insights. These are used in the following step to answer the questions which factors influenced the formal implementation process and whether or not discretion was a relevant one among them.

14.7 Analysis

When it comes to the role of discretion, two observations immediately spring to mind: First, the Stage II Petrol Vapour Recovery Directive hardly grants any discretion. Second, discretion was not found to have played any essential role in the negotiation strategy of the Dutch delegation. It was neither sought by Member States to ensure the availability of sufficient flexibility for the implementation of the Directive. Nor did discretion facilitate legislative decision-making in reconciling different interests. That being said, why should discretion have been relevant in the process of transposing the Directive into national law?

14.7.1 Discretion-in-national-law

'Discretion was not relevant', could be the first answer in replying to this question, bearing in mind that the *discretion-in-national-law expectation* does not carry any relevance. After all, compliance with the Directive was achieved in spite of the fact that only meagre discretionary room was available for transposition and not, as expected, due to a high margin of discretion. In this regard, it can be established that the Netherlands benefitted from the fact that legally binding requirements for the installations of stage II petrol vapour recovery systems at service stations had already been in place prior to the Commission proposal addressing this subject matter. What's more, it has emerged that the Directive has been modelled along the lines of already established legislation in the environmentally progressive Member

50 Cf. Article 3.22 of the Activities Regulation.

States, including the Netherlands. Finally, the Dutch Government supported the harmonisation of national laws in this area, since it was considered to ensure environmental and economic benefits. Considering all this, it is therefore safe to say that discretion was not of importance in the present context.

14.7.2 Discretion, compatibility and disagreement

Furthermore the transposition analysis does not provide any evidence that discretion entered into play by interacting with compatibility (expectation 7). While it is true that the EU Directive and Dutch law where highly compatible, is not very likely that discretion enforced this positive effect as it was virtually absent from the Directive. What's more, due the seemingly high fit between EU and national legal arrangements, discretion had no important role to play in facilitating the incorporation of EU requirements into the national legal framework. Empirical evidence underlines the good fit between EU and national rules. Assessing the legal compatibility between these two by using the four-fold classification of misfit[51] confirms this view, leading to the conclusion that even a small legal misfit did not arise. Finally, where small differences existed, these were overcome rather easily as exemplified by the 'new' minimum level of petrol vapour recovery which simply needed to be codified while it was already realised in practice.

Another expectation is that Member State disagreement with a directive's requirement increases the likelihood of deficient transposition, and that this effect becomes stronger the smaller the directive's scope of discretion is (expectation 6). Given the previous considerations, however, an interaction effect of little discretion and disagreement with EU rules can be ruled out. Even if the Directive grants very little discretion, the analysis of the negotiation process shows that agreement with its content on the part of the Dutch Government was high.

14.7.3 Discretion, administrative capacity and transposition actors

The last two expectations that need to be assessed, link discretion with the administrative capacity of the transposing authority and the number of actors involved in transposition (expectations 8 and 9). In considering the first one, it can be noted, that neither intra-ministerial problems nor lacking transposition knowledge emerged from the analysis as impeding factors in transposition. Based on these findings it is reasonable to conclude that administrative capacity contributed to the proper transposition of the Directive. However, the effect was not reduced by discretion, simply because the Directive did not provide for considerable flexibility. The *capacity interaction expectation* is therefore ruled out. Regarding the *actor interaction expectation*, it does not carry any relevance in the present transposition case; for one,

51 Steunenberg and Toshkov, 2009, p. 960.

because of the absence of a high margin of discretion; and second, due to the fact that aside from the Ministry of Infrastructure and the Environment no other relevant actors were involved in the transposition of the Directive. Last but not least, the results of the empirical analysis do not indicate any disagreements or domestic conflicts about the way the Directive should be transposed into national law.

14.8. Conclusion

Since none of the expectations about the potential effects of discretion on national transposition apply in the case at hand, it can be concluded with certainty that discretion was irrelevant for the transposition of the Stage II Petrol Vapour Recovery Directive. Apparently, discretion was not needed to ease transposition in the absence of any serious disagreement between transposition actors and legal incompatibilities between EU Directive and national law that could have jeopardised the smooth progress of transposition. Nevertheless, it should not be disregarded that there were a few legal disparities between the EU and national legal arrangements, pertaining to the Directive's scope, the petrol vapour capture efficiency of stage II systems as well as the periodic checks of these systems, which were however rather small. What's more, these small differences were ironed out during the transposition of EU rules into Dutch law. While this was not achieved by using discretionary provisions and wording – for which the Directive did not provide anyway – it was turned out to be possible through the discretionary choice of forms and methods considered to be the most suitable for integrating the Directive into a well-established legal framework. Discretion may not have been a decisive factor in achieving compliance with the Directive. But in any case, it can be ruled out that discretion impeded the transposition of the Directive in the Netherlands.

15 Discretion under comparison

15.1 Introduction

The aim of this chapter is to bring together the findings from the analysis of each of the six transposition cases previously discussed in order to look into discretion in a comparative fashion. Processes at the EU and national level with regard to two directives from different policy areas are compared as to the role of discretion in both of these processes. Thus, three directive pairs are analysed: the Blue Card Directive versus the Pyrotechnic Articles Directive, the Waste Framework Directive versus the Toy Safety Directive, and finally the Return Directive versus the Stage II Petrol Vapour Recovery Directive.

Taking a glance at the case study results, they seem to confirm the mixed record that has been ascribed to the effects and the role of discretion by implementation studies. Starting with the migration directives, it can be noted that discretion was relevant for both the EU negotiations and transposition processes, either by having facilitating or impeding effects. The transposition outcomes in the two cases, however, differed. Whereas the Blue Card Directive was properly transposed, transposition of the Return Directive was considerably delayed. With regard to the EU level, both cases confirm the facilitating effect of discretion in leading to compromises in negotiations. The analyses also bring to light that transposition was delayed with regard to the consumer protection directives, without however showing that discretion was involved in causing delays. As for the Toy Safety Directive, delay was very short whereas the transposition of the Pyrotechnic Articles Directives was only completed six months after the deadline. Discretion did not appear to play a decisive role in these transposition cases. Yet in the negotiations on the Pyrotechnic Articles Directive it was not entirely irrelevant, whereas in the case of EU decision-making on the Toy Safety Directive it was not a pertinent factor. Finally, a more consistent picture arises from the analyses of the environmental directives, the Waste Framework Directive and the Stage II Petrol Vapour Recovery Directive. The case studies show that discretion was not of relevance. The Waste Framework Directive does include some discretion but the case study results do not prove that it was of great importance for EU negotiations. The same applies in this regard to the Stage II Petrol Vapour Recovery Directive. The results are even more clear-cut with a view to the transposition processes. In neither case did discretion carry any relevance. On the other hand, it played a pertinent role in EU negotiations. This became evident in three of the cases analysed. It showed very clearly in the transposition of the two migration directives but also, to some extent, with respect to the Pyrotechnic Articles Directive.

In this latter case, however, discretion did not decisively affect transposition, presumably because of other factors at play.

As table 22 shows, it cannot be disputed that discretion can be of relevance to EU decision-making on directives and their transposition into national law. In order to develop a still better understanding about the circumstances under which discretion can be expected to unfold facilitating effects and to clarify the functions it plays in decision-making processes regarding directives, more order must be brought into the case study findings. To this end the subsequent discussion is organised according to a comparative framework.

Table 22: Role of discretion (✓ = relevant, – = irrelevant)

Directive	*EU negotiations*	*Dutch transposition*
Blue Card	✓	✓
Pyrotechnic Articles	✓	–
Waste Framework	–	–
Toy Safety	–	–
Return	✓	✓
Stage II Petrol Vapour Recovery	✓	✓

15.2 Comparative framework

EU and national decision-making processes regarding the directives analysed are examined to establish how and why they are similar or different with due regard to the relevance and role of discretion. The comparative analysis takes into account that different effects have been ascribed to various degrees of discretion, especially higher ones that are granted to Member States. Owing to this fact, each of the three directive pairs, displayed in table 23, includes a directive that grants more and one that grants less discretion – as established previously by means of the coding and calculation exercises.

Table 23: Directives for paired comparison

1	Blue Card Directive & Pyrotechnic Articles Directive	Migration & Consumer Protection
2	Waste Framework Directive & Toy Safety Directive	Environment & Consumer Protection
3	Return Directive & Stage II Petrol Vapour Recovery Directive	Migration & Environment

The comparison of the EU negotiation processes takes due account of the factors that have previously been identified as being relevant to the process, also because they constitute the circumstances that encourage or discourage the granting of discretion to Member States. The national level analyses are organised in line with the most similar systems design that was presented earlier. Thus, each paired comparison of the national transposition process takes into consideration that alongside discretion, other factors with explanatory power exist for the observed transposition outcomes. These factors, which might also affect transposition, I sought to keep constant in order to single out discretion as the explanatory factor of primary interest, for explicit evaluation as to its effects on transposition. Similar to the EU-level analyses, comparative light is shed on discretion, and other factors it is claimed here to be related with in affecting transposition.

The EU- and national-level analyses are structured along similar lines as the individual case studies, and thus, centre on the expectations previously developed. Each of the nine expectations is discussed individually and with a view to all three directive pairs (see table 24). Following such a structure is motivated by the wish to present comparative results in a clear way and to avoid redundancy. For the same reason, I slightly depart from the paired comparison in the discussion of the first expectation. Here, I deem it more suitable to discuss directives from the same area together and to contrast them, in a subsequent step, with the other directives and policy areas.

Table 24: Framework for comparison

Directive pair 1,pair 2, pair 3	
E1 Discretion & policy area E2 Discretion & political sensitivity E3 Discretion & compatibility E4 Discretion & European Parliament	E5 Discretion-in-national-law E6 Discretion & disagreement E7 Discretion & compatibility E8 Discretion & administrative capacity E9 Discretion & transposition actors
EU-LEVEL ANALYSIS	NATIONAL-LEVEL ANALYSIS

15.3 EU-level analysis

15.3.1 Discretion and policy area

The policy area matters

The starting point for the analysis of the relationship between discretion and policy area is the idea that in those areas that are characterised by less EU involvement, decision-making competences are distributed in favour of the Member States. Consequently, corresponding directives grant more discretion to Member States. Where the EU, on the contrary, has a firm

influence, less discretion is granted to Member States. Firm EU influence is reflected by qualified majority voting and co-decision procedure, as well as by advanced institutional development and other non-legal activities by which the EU impacts the national structures and practices of its Member States. Having a firm influence in a policy area means, in other words, that a policy area is Europeanised to quite some extent, and that legislative instruments, such as directives, aim at higher levels of harmonisation, and thus, grant less discretion to Member States. Considerable EU leverage in a policy area also suggests that Member States have meanwhile accepted the leading role of the EU in deciding and enacting legislation.

By mapping out the historical evolution of the three policy areas it was shown that the distribution of competences between the EU and its Member States has evolved differently. The Treaty on European Union (TEU), signed in Maastricht (1992) made both consumer protection and the environment first pillar issues, and therefore subject to greater legislative influence of EU institutions if compared to the two intergovernmental pillars, Common Foreign and Security Policy and Cooperation in Justice and Home Affairs (JHA), the latter including migration policy. Regarding migration-related issues, Member States were keen to retain national decision-making powers and only reluctantly surrendered them to the supranational level. What's more, while under the Treaty of Amsterdam (1999), competences in the area of migration were finally moved to the first supranational pillar, specific legal arrangements kept the EU's influence still limited.[1] Qualified majority voting and co-decision were only applied to the fields of irregular and legal migration later on: with repect to the former JHA sub-domain shortly before, and regarding the latter JHA sub-domain only with the entry into force of the Treaty of Lisbon (2009).

Migration and consumer protection

Looking first at the field of migration and the wider JHA area it partakes, what stands out is the long-lasting intergovernmental cooperation of Member States outside the EU framework. Despite expressing their commitment at European Council meetings to common objectives in the area of migration and asylum, progress towards harmonisation remained limited. Both negotiations on the Blue Card Directive and the Return Directive demonstrate the difficulty in going beyond mere lip service to defining and applying common solutions for legal and irregular migration issues. The outcomes of the negotiations reflect the strong position of the Member States in securing for themselves a wide scope of discretion. In the case of the Blue Card Directive, albeit being the first EU legislative act in the area of legal migration, the unanimity and consultation procedure put a quick end to an ambitious Commission proposal which implied more harmonisation than

1 Referring to the shift from voting by unanimity and consultation to qualified majority voting and co-decision as further specified in Article 67(1) of the Treaty of Amsterdam and Council Decision (2004/927/EC) activating the passerelle clause.

Member States were willing to accept. The same holds for the Return Directive, which was, unlike the Blue Card Directive, adopted by qualified majority voting in the Council and co-decision by Parliament and the Council. The Commission proposal included a number of explosive issues that precluded acceptance by the Member States where EU rules were considered to interfere with national competences. This was exemplified by discussions about the Directive's operating provisions on, for instance, return decision, voluntary departure, and entry ban. On the whole, both migration directives confer considerable discretion upon Member States.

Unlike in the area of migration but similar to the environment, the EU became a legislative actor in its own right in the area of consumer protection under the Maastricht Treaty. In addition, being closely linked to the EU's core policy, i.e. the internal market, EU consumer law was, in fact, provided with a raison d'être which manifested itself in the promotion of consumer interest and protection, initially by means of EU soft law (Council Resolutions, Commission papers). Once legislative competence was gained, EU consumer law was more readily subjected to legislative harmonisation. It is therefore not too surprising, that the Pyrotechnic Articles Directive affords Member States little discretion for the purpose of transposition. The latter point fully applies to the Toy Safety Directive. As regards the revision of the requirements for toys or the conditions of their placing on the market, these were subjected to the exclusive competence of the EU. What's more, common requirements in the realm of enforcement furthermore cut down discretionary room left to the Member States. There was virtually no discretion available for the transposition of the Directive.

…and the area of environment

What about the area of environment if compared to the fields of consumer protection and migration? Two directives from this area have been addressed in the case study analyses: the Waste Framework Directive referring to waste (treatment) and the Stage II Petrol Vapour Recovery Directive, addressing the impact of air pollution on human health and the environment. The Waste Framework Directive includes some discretionary provisions but was found by transposition actors to be a tightly defined piece of legislation, and therefore not considered as providing considerable discretion. The Toy Safety Directive presents a clearer case: coding and calculation exercises led to the conclusion that the Directive grants a small scope of discretion and this finding was shared by the interviewees. Similar to the area of consumer protection and unlike migration, sketching the history of the development of EU environmental integration has shown that the EU has gained a strong foothold in this field. This is evidenced by a firmly developed legal and institutional framework. With consumer protection, environmental integration shares at least three aspects: the early linkage with the EU's internal market project, which provided the impetus for further EU environmental integration – economic expansion brought up environmental concerns and stimulated law-making. Furthermore, as in the former case,

the European Commission was actively shaping integration long before EU legislative competence was established, by means of, amongst others, environmental action programmes, and market-based policy instruments. Looking at the level of law-making, both areas of consumer protection and especially the environment, show a high legislative output, mostly in the form of directives but regulations are also frequently used. Being a relatively young EU policy area, the scope of legislation is much smaller in the area of migration but also here directives are the primary instrument of regulation.

To sum up, the analyses of the six directives confirm a pattern which reflects a particular relationship between the conferral of discretionary decision-making competence upon Member States and the EU policy area in the context of negotiations. In policy areas where the EU has less influence in terms of its institutional and legal development, more discretion is made available to Member States. This was confirmed by the two transposition cases involving migration directives. The inverse relationship, meaning more EU influence resulting into less discretion being granted, was shown by the analyses of the consumer protection and environmental directives.

15.3.2 Discretion and political sensitivity

BLUE CARD VERSUS PYROTECHNIC ARTICLES

Political sensitivity matters

Variation of the directive's discretion margin is associated with the political sensitivity of the directive's subject matter. The more politically sensitive the directive's policy issue is, the more discretion is incorporated into the directive to secure agreement among Member States.

In case of the Blue Card Directive the political sensitivity expectation was clearly found to hold true. The Directive relates to the area of justice and home affairs, and in particular legal migration. By means of an EU admission scheme, the Directive lays down the conditions and rights of residence in the first and second Member State which non-EU nationals seek to enter. Making part of the JHA area and being the very first EU measure to regulate labour migration, the directive addresses a sensitive field for harmonisation of national laws. It affects a fundamental part of national decision-making competence which had already been used in various Member States, including the Netherlands, to translate national preferences into distinct national admission procedures for non-EU migrants. In relation to these national admission procedures the proposed EU admission scheme was eventually rendered into a mere supplement. This was a result of Member States' objections leading to controversy which was overcome only by the incorporation of various discretionary provisions (minimum harmonisation and derogation arrangements). Already existing legal diversity precluded individual attempts to export own legal arrangements to the EU level. EU decision-making on the Blue Card Directive provides an illustrative example of how EU law challenges national legal orders and practices.

The negotiations on the Pyrotechnic Articles Directive show similarities in this latter respect, albeit to a much lesser extent. Political sensitivities were caused by concerns about the preservation of national cultural practice and traditions regarding the marketing and use of pyrotechnic articles. This was exemplified by the incorporation of the so-called Malta clause. Still more important was, with regard to discretion, the granting of permission to restrict the free circulation of pyrotechnic under specific conditions.[2] This way Member States could retain their national legal arrangements for the sale of fireworks to consumers which for safety reasons was considered to be important. Responding to the political sensitivities of the Member States that had become apparent at the preparation stage, the Commission had incorporated discretion into the legislative proposal for the Pyrotechnic Articles Directive right from the start. This is remarkable given the Directive's subject matter and objective: ensuring the free movement of pyrotechnic articles and to this end, the creation of a legislative framework at the Community level based on minimum safety requirements for these articles and the harmonisation of information provisions regarding the safe handling and use of pyrotechnic articles. Seen in this light, political sensitivity and the granting of discretion may not be so readily associated with the negotiations on a directive, which, like the Pyrotechnic Articles Directive, addresses a sector in an advanced state of harmonisation (product safety / internal market). It may also come as a surprise, because EU internal-market related directives usually seek to establish a level-playing field for domestic industries, as well as a predictable legal framework from which both business and consumers shall benefit. Therefore these directives are usually hardly discretionary since this might encourage derogation by Member States from common rules and thus undermine the principle aim EU law actually pursues.[3]

But even though discretion can be considered as resulting from the Commission's efforts to tackle political sensitivities, strictly speaking, the political sensitivity expectation as it stands here does not fully apply to the negotiations on the Pyrotechnic Articles Directive. First of all, the expectation implies a higher discretion margin but the Directive's scope of discretion is small which may be due to the fact that political sensitivity, in contrast to the negotiations on the Blue Card Directive, remained limited. Second, whereas the idea is that additional discretion is incorporated into a Directive proposal during the negotiations, in the present case, discretion made already part of the Commission's initial proposal. For these reasons, the expectation only partially applies. Two decisive conclusions can nevertheless be drawn. First, the case of the Pyrotechnic Articles Directive suggests that also in policy areas where legislative harmonisation has progressed very far, political sensitivities and controversy can still arise from

2 See Article 6(2).

3 Derogation from measures concerning the free movement of goods in the EU is kept limited and only possible under certain conditions. See Article 36 TFEU (ex Article 30 TEC).

differences of national legal systems and practices and possibly impede negotiations. Second, in such cases discretion can pave the way out of stalled negotiations.

What can be concluded from this comparison? The political sensitivity expectation fully applies in the case of the Blue Card Directive, whereas it does not entirely hold true for the negotiations on the Pyrotechnic Articles Directive. In contrast to this latter case, political sensitivities carried more weight in the negotiations on the Blue Card Directive, leading to the granting of considerable margins of discretion to Member States. And yet, political sensitivities also mattered, albeit differently, in the negotiations on the consumer protection directive: they were anticipated by the Commission already during the preparation of the legislative proposal and tackled by incorporating discretion into the legislative text. They therefore did not feature prominently in the subsequent decision-making process. Besides, due to the advanced harmonisation of EU product safety legislation – of which the proposed Directive represents a case in point – it was much more unlikely that political sensitivity would spark off many discussions about the proposed EU requirements. All the same, it is a fact that discretion facilitated compromise and contributed to the successful conclusion of both negotiation processes. In this context, it should be underlined that, as explicitly stated by the interviewees, without discretion being granted to Member States, neither of the two Directives would have been adopted.

WASTE FRAMEWORK VERSUS TOY SAFETY

Political sensitivity does not matter

How relevant were political sensitivity and discretion in the negotiations on the environmental and consumer protection directives when placed next to each other? A comparative look at the Waste Framework Directive and Toy Safety Directive leads to different conclusions than in the cases above.

The Waste Framework Directive establishes measures for the protection of the environment and human health. It seeks to reduce adverse effects from waste management and to improve the efficiency of resource reuse. Interestingly, originating from the realm of environmental protection law, which is strongly Europeanised, the Directive includes a number of discretionary provisions. At the same time, the interviewees described the Directive as a rather tightly-defined piece of legislation, considering it to imply only limited discretion. This observation actually fits into the context of already advanced harmonisation in the area. What's more, also in the present case, national waste management systems had already been aligned to some extent with EU law. Hence, while representing a newly-designed instrument, the Waste Framework Directive nevertheless builds upon an already existing EU legislative framework. This may explain why politically delicate issues apparently did not play a decisive role in triggering the granting of additional discretion to Member States. As shown in the analysis, however, the scope of further harmonisation was discussed

prior to the formal decision-making process, reflecting the different views taken by the Member States. Disagreement regarding key terms ('waste', 'by-products', 'recovery' versus 'disposal') additionally revealed different national approaches to the management of waste. That being said, it cannot be excluded for sure that the scope of harmonisation did not trigger debate and political sensitivity, leading to more discretion being built into the legislative text, especially since the Directive included more discretionary provisions than the initial proposal tabled by the Commission. The fact remains, however, that the empirical analysis did not provide sufficiently conclusive evidence for the existence of the expected relationship between political sensitivity and discretion.

The Toy Safety Directive provides a clearer picture in this regard. Laying down rules on the safety of toys and their free movement within the EU, it shows the typical linkage between consumer protection and internal market objectives. More importantly, it is almost completely devoid of any discretionary provisions and has been characterised accordingly in the interviews. This has to do with the rather technical nature of the Directive and the fact that, being a new approach directive, it entails the total harmonisation of technical standards which, for economic and safety reasons, turned out to be rather in line with Member States' preferences. Moreover, the Toy Safety Directive did not imply radical innovations; similar to the Waste Framework Directive, it, represented on the one hand, a new legislative act in formal terms, but, on the other hand, it modified and further elaborated rules on the safety of toys which had been established at the EU level earlier on. In the light of the foregoing and due to the absence of any contrary evidence, it is reasonable to say that the claim discussed here does not have any relevance for the case of the Toy Safety Directive.

In a nutshell, taking a comparative look at the Waste Framework Directive and Toy Safety Directive, the conclusion is drawn that in neither case did the alleged relationship between political sensitivity and discretion have a bearing on the negotiation processes under consideration here.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

Political sensitivity matters – political sensitivity does not matter

What about political sensitivity and discretion as regards the negotiations on the Return Directive and Stage II Petrol Vapour Recovery Directive[4]? Did these two directive features come into play? The relevant findings in this respect are that the negotiations on the migration directive were protracted whereas in the case of the environmental directive compromise was reached relatively swiftly. In addition, the Return Directive grants considerable discretion if compared to the Stage II PVR Directive which virtually grants no

4 Hereafter, it is referred to, in short, as 'Stage II PVR Directive'.

discretion. The Directives' subject matters obviously had quite opposing effects on the negotiations.

The Return Directive seeks to establish common standards and procedures for EU countries for returning illegally staying third-country nationals. The final agreement on the Commission proposal was only achieved with great effort after lengthy and cumbersome negotiations. The Stage II Petrol Vapour Recovery Directive shall ensure that harmful petrol vapour displaced from the fuel tank of a motor vehicle during refuelling at a service station is recovered by using stage II systems. Negotiations on this Directive proceeded quickly and smoothly.

If discretion is made available to Member States, this can affect the negotiations on an EU directive in a positive way. The underlying consideration is, then, that the prospect of having more leeway for transposing the Directive in a way Member States see fit, especially as concerns politically sensitive, controversial issues, is conducive to reaching agreement in the Council. Deadlock in negotiations can thus be avoided. The Return Directive is a case in point. The political sensitivity of the Directive and the controversy it triggered during the negotiations are explained by the fact that the Directive's requirements interfered deeply with national legal systems. This is evidenced by the EU's effort to establish common rules in the area of immigration control and the return of irregular migrants, and therefore in a domain previously making part of national decision-making authority. As a consequence, Member States were reluctant in giving parts of their national decision-making powers to the EU institutions, and thus keen to keep legislative harmonisation within limits. This is exemplified by the controversial debate on the horizontal application of the Directive and its proposed scope, the latter issue being eventually settled through the granting of discretion: by offering Member States the possibility to exclude certain categories of irregular migrants from the Directive's scope, including those subject to criminal law cases, their approval of this part of the Directive was approved. At the same time, and important from the Member State perspective, far-reaching harmonisation of national criminal laws was avoided. Other contentious issues, pertaining to key elements of the Directive, such as the return decision or procedural safeguards, were solved in a similar way.

Quite the opposite holds true for the negotiations on the Stage II PVR Directive since the Directive did not entail any issues, causing political sensibilities. This is not to say that the Member States simply rubber-stamped the Directive's text. Some adjustments were made during the negotiations following Member States' objections, for instance, regarding the conditions for equipping service stations with stage II petrol vapour recovery systems. Other crucial aspects of the proposal were largely left unaltered (e.g. minimum level of petrol vapour recovery, periodic checks). What's more important, none of these points sparked off heated debates between the Member States. First, this is due to the fact that the Directive provisions largely include technical requirements and hence no issues on which, politically speaking, reaching agreement was difficult to achieve. Second, for

the Netherlands and several other Member States the installation of stage II systems in service stations did not entail any radical changes as similar systems were already in use. Additionally, the introduction of these systems did not come as a surprise but had been anticipated by Member States as a follow-up measure to the previous measure regarding petrol vapour recovery during the storage of petrol at terminals and its subsequent distribution to service stations.[5]

All in all, this comparison makes clear that whereas political sensitivities leading to the granting of discretion highly mattered in the negotiations on the Return Directive, this does not hold for EU decision-making on the Stage II PVR Directive. Discretion did not play any relevant role in the negotiations on this latter Directive. This is also evidenced by the fact that both the proposal and final version of the Stage II PVR Directive have a very small discretion margin. The case of the Return Directive, by contrast, is illustrative of discretion's positive effect on the EU negotiations: as far as this decision-making process is concerned, discretion helped to overcome disagreement and facilitated compromise regarding key elements of the Directive.

15.3.3 Discretion and compatibility

BLUE CARD VERSUS PYROTECHNIC ARTICLES

Compatibility matters – compatibility does not matter

Another expectation considers the aspect of compatibility between a European Directive and national law. Being the country selected for the empirical analysis, the focus is on the legal arrangements in the Netherlands. It is expected that the less compatible the EU directive and already existing national legislation are, the more likely that discretion is incorporated into the directive.

The empirical findings show that compatibility between EU and national arrangements played a role in both negotiation processes – albeit in different ways. Starting with the Blue Card Directive, the corresponding Commission proposal included a number of disparities from the viewpoint of Member States' laws. Above all, this concerns the proposed EU admission scheme, which was supposed to become exclusively applicable in the Member States, implying the replacement of already existing or planned national admission schemes. Next to it, there were a number of other issues of obvious legal incongruence between the Directive and national laws, pertaining to the envisaged validity of the Blue Card, the key terms used in the legislative text, the admission criteria, including those concerning unregulated and other specific professions. Incompatibilities were in most of the cases alleviated by the incorporation of discretion. Especially impor-

5 Stage I Petrol Vapour Recovery Directive (94/63/EC). See footnote 15, chapter 14.

tant in this regard were the derogation and harmonisation clauses, allowing Member States to preserve their national admission schemes as well as – by means of references to national legal orders and practices added to the proposed text of the Directive – the explicit acknowledgements of national legal approaches.[6] Empirical evidence from the analysis of the negotiations on the Blue Card Directive, thus, substantiates the claim that greater incompatibility between EU and national law results into the incorporation of more discretion into the text of an EU directive.

The same cannot be clearly concluded regarding EU decision-making on the Pyrotechnic Articles Directive. Incorporating wide discretionary provisions was precluded by the fact that, being a new approach directive, addressing product safety and internal market aspects, a higher level of harmonisation was already implied by the Commission proposal. This, however, does not change the fact, that the Directive included rules that were different from those in the Member States. This becomes evident in the debates about the restrictions on the availability of pyrotechnic articles to consumers by means of a ban on certain category 4 fireworks and the proposed definitions and categorisation of pyrotechnic articles more generally. These EU requirements revealed legal differences between the EU Directive and Member States' laws. Like in the Netherlands, where pyrotechnic articles used to be defined according to the purpose of their use instead, as determined by the Directive, taking product features as defining characteristic (hazard and noise levels). In this way, the Directive implied a wider scope of pyrotechnic articles, making also those products available to consumers, which under the Dutch Fireworks Decree were considered as too dangerous and unsafe for private use. In this case, granting discretion, by permitting the free movement of pyrotechnic articles to be limited, reduced the legal incompatibility between the relevant EU and national rules. And yet, lacking compatibility still persisted. The proposed ex-ante approval system[7] implied a different policy approach than applied in the Netherlands with its system of ex-post controls of pyrotechnic products (market surveillance). Having to establish pre-market approval systems from scratch, the Directive entailed considerable policy misfit from the Dutch viewpoint. Being the only Member State lacking ex-ante control systems, the Netherlands was, however, not in the position to prevent their introduction.

Summing up the comparative results, the expected link between compatibility and discretion holds true for EU decision-making on the Blue Card Directive. It does not apply with regard to the negotiations on the Pyrotechnic Articles Directive. Regarding the Blue Card Directive, the unanimity rule in the Council reflecting Member States' strong position in negotiations, as well as their common aspiration for more flexible EU require-

6 For instance, Article 5 including references such as 'as provided for in national law', 'as determined by national law'.

7 This refers to the CE Marking Conformity Assessment Procedures.

ments, were conducive to the incorporation of discretion in overcoming legal incompatibility.

WASTE FRAMEWORK VERSUS TOY SAFETY

Compatibility does not matter

Was a lacking match between EU and national rules, a problematic issue in the negotiations on the environmental and consumer protection directives?

In case of the Waste Framework Directive, empirical evidence from the analysis of the EU decision-making process allows for drawing the conclusion that mismatch between EU and Dutch rules can be ruled out. In spite of the fact that negotiations were not smooth, not least because of a disagreement between the Council and European Parliament, compatibility issues were not so profound that they triggered fierce debates among the Member States. In addition, compatibility between the Directive and Dutch law was high. The Netherlands already had an advanced system in place for the efficient and environmentally sound management of waste, which was not challenged, but rather in harmony with the core elements of the Directive, such as the waste management hierarchy and application of life-cycle framework in waste treatment. Furthermore, little differences between EU and national rules which resulted from the proposed scope and aspects of waste management plans and programmes were ironed out by means of getting Dutch preferences incorporated into the Directive.

Similar conclusions as to the compatibility between the Directive and Dutch law can be drawn from the case study findings pertaining to the Toy Safety Directive. Approval on the part of the Dutch Government was high as mentioned by the interviewees. Furthermore, where EU requirements were not fully in line with Dutch preferences, for instance, in respect of fragrances in toys, this did not concern legal compatibility but was rather related to technical aspects. The Dutch delegation only sought to change some minor issues to bring EU rules still closer to national legislation, and, in particular, own safety standards, but furthermore largely agreed with the suggestions for rules as forwarded by the Commission in its legislative proposal.

To conclude, the comparison of the negotiation processes on the Waste Framework Directive and Toy Safety Directive does not deliver any evidence proving justification of the *compatibility expectation*. Or put in another way: the expectation that more incompatibility has as a consequence the granting of more discretion to Member States does not hold true for the two cases considered.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

Compatibility matters – compatibility does not matter

Assessing the final directive pair regarding the link between legal compatibility and discretion yields the following results. To begin with, insights into EU decision-making on the Return Directive show that lacking compat-

ibility played a role with a view to the granting of discretion. There were a number of incompatibilities between Member States' laws and major elements of the Directive such as its provisions on the return decision, entry ban and legal remedies. In the debates on the return decision, Member States established a direct link between compatibility and discretion, criticising the lacking flexibility of the Directive's provisions for the fact that issuing a return decision for any illegally staying immigrant[8] was not compatible with their legal frameworks. From the viewpoint of the Netherlands, the return decision and entry ban requirements were new elements in the return procedure and consequently, had to be introduced into Dutch law on aliens. What's more, certain EU requirements were challenging national law which had only recently been reformed. The two-step return procedure, for instance, which did not match with the more straightforward approach of the Dutch 'decision with multiple consequences', and the proposed rules on legal aid were considered by the Dutch Government as re-introducing burdens for the judiciary that had effectively been reduced by previous changes to national law. Legal diversity among Member States' laws made it, however, difficult for the Dutch delegation to export national arrangements to the EU level for aligning the proposed Directive more with national rules, for instance, as concerns the judicial review of decisions related to return. Only through building flexibility into the Directive text, hence by granting discretion to Member States, some incompatibility between EU and national rules was eventually removed and Dutch preferences partly accommodated (e.g. optional two-step approach, relaxing safeguard provisions).[9]

In the light of the foregoing, there is thus a clear link between lacking compatibility and the granting of additional discretion for national implementation. In this respect, the Stage II PVR Directive strongly contrasts with the Return Directive, since it did not imply any severe mismatch from the perspective of relevant Dutch law. After all, with regard to the Netherlands, but also some other Member States, the Commission proposal partly reflected the domestic legal situation already present for the recovery of petrol vapour. Additionally, case study findings suggest that the Commission took national legislation, including Dutch law, as a template for its proposal on the Stage II PVR Directive which furthermore explains legal compatibility between EU and national rules. Finally a good match between EU and Dutch rules can be concluded from the absence of efforts on the part of the Dutch delegation to frequently forward amendments or support suggestions of other delegations in aiming to change the content of the proposed Directive.

In a nutshell, clear results can be obtained from comparing the negotiation processes on the two Directives. The compatibility expectation can be empirically substantiated as regards the negotiations on the Return Directive, but not with regard to decision-making on the Stage II PVR Directive.

8 As proposed by Article 6(1).
9 See Articles 8(3) and 12(3).

15.3.4 Discretion and European Parliament

BLUE CARD VERSUS PYROTECHNIC ARTICLES

No discretion-reducing influence of the European Parliament

Next to the Commission forwarding the proposals for directives and Member States negotiating them in the Council of Ministers, the descriptive analyses of the negotiation processes paid attention to the European Parliament, being as co-legislator in most of the cases analysed, another key player in EU decision-making. Especially if the European Parliament acts in this latter role, it is expected to impact the scope of discretion which is finally granted to Member States for the national implementation of the directive negotiated. Assuming that the European Parliament, on the whole, takes a rather integrationist approach in EU decision-making, and hence, promotes legislative harmonisation, it is posited that the greater its role in the legislative process, the less discretion is granted to Member States.

To begin with, the European Parliament's role in the negotiations on the Blue Card Directive differed from its role in the negotiations on the Pyrotechnic Articles Directive. In the former case, it had only marginal influence due to the applicable decision-making rules: consultation procedure and unanimity voting. The consumer protection directive, by contrast, was co-decided by both the Council of Ministers and the European Parliament, giving the latter EU institution far more leverage in decision-making as compared to the case of the migration directive.

Being merely in the position to give a non-binding opinion, chances for the European Parliament to have a decisive impact on the Blue Card Directive's scope of discretion were certainly small. Analysing its position on the proposed Directive nevertheless could have brought to light a negative attitude of the European Parliament towards the conferral of broad discretion upon Member States. Interestingly, however, the case study results do not support this expectation. On the one hand, endorsing a common approach to labour migration, the European Parliament did not approve of any substantial deviation from EU rules which would have implied legal diversity instead of uniformity. And yet, on the other hand, for reasons of subsidiarity, it approved of some discretion being granted to enable Member States to retain control over the access of migrants to their national labour markets.

Acting as co-legislator, it may be assumed that the European Parliament reduced the scope of discretion available to Member States when a common agreement on the Pyrotechnic Articles Directive had to be found. As likely as this may seem within a context, where the European Parliament had a much greater say in EU decision-making than in case of the Blue Card Directive, the case study analysis does not provide evidence justifying this claim. While legislative harmonisation was supported to achieve the Directive's internal market objective, at the same time, also the granting of discre-

tion was approved by the European Parliament where it was considered to advance the Directive's product safety objectives.[10]

In the light of these comparative findings, the overall conclusion is that regardless of whether or not its position as decision-maker was weaker or stronger, it was not the strategy of the European Parliament to limit Member States' discretion.

WASTE FRAMEWORK VERSUS TOY SAFETY

No discretion-reducing influence of the European Parliament

Turning to the Waste Framework Directive and Toy Safety Directive, did the European Parliament in the corresponding negotiation processes seek to reduce the scope of discretion given to Member States for the implementation of a revised EU legal framework on waste as well as, with regard to the latter Directive, rules on the safety and free movement of toys?

The empirical findings suggest that the European Parliament, in its capacity of co-legislator, was an assertive actor in both negotiation processes. With regard to the Waste Framework Directive, the European Parliament did not readily give in to the Council. A final compromise between the co-legislators was only struck after Member States had reached a common agreement. As for its position on the conferral of discretionary powers upon Member States, no conclusive evidence was found to support the expectation that it sought to minimise discretion. The importance of a harmonised approach in the implementation and application of EU waste management rules was emphasised. However, the amendments of the European Parliament also included a number of discretionary provisions. Probably due to the fact that previous implementation of the Directive had been beset with problems, the European Parliament sought to enhance Member State compliance, by supporting the granting of some discretion for implementation, thereby acknowledging the differences of Member States' waste management systems.

With regard to the Toy Safety Directive, empirical results seem to indicate that the European Parliament had some leverage on the Directive's content for many of its amendments found their way into the final text. Similar to the case of the Waste Framework Directive, the European Parliament, however, did not entirely reject the granting of discretion to Member States but acknowledged the necessity of it for giving effect to the subsidiarity principle.[11] On the whole, however, discretion did hardly play any role during the negotiations. The Directive, implying a new approach to harmonisa-

10 This concerns Article 6(2) limitation on free movement clause, and Article 7(2) setting of minimum ages regarding private and vocational use.

11 Cf. Article 11(3) of the final Directive regarding the determination of the language of warnings on toys.

tion and standardisation, included a wide scope of harmonisation.[12] Hence, from the outset, it merely provided Member States with a narrow margin of discretion for implementation.

All things considered from a comparative perspective, the empirical analysis could not establish the credibility of the expectation under consideration. There are no conclusive findings providing proof of a link between more impact of the European Parliament on legislative decision-making and the reduction of discretion granted to Member States.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

No discretion-reducing influence of the European Parliament

Finally, what about the Return Directive and Stage II Petrol Vapour Recovery Directive and the role of the European Parliament in determining the scope of discretion granted to Member States in EU decision-making on these two legislative acts?

Again, both Directives were adopted jointly by the European Parliament and Council under co-decision, the Return Directive being the first major piece of EU migration law subjected to these decision-rules. Harmonising national return systems to ensure a fair and human treatment of thrird-country nationals was supported by the European Parliament, and may suggest that the latter sought to reduce discretion for implementation.

The case study analysis, however, did not deliver any conclusive evidence to corroborate this expectation. It cannot be denied that the European Parliament supported the harmonisation of national laws as exemplified with regard to the proposed detention requirements where a common approach should guarantee fair and human treatment of returnees and preclude forced returns. Overall, however, it did eventually not live up to its own aspirations. Due to its 'beginner status' in co-legislating migration matters with the Council, and therefore scarce experience with this activity, its attempts to influence the content of the Directive met with mixed success. In addition, from the empirical findings no consistency can be deduced regarding the European Parliament's approach to reduce discretion. What's more, the same reasons that motivated the European Parliament to advocate a fair and human rights-based approach to the return of irregular migrants also triggered its support for discretion. This was reflected by its request to make the obligation of issuing a return decision optional for Member States.

The analysis can be kept short as regards the Stage II PVR Directive. Also here, no link could be established between the influence of the European Parliament on legislative decision-making and the scope of discretion being conferred upon Member States. As noted earlier, discretion was in principle irrelevant. The Directive mostly included technical provisions and left hardly any discretion for Member States from the outset. Moreover, the

12 In particular, owing to its total harmonisation requirements (essential safety standards), and minimum enforcement requirements.

European Parliament's position on the Directive proposal does not provide any evidence to suggest that it impacted in any way the scope of discretion.

Viewed from a comparative angle, the case study findings provide no justification of the claim that the European Parliament was determined to reduce the scope of discretion being granted to Member States. Hence, in none of the three paired comparisons can the European-Parliament-matters expectation be substantiated.

The results of the comparative analysis of the negotiation processes are summarised in table 25. Based on these results a number of conclusions can be drawn. To begin with, the assumed link between discretion and policy area holds true for all three directive pairs. Hence, as expected, where legal and institutional influence of the EU still is in a rather early stage, more discretion is granted to Member States as exemplified by the two migration directives. This link also applies, albeit in the inverse way, to the consumer protection and environmental directives – meaning that in case of more EU influence, less discretion is granted. Furthermore, and in line with the expectations, political sensitivity and lacking compatibility between EU and national rules are reasons for the incorporation of more discretion into directives where EU harmonisation is not yet as advanced. Equally important to note, and as previously assumed, building more discretion into the directive text appears to be the more likely solution to preference divergence among Member States in negotiation contexts characterised by a high diversity of national legal traditions. The negotiations on the Blue Card Directive and Return Directive make that clear. The two factors are rather irrelevant in respect of already progressively harmonised policy areas and issues of which the Toy Safety Directive, Waste Framework Directive, and finally, the Stage II Petrol Vapour Recovery Directives are cases in point.

Table 25: Comparative results EU negotiations
(+ holds true, – does not hold true, +/– holds partially true)

Directive pairs	E1 Discretion & policy area	E2 Discretion & political sensitivity	E3 Discretion & compatibility	E4 Discretion & European Parliament
Blue Card	+	+	+	–
Pyrotechnic Articles	+	+/–	–	–
Waste Framework	+	–	–	–
Toy Safety	+	–	–	–
Return	+	+	+	–
Stage II Petrol Vapour Recovery	+	–	–	–

The Pyrotechnic Article Directive also largely fits into this picture. However, political sensitivity was a reason for why discretion was incorporated prior to the start of negotiations in the Council of Ministers. Since the case study findings make it evident that discretion decisively contributed to the final decision-making outcome, the link between discretion and political sensitivity was found to partially hold true. It is remarkable that additional discretion, albeit by little degrees, was built into the text of the Pyrotechnic Articles Directive which, after all, entails a new approach to the standardisation and certification of products and therefore rather high levels of harmonisation. The reasons for this can be linked to the two objectives pursued by the Directive: harmonising national rules aiming to achieve an internal market for pyrotechnic articles and high public safety standards. But exactly for reasons of consumer safety as well as cultural and legal customs, negative effects from the free movement of these articles should be cushioned by giving permission to limit free circulation, resulting into the granting of discretion. The figure finally shows that in none of the three paired comparisons evidence was found in support of the claim that the European Parliament seeks to minimise the scope of discretion being made available for Member State implementation. As suggested by the comparative results, to believe that it does may be a foregone conclusion. Despite its support of harmonising national laws and the proper implementation of EU law as shown, for instance, in the negotiations on the Blue Card Directive and Pyrotechnic Articles Directive, both cases reveal that the European Parliament was not totally against the granting of discretion if this encouraged subsidiarity and implementation. This being said, future research might benefit from a more detailed analysis. Such an analysis should take into account that the European Parliament is not necessarily acting as a unitary actor with homogenous preferences on particular issues (Bowler and Farrell, 1995; Hix, 2005). After all, political groups in the European Parliament may share but also differ in their views concerning proposed EU rules. This may be brought to light through more profound case study research focusing on the work of the permanent committees involved in examining and amending directive proposals as well as by a more in-depth study of the plenary sessions where the European Parliament as a whole votes on these proposals. Furthermore, it may be interesting to analyse whether discretion can have a similar function within the European Parliament as it is expected to have, under certain conditions, in the Council of Ministers, namely to facilitate compromise between diverging positions on directive proposals.[13]

What about the role of discretion in the national transposition of the Directives analysed, if viewed from a comparative perspective? How did discretion play out, how was it used? The comparative analysis presented in the subsequent sections seeks to answer these questions.

13 This idea came up when analysing the role of discretion in the negotiations on the Waste Framework Directive (see section 11.4.3).

15.4 National-level analysis

15.4.1 Background factors

Before moving on to the paired comparison analysis of the Dutch transposition processes and in order to shed light on the role of discretion, the research context of each of the three comparative cases needs to be addressed briefly. Recalling from the discussion of the case study design, the question of how discretion affects transposition can only be tackled properly by narrowing the focus on the relationship between discretion and transposition outcome (presumed cause and outcome). This was done with the aim of comparing the results of transposition in two cases where different discretion margins of directives (small versus large) are considered to affect the process. Consequently, other so-called background factors, conceived as alternative explanations for outcomes of transposition, have to be sufficiently similar between the cases compared, to minimise as much as possible their share in shaping the process outcomes (ceteris paribus clause). In reality, however, conditions are usually less than ideal. Hence, differences as regards the background conditions have to be taken into account to assess their influence on transposition.

BLUE CARD VERSUS PYROTECHNIC ARTICLES

Table 26: Background factors comparison 2009/50/EC vs. 2007/23/EC

Directive	Policy Area	Margin of discretion	Number of transposition actors	Number of transposition measures	Sort of transposition measure	Time for transposition
Blue Card Directive 2009/50/EC	Migration	High	1	2	Orders in Council	24
Pyrotechnic Articles 2007/23/EC	Consumer Protection	Small	1	1	Order in Council	30
				2	Ministerial Decisions	

To start with, table 26 shows that the conditions under which the Blue Card Directive and Pyrotechnic Articles Directive had to be transposed differ in respect of the time allocated for transposition. For the transposition of the migration directive Member States had 24 months, and thus the amount of time which is on average available, whereas with 30 months more time was granted for transposing the consumer protection directive. Interestingly, while more transposition time has been associated with timely transposition (Kaeding, 2007b), delayed transposition of the Pyrotechnic Articles Directive in the Netherlands contradicts this claim. Therefore the question may be asked if the granting of more time for transposition contributed to this dealy. The case study findings do not suggest this. As for the transposi-

tion of the Blue Card Directive, conditions of timing and correctness were met within the 24 months available. No particular implications of this time frame for the process of transposition were in evidence.

Furthermore, the two transposition cases slightly differ with respect to the sort and number of transposition measures. Both Directives were transposed by means of delegated legislation. In case of the Blue Card Directive this pertained to two orders in council, whereas incorporating the Pyrotechnic Articles Directive into Dutch law required three measures, one order in council and two ministerial decisions. In the latter case, the empirical findings do not indicate that the procedures for creating transposition measures caused the speed of transposition to slow down. As became evident from the descriptive analysis of the transposition process, delay was officially explained by the Minister by pointing to the Directive's technical complexity and lack of clarity, which apparently were not conducive to an easy and smooth incorporation of the Pyrotechnic Articles Directive into Dutch law.

WASTE FRAMEWORK VERSUS TOY SAFETY

Table 27: Background factors comparison 2008/98/EC vs. 2009/48/EC

Directive	Policy Area	Margin of discretion	Number of transposition actors	Number of transposition measures	Sort of transposition measure	Time for transposition
Waste Framework Directive 2008/98/EC	Environment	High	2	5	Parliamentary Act, Orders in Council, Ministerial decisions	24
Toy Safety Directive 2009/48/EC	Consumer Protection	Small	1	1	Order in Council	24

The ceteris paribus clause is also not entirely met with regard to the directive pair composed of the Waste Framework Directive and Toy Safety Directive (see table 27). Both Directives were transposed by one Ministry within the same amount of time (24 months). Contrary to the transposition of the consumer protection directive, transposing the environmental directive, however, required a statutory change and therefore a more active involvement of the Dutch Parliament. In addition, differences between these transposition cases pertain to the number and sort of transposition measures: The Toy Safety Directive was transposed by means of an order in council. Transposing the Waste Framework Directive, by contrast, required five transposition measures, including primary and delegated legislation (one parliamentary act, two orders in Council, and two ministerial decisions). Delay in case of the consumer protection directive was negligible. As for the environmental directive, the high number of measures was not found to have caused the short-term delay in transposing it.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

Finally, the ceteris paribus clause does not fully apply with respect to the third case as becomes obvious from table 28: the comparison between the Return Directive and the Stage II PVR Directive.

Table 28: Background factors comparison 2008/115/EC vs. 2009/126/EC

Directive	Policy Area	Margin of discretion	Number of transposition actors	Number of transposition measures	Sort of transposition measure	Time for transposition
Return Directive 2008/115/EC	Migration	High	2	5	Parliamentary Act, Orders in Council, Ministerial decision, Announcement	24
Stage II Petrol Vapour Recovery 2009/126/EC	Environment	Small	1	2	Order in Council, Ministerial Decision	24

Also here differences relate to the number and sort of transposition measures as well as the number of transposition actors. While the transposition of the Return Directive involved next to the transposing Ministry also the Dutch Parliament, the Stage II PVR Directive was transposed by one Ministry and without the involvement of further domestic actors. In contrast to the Stage II PVR Directive which was properly transposed by delegated legislation (order in council and ministerial order), the transposition of the Return Directive required five measures including an amendment to statutory law. The results of the case study analysis of the Dutch transposition of the Return Directive brought into view that the delay in transposition is linked to the transposition measures and number of transposition actors.

15.4.2 Discretion-in-national-law

BLUE CARD VERSUS PYROTECHNIC ARTICLES

Discretion-in-national-law matters – discretion-in-national-law does not matter

Putting a bright spotlight on discretion, it is expected to facilitate the incorporation of a European directive into national (Dutch) law, especially if more of it is made available to Member States. The underlying idea is that discretion provides actors in the process of transposition with a range of options as regards forms and methods of implementation which are all compatible with the directive.

Starting with the first directive pair, the Blue Card Directive and Pyrotechnic Articles Directive, the findings of the case study analyses substantiate the discretion-in-national-law expectation to a great extent in the for-

mer and to only a very little extent in the latter case. In both transposition cases discretion was used to integrate EU requirements into national legislation: the requirements of the Blue Card Directive were transposed into the Dutch Aliens Act and Aliens Decree and the requirements of the Pyrotechnic Articles Directive incorporated into the framework of the Dutch Fireworks Decree. As regards the migration directive, the Ministry of Security and Justice benefitted from the wide scope of discretion, which made it possible to convert EU rules into national legislation while largely preserving the latter's status quo. The Dutch admission scheme for labour-driven migration established by the Knowledge Migrant Regulation had proven its worth and hence should be left in place. With discretion being available this legal framework did not have to be fundamentally altered and, consequently, transposition costs could be kept low. Discretionary EU rules that did not fit into it were not incorporated – no labour market test nor changes to the salary threshold or rules on ethical recruitment were introduced and the obligation to change existing ones or create new rules was avoided (e.g. mobility rights for Blue Card holders). Interestingly, the strict transposition of EU rules, being not always entirely in line with the Directive's requirements, including the use of 'illicit' discretion (lying outside the Directive's scope), was not challenged by the Commission.

Regarding the aspect of availability of discretion the picture changes, when turning to the transposition of the Pyrotechnic Articles Directive. Besides the discretionary choice as to the forms and methods of implementation, the Ministry of Infrastructure and the Environment had only little additional discretion at its disposal to incorporate the latter's requirements into Dutch law. Moreover, transposition was not on time but delayed for six months. Regarding the role of discretion, it was not found to have contributed to delay. On the contrary, the case study findings show that even little discretion granted by the Directive facilitated transposition. Discretion served to iron out disparities between EU and national legal arrangements such as the differences in definitions and categories of pyrotechnic articles. Moreover, using discretionary freedom in limiting the free movement of pyrotechnic articles, the Dutch Ministry was able to continue the national practice to keep certain articles outside the reach of consumers, even though under the scope of the Directive these articles might have become available for private use. In this regard, the Ministry could preserve its own safety standards which, given the traditional problem of unsafe fireworks, was in the Dutch interest.

All things considered, the claim that more discretion facilitates transposition holds for the Blue Card Directive. It does not apply in the case of the Pyrotechnic Articles Directive. Yet, it is noteworthy to underline the fact that, as empirically shown in respect to the consumer protection directive, discretion being granted by little degrees can have a facilitating effect on transposition. Nonetheless, this effect did not suffice to achieve proper transposition.

WASTE FRAMEWORK VERSUS TOY SAFETY

Discretion-in-national-law does not matter

What for effects did discretion have regarding the Waste Framework Directive and Toy Safety Directive? The findings of the comparison of the two transposition processes lead to similar results.

The Waste Framework Directive was transposed into the framework of the Dutch Environmental Management Act. While the Directive includes some discretionary provisions, they were for the most part not used. Making use of discretion was not necessary because Dutch legislation closely matched the revised rules on waste treatment. The Dutch influence on the content of the Commission's legislative proposal already prior to the official negotiations contributed to the good match between the Directive and Dutch law. In this context, discretion was not of importance for converting EU rules into the national legal system.

The case of the Toy Safety Directive looks not so much different. A first point to make is that discretion was hardly available because the Directive implied a high level of harmonisation. Being in formal terms a new legislative act, it revised previously introduced EU rules.[14] Against the background of already harmonised national law in the area of toy safety, discretion was not relevant in giving a 'national twist' to EU rules to keep changes to originally national legislation to a minimum. The use of transposition measures and techniques (direct and dynamic referencing) instead show that the Directive was transposed as it stands.

In a nutshell, discretion did not play a pertinent role in facilitating transposition – neither in the case of the environmental nor as regards the consumer protection directive. Both Directives were not transposed on time. But while the facilitating effect of discretion did not materialise, discretion was also not found to have hampered the transposition of the two Directives.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

Discretion-in-national-law does not matter

Finally, whether or not more discretion contributed to better (timely and legally correct) transposition is discussed with a view to the Return Directive and Stage II PVR Directive.

The transposition analysis of the migration directive does not bear this out. A wider scope of discretion was made available to transpose the Directive into the Dutch law on aliens. Transposition, however, was only achieved with considerable delay resulting in an infringement proceeding. Furthermore, due to breaches of provisions with direct effect, cases were held in front of Dutch courts. The results of the empirical analysis furthermore show that discretion was not irrelevant because the Minister used it to

14 These rules had been established by Council Directive 88/378/EEC.

convert EU rules into the framework of the Dutch Alien Act. This way, EU requirements concerning the scope and operational provisions (e.g. return decision, entry ban, and detention) were incorporated without breaking down already existing legal structures. But preserving national legislation resulted in too little account being taken of the Directive's objectives and spirit, above all the voluntary and non-coercive approach to the return of illegally staying third-country nationals. This was not only criticised by the national Parliament with a view to the Minister's proposal for the criminalisation of the offence against the prohibition of re-entering the Netherlands but also more directly related to his use of discretion. The analysis of transposition legislation shows, for instance, that discretionary rules concerning the voluntary departure period were found to be stricter and disproportionate compared to those of the Directive.

Moving on to the Stage II PVR Directive, there is no reason to speak of more discretion leading to better transposition. It is true that the Directive was transposed in a timely and legally correct fashion. But discretion did not play any role in the transposition of this Directive. This can be established on the basis of the following facts. First, the Directive text implied virtually no discretion. As stated above, the technical nature of the Directive as well as its high compatibility with relevant Dutch law (Activities Decree and Regulation) precluded the necessity of discretion for the purpose of transposition. Second, empirical evidence is lacking that indicates the relevance of discretion for transposition.

All in all, the comparison shows that in neither case do the results of the analyses provide justification of the expectation that more discretion led to better transposition. With regard to the Return Directive discretion had even opposite effects, the use of discretion seems to have contributed to difficulties in transposing the Directive. This latter aspect receives more attention below.

The comparative transposition analysis has so far focused on the effect of discretion on transposition. However, implementation research has shown that next to directive features, other factors come into play at the national level that together with discretion may affect Member States' transposition performance.

15.4.3 Discretion and disagreement

BLUE CARD VERSUS PYROTECHNIC ARTICLES

The disagreement interaction expectation does not matter

One of these factors is disagreement with the content of the Directive expressed at the EU decision-making stage. It is expected that such a disagreement raises the likelihood of deficient transposition which is further compounded if only little discretion is available to transpose the relevant EU requirement.

The Blue Card Directive as well as the Pyrotechnic Articles Directive included requirements that did not completely match Dutch preferences. As to the former Directive, the requirement concerning unregulated professions was found by the Dutch Government to create unnecessary burdens for national authorities. Also the final rules on the validity of the Blue Card Directive were not in line with Dutch preferences. With respect to the Pyrotechnic Articles Directive, the absence of any provisions prohibiting certain articles within category 4 professional fireworks and especially the obligation to introduce an ex-ante approval system for pyrotechnic articles were contrary to Dutch wishes.

The analysis of the transposition of the Blue Card Directive into Dutch law does not provide any evidence that requirements which diverged from national preferences were not complied with. What's more, contrary to the scenario described by the expectation, not little but considerable discretion was offered to Member States for the purpose of implementation. In other words, the expectation does not carry much relevance in the case of the Blue Card Directive.

Things are a little different as regards the Pyrotechnic Articles Directive which fulfils the condition mentioned in the expectation in that it only grants little discretion. And yet, no empirical evidence was found which shows that disagreement with certain EU requirements prompted actors to impede transposition deliberately. The introduction of the pre-market approval system, for instance, even though causing administrative costs and burdens for business and consumers, was not identified in the analysis as a reason for delay.

A comparative perspective on the two transposition cases leads to the conclusion that the claim cannot be substantiated. To put it in more concrete words: in neither case, evidence was found that previous disagreement with a directive requirement alongside little discretion available for implementing this requirement caused delay. Hence, the conclusion that discretion did not have impeding effects on transposition.

WASTE FRAMEWORK VERSUS TOY SAFETY

The disagreement interaction expectation does not matter

The comparison between the two Directives of the second pair can be brief and concise. Satisfaction with the revised legal framework for the management of waste on the part of the Dutch Government was high. The final Directive was in good harmony with the domestic legal system. Transposition was slightly delayed. But in the absence of any relevant points of dissatisfaction this delay cannot be traced back to a joint effect from both, disagreement and little discretion, which is expected to impede transposition.

Likewise, as regards the Directive on the safety of toys and their free movement within the EU, the content of this Directive was largely in line with Dutch preferences besides a few exceptions (e.g. proposed warning requirements, obligations for economic operators). Nevertheless, the Dutch

Government highly approved of the final text of the Toy Safety Directive, and most importantly, transposition was only marginally delayed. Hence, in principle, compliance was achieved.

In short, any impediments to the process of transposition resulting from disagreement in combination with lacking discretion can be excluded for both cases.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

The disagreement interaction expectation does not matter

Finally, with respect to the last directive pair, is there any evidence proving the link between the negotiation and subsequent transposition stages showing that discretion in interaction with disagreement contributed to deficient transposition?

The Dutch transposition of the Return Directive was delayed. And yet, with regard to discretion, this transposition case does not match the situation described by the expectation considered here. This can be derived from the fact that the Directive includes several flexible legislative arrangements and therefore grants a rather high instead of a low margin of discretion. From the negotiation analysis it is obvious that there were some requirements, of which the Dutch delegation did not fully approve, pertaining, amongst others, to the Directive's scope, the provisions obliging Member States to issue a return decision and entry ban as well as to provide for legal remedies. But in most of these cases, some flexibility was made available for transposition and it was also used by the Dutch Minister. Moreover, the case study findings do not indicate that previous disagreement with EU requirements was amongst the causes for the considerable delay in transposition.

A relatively short analysis suffices in case of the Stage II PVR Directive. Clearly, the data does not square with the disagreement interaction expectation. As previously noted, the content of the Directive did not give relevant reasons for disagreement, in other words, it was met with large approval by the Dutch Government. Besides, transposition was carried out in a timely and legally correct manner.

Together with the other two comparative cases, also the third paired comparison leads to the conclusion that discretion did not contribute to transposition problems with EU requirements which diverged from national interests.

15.4.4 Discretion and compatibility

Legal compatibility between on the one hand the EU Directive analysed, and, on the other hand Member States' laws, in particular Dutch law, were a focal point of the negotiation analyses. It was shown that lacking compatibility may provide grounds for building more discretion into the directive text. Whereas based on the Commission proposal and its evaluation by national ministries and local goverments by means of the BNC-fiche, a rather prelimi-

nary assessment of the match between the relevant EU Directive and Dutch law was given in the negotiation analyses, a more concrete assessment was provided by looking into the transposition processes. Compatibility between EU and Dutch rules was assessed here by means of the concept of four types of misfit (high, moderate, limited, and small misfit), taking into account the number and content of national transposition measures. This concept was borrowed from previous transposition analysis (Steunenberg and Toshkov, 2009). Bringing compatibility together with discretion, the following was assumed about the way these two factors are linked in the context of transposition: Compatibility between the EU directive and national rules raises the likelihood of proper transposition while at the same time this effect is expected to become stronger as the degree of discretion increases.

BLUE CARD VERSUS PYROTECHNIC ARTICLES

The compatibility interaction expectation matters – it does not matter

To be more precise, the compatibility interaction expectation implies that in case of a low match or high misfit, timely and legally correct transposition is rather unlikely. The negative effects from misfit cannot easily be compensated for by discretion whereas in case of medium or high fit, discretion may strengthen the positive effects resulting from compatibility and therefore further facilitate the legal implementation of the directive. The latter scenario was found to apply regarding the transposition of the Blue Card Directive. Using the compatibility concept as a benchmark, a small misfit between the Directive and Dutch law on aliens was established, based on the knowledge that only two instruments of delegated legislation were needed to transpose the Directive's requirements. In other words, except for some minor issues (as mentioned before, the validity of the Blue Card, EU rules on unregulated professions and salary threshold), the compatibility between EU and Dutch legal arrangements was rather high. In addition to that, the Directive entailed a considerable amount of discretion for the interpretation and application of its provisions. All things considered, high compatibility in combination with a wide scope of discretion available for transposition contributed to achieving compliance.

What about the Pyrotechnic Articles Directive? In contrast to the Blue Card Directive, this consumer protection directive was not without any relevant misfit for the Netherlands. But misfit was found to be largely related to the incongruence between the Directive and national arrangements in terms of policy, owing to the proposed pre-market approval system of pyrotechnic articles (conformity assessment procedure) which was missing on Dutch territory. Legal incompatibility, by contrast, was only limited as shown by the results of the compatibility check using the four-types-classification model and the fact that necessary changes for the purpose of transposition eventually left the Dutch Fireworks Decree largely unaltered. As for discretion, only little of it was available for transposition, which does not match the expectation that more discretion enforces the positive effect of compat-

ibility. It should nevertheless be noted that discretion, albeit being granted by little degrees, facilitated converting the Directive into the national legal framework. But this does not change the fact that transposition was delayed for six months. Hence, in contrast to the case of the Blue Card Directive, compatibility and discretion by interacting together could not produce a positive effect, at least not one that was strong enough to compensate for the negative effects resulting from, amongst others, the policy misfit that the Pyrotechnic Articles Directive entailed for the Netherlands.

Put in a nutshell, a joint effect from compatibility and discretion materialised and contributed to the proper transposition of the Blue Card Directive. Even if such an effect occurred in the case of the Pyrotechnic Articles Directive, the truth remains that transposition was hampered by another factor and the proper formal implementation of the Directive therefore not achieved.

WASTE FRAMEWORK VERSUS TOY SAFETY

The compatibility interaction expectation does not matter

Based on the results from the negotiation analysis, the Waste Framework Directive was considered to be compatible with relevant Dutch legislation. Transposition of the Directive in the Netherlands, however, required five transposition measures including, alongside delegated legislation, also one statutory amendment (amendment to the Dutch Environmental Management Act). While this may have been indicative of a higher legal misfit, the large number of transposition measures was, instead, explained by the framework structure of the Dutch Environmental Management Act: modifying the latter, which was necessary to transpose EU rules regarding the definition of key terms like 'waste' 'hazardous waste' and 'prevention', amongst others, required making corresponding adjustments to lower-level regulation within the framework of the Act. Furthermore, the case study findings obtained from the analysis of the transposition measure, and interviews with civil servants from the transposing Ministry of Infrastructure and the Environment, confirmed the initial assessment of high compatibility. In addition, the empirical results show that discretion, which is, in case of medium or high fit, expected to facilitate transposition, did not come into play. It was hardly used in transposing the Directive.

Similar to the Waste Framework Directive, legal misfit was small between the Toy Safety Directive and the Dutch Toys Commodities Act Decree into which the requirements of the revised legislative act were incorporated. Put differently, compatibility was rather high which certainly contributed to the relatively smooth transposition of the Directive – leaving the very small delay out of consideration. As for discretion, it was hardly granted by the Directive and the empirical results do not suggest that it decisively enforced the positive effect of compatibility.

Summing up, comparing the national-level processes regarding the environmental and consumer protection directives shows that a possible

interaction effect from discretion and compatibility had no bearing on the transposition of EU rules into Dutch law. While it seems safe to assume that compatibility between EU and Dutch legal arrangements contributed to proper transposition in both cases, discretion did not decisively affect compatibility – neither as facilitating nor impeding factor.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

The compatibility interaction expectation does not matter

Last but not least, the comparison has to address the third directive pair consisting of the Return Directive and Stage II Petrol Vapour Recovery Directive.

Compatibility between the migration directive and Dutch aliens law was not high, despite some achievements made during the EU decision-making process to bring the Directive more in line with the domestic legal order (e.g. as regards rules on the Directive's scope, return decision). Already further up, it was pointed out that effects leading to the delay in the transposition of the Return Directive can be linked to the number and sort of transposition measure (section 15.4.1). Based on the misfit model used, a moderate to high misfit was established. The Directive had to be transposed by means of two orders in council, which did not simply replace but amended existing legislation. The expectation concerning compatibility and discretion implies that impeding effects from low compatibility are further strengthened by discretion if the latter is granted by larger degrees. As established by the transposition analysis, discretion was used by the Dutch Minister to preserve already existing national legislation, even though where this was not in line with the spirit of the Directive and, at least, doubtful as regards some of the Directive's provisions.[15] Discretion, in this context, was, thus, not conducive to but rather impeding, in interacting with low compatibility, the proper transposition of the Directive.

Whereas compatibility and discretion were relevant for the transposition of the Return Directive, albeit by affecting the process in a negative way, this is clearly not the conclusion that can be drawn from the findings of the analysis relating to the Stage II Petrol Vapour Recovery Directive. First of all, compatibility between EU requirements aiming at the reduction of petrol vapour at service stations and relevant Dutch law was high. This was confirmed by means of the compatibility concept which pointed to a high fit. Second, being largely composed of provisions including technical requirements, discretion was practically absent from the Directive. Third, the empirical results do not prove the relevance of discretion for incorporating the Directive's requirements into the Dutch legal framework provided for by the Environmental Management Act.

The above comparative considerations permit it to conclude, that in neither case the joint effect from discretion and compatibility between EU

15 Such as in case of the transposition of Articles 7(3) and 11(3) of the Directive establishing conditions concerning the voluntary departure period and entry ban.

and national legal arrangements did occur. It should be born in mind that discretion was used in the case of the Return Directive, and while arguably contributing to the preservation of national legislation did not, however, facilitate achieving timely and legally correct transposition.

15.4.5 Discretion and administrative capacity

The following expectation is considered: administrative capacity raises the likelihood of proper transposition, but this effect decreases as the degree of discretion increases. Referring back to the theoretical discussion, administrative capacity is understood in the dissertation as pertaining, for one, to transposition knowledge, that is to say the theoretical and practical understanding as well as the required skills national actors have to transpose the directive into national law. Second, it can also relate to 'intra-ministerial coordination' between the policy and legal units within the ministry or ministries involved in the negotiation and legal implementation of EU directives, respectively. If transposition knowledge is poor, and / or coordination between the policy and legal units insufficient, the process of legal implementation is expected to be hampered. The presence of available administrative capacity raises the likelihood of proper transposition. Discretion plays a negative role in this context if it is granted by larger degrees. It is expected to reduce the positive effect of administrative capacity in shaping proper (timely and legally correct) transposition.

BLUE CARD VERSUS PYROTECHNIC ARTICLES

The capacity interaction expectation does not matter

Considerable discretion was available for the national transposition of the Blue Card Directive. Administrative capacity due to insufficient transposition knowledge or coordination problems within the transposing Ministry of Security and Justice, however, did not play any role. The administrative capacity of the civil servants in charge rather contributed to the smooth transposition of the Directive which was also not hampered but rather facilitated by the wider discretion margin. The Netherlands complied with the Directive.

Turning to the Pyrotechnic Articles Directive, the expectation does not apply due to the fact that the Directive grants only little discretion. Furthermore, the case study findings do not suggest that administrative capacity was problematic for national transposition. On the contrary, they point out that the requirement of transposition knowledge was fulfilled. From the interviews it emerged that the civil servant of the Ministry of Infrastructure and the Environment in charge of the Directive dossier had profound knowledge of both negotiation and transposition processes in which he was closely involved. Due to his involvement at both stages, also no problems relating to intra-ministerial coordination were detected.

To conclude, in none of the cases was there any evidence to prove the link between administrative capacity and discretion impacting transposition in a negative fashion.

WASTE FRAMEWORK VERSUS TOY SAFETY

The capacity interaction expectation does not matter

The Waste Framework Directive was transposed by the Ministry of Infrastructure and the Environment. The case study results do not give reason to believe that knowledge of how to convert the rules of the European waste management system into Dutch law was lacking. All the same, the empirical analysis brought to light that intra-ministerial coordination was not optimal due to the diverging views of the policy and legal units of the Ministry of Infrastructure and the Environment regarding the transposition of EU rules on the determination of the end-of-waste status.[16] While this could have been a reason for the transposition delay, it was not confirmed as such by the interview partners that were chiefly responsible for the dossier on the Waste Framework Directive. Instead, their statements corroborated the idea that had emerged from the study of documents and literature: the slight delay was caused by the political circumstances, or more precisely, by a change of government occurring during the transposition process. Regarding discretion no proof was found that it came into play.

The expected link between administrative capacity and discretion was also not pertinent to the transposition of the Toy Safety Directive. To make it short: based on the case study findings it could be established that national transposition was carried out with sufficient administrative capacity provided by the policy unit of the Ministry of Infrastructure and the Environment, and in particular the legal civil servant in charge of incorporating the revised safety and market-related rules on toys into Dutch law. Discretion was hardly granted by the Directive and, as established earlier, did not negatively affect transposition.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

The capacity interaction expectation does not matter

Finally, what about the Return Directive and the Stage II PVR Directive? While the two Directives are different in many respects, they share the absence of an interaction effect from discretion and administrative capacity.

The Return Directive was considerably delayed. But administrative capacity or rather the lack of it, in combination with the relatively high discretion margin of the Directive, was not identified in the analysis as having caused problems for national transposition.

Likewise, the applicability of the expectation can obviously be excluded in respect of the Stage II PVR Directive. The Directive includes practically

16 Cf. Article 6(4) of the Waste Framework Directive.

no flexible arrangements and therefore discretion does not appear as a factor that reduced the positive effects from administrative capacity for national transposition performance. What's more, based on the empirical results, it is reasonable to assume that administrative capacity rather contributed to the timely and legally correct transposition of the Directive by the Ministry of Infrastructure and the Environment.

To sum up, all directive pairs have in common that administrative capacity and discretion, as two factors that can interact and affectnational transposition did not have any relevant impact on the process. In other words, the capacity interaction expectation has no explanatory power with respect to the comparative cases considered.

15.4.6 Discretion and transposition actors

The last factor with which discretion is expected to interact is the number of actors responsible for transposition. The central plank of the argument is that the more actors are involved, the more likely it is that transposition is deficient and that this negative effect gets stronger the more discretion a directive grants. With regard to the Dutch transposition context actors are usually involved at the ministerial as well as political level. In the former case, problems causing deficient transposition can arise from difficulties with inter-ministerial coordination, i.e. through poor communication, conflicts of interest and therefore lacking consensus regarding the way the directive should be incorporated into national law, including the questions whether or not and how to make use of discretionary provisions. The same issues may arise at the political level, between the responsible ministry / ministries on the one hand, and on the other hand, national Parliament which plays an active role if the directive is transposed by means of statutory instruments.

BLUE CARD VERSUS PYROTECHNIC ARTICLES

The actor interaction expectation does not matter

As regards the Blue Card Directive, the facts are clear: The Directive grants considerable discretion which, however, and in conjunction with the number of transposition actors, had no impeding effect on transposition. Proper transposition was achieved by the Ministry of Security and Justice which transposed the Directive using delegated legislation. Being the sole actor in charge of legal implementation precluded the possibility of conflicts, resulting from inter-ministerial coordination problems or parliamentary debates, all of which could have delayed transposition or led to the inclusion of aspects into the transposition measure that go beyond the Directive's scope.

Having only a small scope of discretion, the Pyrotechnic Articles Directive does not match with the expectation analysed here, which describes the impeding effect on transposition as resulting from the number of transposition actors interacting with a directive's higher discretion margin. Retarding effects from the involvement of Parliament can furthermore be excluded,

since the Directive was transposed by the Ministry of Infrastructure and the Environment by means of delegated legislation. However, while the Ministry remained mainly responsible for transposition at the ministerial level, the Dutch Public Prosecution Service got involved, too, as regards aspects of enforcement and the way corresponding rules should be incorporated into national law. This collaboration was found to have contributed to delay as emerged from the study of documents and interviews. From the analysis it did not follow, however, that the Directive's little discretion margin strengthened this negative effect. On the contrary, the case study findings pointed to a facilitating impact of discretion on transposition.

In short, the actor interaction expectation does not carry any relevance for the two transposition cases.

WASTE FRAMEWORK VERSUS TOY SAFETY

The actor interaction expectation does not matter

In the Netherlands, the transposition of the Waste Framework Directive made it necessary to amend the Environmental Management Act. As a result, the Directive was transposed by means of statute, amongst other measures, and hence, required the active involvement of the national Parliament. Based on the case study findings, it could be concluded that parliamentary involvement did not contribute to delay. Likewise, any obstacles to transposition at the ministerial level can be ruled out, due to the fact that the Ministry of Infrastructure and the Environment acted alone in converting EU rules into Dutch environmental law.

The same applies to the Toy Safety Directive which was transposed by one national authority, the Ministry of Health, Welfare and Sport. This fact eliminates the possibility of problems resulting from deficient inter-ministerial coordination or parliamentary involvement obstructing the proper transposition of the Directive. The empirical analysis shows that national stakeholders gave feedback to the transposition measure without, however, delaying the process. In the absence of any difficulties being caused by diverging views and preferences regarding transposition among national actors, and only little discretion being granted by the Directive, the expectation under consideration carries no relevance in the present case.

The previous conclusion from the first paired comparison has to be reiterated: the comparative analysis does not provide any evidence of the alleged effects of the two factors, transposition actors and discretion, on transposition.

RETURN VERSUS STAGE II PETROL VAPOUR RECOVERY

The actor interaction expectation partially matters – it does not matter

With regard to the expectation assessed here, the Return Directive represents an interesting case. For one, because it has a rather wide discretion margin, certainly if compared to the Stage II PVR Directive, and second, because the latter's transposition required the active participation of the

national Parliament. To transpose the Directive into Dutch law on aliens, it was necessary to amend both Alien Act and Decree. Third, besides the fact that the Directive included discretionary provisions leaving options in transposition that needed to be discussed, it also concerned a politically sensitive issue. Fourth, transposition was considerably delayed. Given these circumstances, there seems to be enough potential for conflict between the Ministry of Security and Justice and national Parliament. Empirically, this is clearly shown by the fact that transposition and the choices made by the Minister in incorporating (discretionary) provisions triggered controversy between the two transposing actors. On the other hand, the empirical results indicate that parliamentary treatment of the draft transposition measure went rather fast. In addition, other external causes were found to have contributed for the most part to the considerable delay of transposition. Against this background, the impeding joint effect of discretion and more actors being involved in transposition was found to only partially apply.

As to the Stage II PVR Directive, it can be concluded with certainty that such an interaction effect did not play a relevant role in the transposition of the Directive. First of all, the Directive granted virtually no discretion. What's more, the Ministry of Infrastructure and the Environment was the only actor in charge of transposition at the ministerial level. Being transposed by means of delegated legislation, transposition furthermore did not require any involvement from Parliament. Hence, conflict hampering the proper incorporation of the Directive's requirement did not arise. Besides, the Netherlands was in compliance with the Directive.

In a nutshell, in none of the three cases in which directive pairs are analysed, did Dutch transposition suffer from a negative joint effect of the number of transposition actors and higher levels of discretion being made available for the legal implementation of the Directive. With respect to the Return Directive the effect was present but found negligible.

Table 29 gives an overview of the comparative results of the national transposition analyses. It shows in which cases expectations 5 to 9 addressing the role of discretion in national transposition hold true and in which cases they do not or only partially hold true.

Starting with the most obvious case, discretion was pertinent to the transposition of the Blue Card Directive. It facilitated the incorporation of the Directive into Dutch legislation in the presence of a good match between EU and national rules. Interestingly, as regards the Return Directive, even though it was concluded that discretion facilitated the negotiations on the Directive, the case study findings do not show that it also had a positive impact on national transposition. On the contrary, it was observed to have affected the process in a negative way, amongst others, through interacting with the number of transposition actors. This effect was not identified as the main reason for the considerable delay of transposition but nevertheless it contributed to this transposition outcome. Furthermore, it becomes obvious from table 29 that none of the expectations was found to apply in the second comparative case composed of the Waste Framework Directive and Toy

Safety Directive. In other words, discretion neither shows to have facilitated nor impeded transposition. That discretion apparently had no role to play is in line with the more general expectation that it is not of relevance in more harmonised EU areas such as consumer protection and the environment.

Table 29: Comparative results Dutch transposition processes
(+ holds true, – does not hold true, +/– partially holds true)

Directive pairs	E5 Discretion & national law	E6 Discretion & disagreement	E7 Discretion & compatibility	E8 Discretion & administrative capacity	E9 Discretion & transposition actors
Blue Card	+	–	+	–	–
Pyrotechnic Articles	–	–	–	–	–
Waste Framework	–	–	–	–	–
Toy Safety	–	–	–	–	–
Return	–	–	–	–	+/-
Stage II Petrol Vapour Recovery	–	–	–	–	–

In line with this expectation, the transposition analyses of the Pyrotechnic Articles Directive and Stage II Petrol Vapour Recovery Directive show the same results, discretion does not seem to have mattered. Finally, it should be noted that in none of the comparative cases examined there are findings lending proof to interaction effects involving discretion as described by the expectations 6 and 9 including the two factors of disagreement with EU rules at the negotiation stage and administrative capacity of transposing actors. Administrative capacity defined in terms of transposition knowledge and inter-ministerial coordination, was not found to be lacking. In this particular respect, transposition in the Netherland was carried out without any hitches.[17] The *capacity interaction expectation* (E9) did not have much explanatory power due to the absence of any interaction effect of administrative capacity and discretion. Discretion was also not found to have interacted at the national transposition stage with previous disagreement to EU requirements. But even if the *disagreement interaction expectation* (E6) was not substantiated by the empirical findings, it is interesting to note that the results displayed in table 29 above, indicate some consistency with regard to discretion and suggest that interrelatedness of the EU and national decision-making stages plays a role in this regard. The cases of the Blue Card Directive and Return Directive indicate that if for a Member State discretion is a relevant factor at the negotiation stage, it also comes into play at the subse-

17 As regards the Waste Framework Directive, inter-ministerial coordination was not optimal, but it did not lead to any impediments to transposition (see section 11.6.2).

quent transposition stage. Granted, the empirical results are drawn from a single-country study and caution should be, as explained at an earlier stage, exercised with generalising conclusions. While this is not the intention here, the point is deemed worth mentioning and could be followed up by future (cross-country) research.

Opposite findings apply most clearly to the cases of the Waste Framework Directive and Stage II Petrol Vapour Recovery Directive: discretion was not relevant for the negotiations and it also did not play any role during the transposition of these Directives. The Toy Safety Directive also seems to fit into this context. But there is more to say regarding this case, and it is felt that the role of discretion in this particular transposition process should be put a bit more into perspective. The discussion will therefore return to this case in the concluding chapter below. Finally, the Pyrotechnic Articles Directive stands a bit out from the other cases due to the fact that while discretion appeared to be a pertinent factor during the negotiations, it apparently was not relevant to the subsequent transposition of the Directive. Suffice it to point out here that discretion was nevertheless not found to be an entirely irrelevant factor but that, in fact, it facilitated transposition into Dutch law, though this positive effect was not enough on its own to secure Dutch compliance with the Directive.

Table 30, 31 and 32: Comparative cases one to three
(+ holds true, – does not hold true, +/– partially holds true; 0/1 = small/large margin of discretion margin; 0/1 = deficient/proper transposition)

Directives	Discretion	Discretion & national law	Discretion & disagreement	Discretion & compatibility	Discretion & administrative capacity	Discretion & transposition actors	Transposition outcome
Blue Card	1	+	–	+	–	–	1
Pyrotechnic Articles	0	–	–	–	–	–	0

Directives	Discretion	Discretion & national law	Discretion & disagreement	Discretion & compatibility	Discretion & administrative capacity	Discretion & transposition actors	Transposition outcome
Waste Framework	1	–	–	–	–	–	0
Toy Safety	0	–	–	–	–	–	1

Directives	Discretion	Discretion & national law	Discretion & disagreement	Discretion & compatibility	Discretion & administrative capacity	Discretion & transposition actors	Transposition outcome
Return Directive	1	–	–	+	–	+/–	0
Stage II Petrol Vapour Recovery	0	–	–	–	–	–	1

But what about the impact of different discretion margins on national transposition which takes centre stage in the analysis? After all, a major reason and aim of the paired comparisons was to find out how especially very discretionary directives affect legal implementation since different effects have been ascribed to them. To this end, tables 30, 31 and 32 provide a closer look at the case study results, this time including the factors of key interest, discretion (margin) and transposition outcome.[18]

It becomes immediately clear when zooming in on the relationship between discretion (margin) and transposition outcome that the results of the comparisons confirm the mixed record ascribed to the effects of discretion in implementation studies. The cases of the Blue Card Directive and Pyrotechnic Articles Directive displayed in table 30 may suggest that, with discretion being granted by larger instead of smaller degrees, proper national transposition is achieved. After all, the Netherlands achieved the proper transposition of the Blue Card Directive, with discretion being revealed as a factor which facilitated this process. This in contrast to the Pyrotechnic Articles Directive which, besides its inherent characteristic to provide Member States with the discretionary choice of implementation forms and methods, only grants little additional discretion based on its provisions. This Directive was not properly transposed and transposition delayed for several months. It was shown that facilitating effects of discretion did not suffice to decisively contribute to compliance. In other words, the first paired comparison seems to highlight the positive effects that discretion can have on transposition, especially if more of it is available for transposition.

These results notwithstanding, and shifting the attention to the two other comparative cases displayed in tables 31 and 32, outcomes are shown that have different implications for the role of discretion. It becomes evident that with regard to the Waste Framework Directive and Return Directive granting higher levels of discretion compared to their counterparts (Toy Safety Directive, Stage II Petrol Vapour Recovery Directive), transposition was deficient, being reflected in a short-term and long-term delay in transposition, respectively.

What's more, directives with a small discretion margin, such as the Toy Safety Directive, and especially the Stage II Petrol Vapour Recovery Directive were properly transposed. The marginal delay regarding the former Directive can hardly be interpreted as non-compliance, particularly as the delay was not treated by the European Commission as an infringement of the Directive. However, like in the case of directives with larger margins of discretion, the findings of the case studies do not reflect any systematic pattern regarding the effects of directives granting discretion by small degrees. It is true that compliance was achieved as regards the Toy Safety Directive,

18 Since the potential impact from background factors (alternative explanations of transposition outcomes) was already discussed above, these factors are not included in the figures.

and in particular, the Stage II Petrol Vapour Recovery Directive. The transposition of the Pyrotechnic Articles Directive, by contrast, was delayed. What's more, it was shown that this Directive has a rather small margin of discretion.

15.5 Conclusion

This study seeks to shed light on the role of discretion in EU decision-making and national transposition processes. To this end, the six individual case studies have been analysed in pairs, by adopting a comparative approach to show how different discretion margins of directives affect transposition in contexts that are in certain aspects relatively similar. Based on the comparative results, empirically substantiated answers were given to key questions of this study. As regards EU decision-making, the veil has been lifted to some extent, revealing the circumstances under which discretion is granted, to what extent and with what effects. EU and directive features were found to matter: the policy area and issue the directive addresses, determines the scope of discretion. Especially in less Europeanised contexts such as migration where legal diversity among Member States is still high, additional discretion is granted as a result of political sensitivity and compatibility between EU and national law. Discretion then serves to facilitate compromise. Regarding the results of the transposition analyses, they confirm the picture emerging from implementation research: discretion affects transposition differently, in other words, no consistent pattern could be established as regards the effects of discretion on transposition neither from directives with larger discretion margins nor from directives with smaller discretion margins. Discretion was found to facilitate transposition in case that it was granted by larger degrees and in the presence of high compatibility between EU and national rules (Blue Card Directive). In the presence of low compatibility and more actors being involved in transposition, more discretion being available to Member States was observed to contribute to deficient instead of proper transposition (Return Directive). Otherwise, discretion did not play a decisive role in transposition. This is most clearly evident in the transposition of the environmental directives (Waste Framework Directive and Stage II Petrol Vapour Recovery Directive).

Part 4

Assessing findings, providing conclusions and outlook

16 Conclusions and outlook

16.1 Structure

The first part of this concluding chapter continues to assess the results of the negotiation and transposition analyses with due respect to the role of discretion. In doing so, the key questions of this study are further discussed and answered. This includes, in the second part, a shift of focus towards the relationship between discretion and legitimacy. The remainder of this chapter addresses the relevance of the dissertation's findings for the study of discretion within the context of processes at the EU and national level with regard to directives, and puts forward a few suggestions for future lines of research.

16.2 Discretion and nothing else matters?

The aim of the dissertation was to shed light on the role of discretion in EU decision-making and the national transposition of EU directives, and to find out how discretion affects these processes. One of the conclusions of this study is that discretion does indeed matter. The empirical findings draw a picture of the different roles that discretion plays in the negotiation and transposition contexts addressed in the case studies. Furthermore, the case study findings made it possible to draw conclusions about the particular circumstances under which discretion facilitates processes at both the EU and national level regarding directives, but also revealed those conditions that lead to impeding effects of discretion on national transposition. To complete the discussion of the empirical results some outstanding issues and additional aspects need to be addressed.

16.2.1 Circumstances and effects (negotiations)

First, the negotiation analyses brought to light that discretion either facilitated EU decision-making or that it had no effect on the progress of negotiations. Facilitating effects occurred in connection with political sensitivity and / or incompatibility between the directive under negotiation and Member States' legal systems. Cases in point include the negotiations on the two migration directives as well as the Pyrotechnic Articles Directive. In fact, the empirical results from these cases confirm the argument of the previously mentioned consensus-building perspective on the delegation of discretionary decision-making competences to Member States (Dimitrova and Steunenberg, 2000; Thomson et al. 2007; Thomson, 2011). It proceeds from

the assumption that disagreements between Member States in the Council of Ministers are settled by building discretion into decision outcomes such as directives. What's more, the case of the Pyrotechnic Articles Directive matches the observation that little discretion being made available to Member States for implementation can already have such an effect. Little discretion can suffice in bringing about consensus as long as Member States have the idea that discretion helps to implement EU rules by largely preserving their domestic legal systems (Thomson, 2011: 260; 262).

16.2.2 Circumstances and effects (transposition)

Second, and with regard to transposition in the Netherlands, it was shown that discretion facilitated or impeded this process. From the analyses it follows that discretion has facilitating or impeding effects by interacting with other factors. In other words, discretion unfolds its effects not alone. It has a bearing on transposition by affecting other factors that are assumed to impact transposition. This was shown in the case of the Blue Card Directive, where discretion strengthened the positive effects of high compatibility between EU directives and relevant Dutch legislation. It was also brought into view with regard to the Return Directive where discretion, by interacting with these factors, increased the impeding effect of both legal incompatibility and transposition actors. But the retarding effect of discretion and national transposition actors did not have a big impact in further slowing down transposition.

Third, the fact that discretion is an intervening factor in transposition furthermore shows that it is not a sufficient condition for proper or deficient transposition to occur. Other factors must be present in conjunction with which discretion unfolds its effects. Given the fact that transposition is found to be affected by a multitude of factors this may not be too surprising but it is nevertheless worth noting. Furthermore, discretion has a noticeable effect on transposition if larger amounts of it are available to incorporate EU rules into national law. The transposition of the two migration directives are clear illustrations of this result.

Fourth, where only little discretion is available for transposing a directive discretion has less impact on transposition. The transposition of the Pyrotechnic Articles Directive indicates that discretion facilitated fitting the Directive into the Dutch Fireworks Decree in the presence of good compatibility. Nevertheless, due to policy misfit and the complexity of the Directive's technical requirements, the positive effects of legal compatibility were outweighed and proper transposition was therefore not achieved.

16.2.3 Effects and role (negotiation and transposition)

The fifth point relates to the effects and role of discretion in transposition as well as, again, to its link with the compatibility (or goodness-of-fit, misfit) argument. Interestingly, as follows from the case studies, the link between

compatibility is of relevance in both the negotiation and transposition processes.

First, as becomes evident from most of the negotiation processes, Member State preferences were shaped by considerations about the compatibility between EU and national law – and hence related to the costs assumed to be incurred by implementation. Member States sought to keep these costs low by uploading own legal arrangements or seeking additional discretion. Incorporating more discretion into directive proposals which guaranteed that EU requirements could be converted into national law as Member States saw fit, led to the latter's final agreement on directive proposals. Second, compatibility between EU and national law played a role in transposition. Together with discretion it either facilitated or impeded proper transposition, as mentioned above with respect to the two migration directives analysed. While the compatibility or goodness-of-fit argument has delivered mixed results as to its relevance in explaining transposition outcomes, the results of the present analyses show in any case that it mattered, with respect to both the negotiation and transposition processes.

A last finding is worth mentioning. The transposition analyses show that legal implementation of EU directives in the Netherlands is based on the strategy to implement a directive by taking over the legislative text in a national legal measure. This strategy follows from the discretionary choice of transposition forms and methods and is referred to as the 'copy-out' technique. By applying it, implementing actors stay as close as possible to the directive text and avoid the incorporation of any national extras[1] with the aim of ensuring timely and legally correct transposition. At the same time, national transposition is focused on using already existing legislation as much as possible,[2] which brings into play the aspect of preserving national legislation and again the role of discretion. After all, the transposition of the migration directives shows that discretion is used to retain existing national legislation. In fact, preserving own legislation is an approach which is not unique to the Netherlands. It is also applied by other Member States that take their national legal systems as a point of departure for transposition (Steunenberg and Voermans, 2006). But such an approach does not seem to guarantee compliance with EU law and it illustrates again the different effects that discretion can have. While preserving own national rules and practices by using discretion contributed to proper transposition regarding the Blue Card Directive, it resulted in deficient transposition and non-compliance as exemplified by the transposition of the Return Directive – not only in the Netherlands but apparently also in other Member States (Zwaan, 2011; 2013). This example shows that while the empirical analysis is country-specific, it indicates trends also found in other Member States.

1 This is reflected in the ministries' adherence to instructions for drafting legislation, no. 331.
2 This is done in accordance with no. 333 of the instructions for drafting legislation.

16.3 Discretion under scrutiny

The positive effects of discretion attest to its potential to facilitate processes of EU law-making and national (legal) implementation – a potential which, as argued in the dissertation, is inherent in discretion. And yet, the case studies, in particular those centring on the migration directives, have also brought to light views that express dissatisfaction and criticism of discretion.

In the area of consumer protection and environmental law this aspect is reflected indirectly. Here it seems that harmonisation by directives has not been entirely successful in producing the intended results. As noted before with regard to consumer protection law, the European Commission pursues plans to advance more vigorously the harmonisation of national consumer laws. To this end it has started to introduce full harmonisation instruments such as the 2011 Consumer Rights Directive,[3] seen by some scholars as difficult to reconcile with the principle of shared competences and subsidiarity (Antoniolli, 2006; Reich, 2012a, 2012b; Weatherill, 2013). As regards EU environmental law, some believe that the Commission is 'disadvantaged' by directives and therefore advocate the use of directly applicable EU regulations (e.g. Jordan, 1999). Although recognising that flexibility makes it possible for Member States to take into account national peculiarities, directives are considered to contribute to the problem of implementation deficits across Member States due to the flexible arrangements they imply – i.e. due to discretion (Jordan, 1999: 78; Steunenberg et al., 2012).

These kinds of debates show the tension between supranational and national dimensions in the EU integration process reflected in debates about the distribution of decision-making competences. In the area of migration, this debate has led to more overt criticism of discretion which is considered by some as the ultimate expression of Member State attempts to retain national legal orders and practices at all costs. Discretion is explicitly addressed in debates about EU harmonisation of national migration law – and viewed critically as shown in the case studies regarding the migration directives. But also in respect of migration directives more generally, discretion is seen with scepticism and is mentioned in one breath with problems of legitimacy and lacking high standards of EU migration law (Formisano and Carrera, 2005: 15).

3 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22 November 2011, pp. 64-88. The Directive's objective is to achieve a 'high level of consumer protection as well as to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders' (Article 1).

Turning back to the cases of the Blue Card Directive and Return Directive, here the availability of considerable discretion was found to have challenged if not undermined the objectives of the initial Commission proposals (Baldaccini, 2009; 2010; Eisele, 2013). The proposal for the Blue Card Directive initially implied high standards concerning the equal treatment of EU Blue Card holders with nationals of the host Member State, including appropriate rights for their family members. Through more discretion that was eventually built into the Directive, it was, nevertheless, possible for Member States to minimise these standards during the negotiations (Eisele, 2013). Likewise, with regard to the Return Directive, it has been strongly doubted whether its discretionary provisions allowing for exceptions and differences in national practice will ensure equal and fair treatment of irregular migrants subjected to return procedures as actually being sought by the Directive (Baldaccini, 2009; 2010).

What can be said in response to this critique? To begin with, these critical voices on discretion cannot be simply rejected out of hand. Recent studies on the implementation of the Return Directive show, for instance, that discretion may indeed be used for restrictive migration policies at the national levels (Zwaan, 2011; 2013). And yet, it is doubted here if these negative perceptions do justice to the concept of legislative discretion as presented in this study. Again, my central argument is that the basic idea underlying the use of discretion is a positive one from the viewpoint of implementation. Discretion as a directive's core feature provides alongside the efficiency benefits previously addressed, the relevant flexibility for Member States to fit EU rules into their traditionally grown legal systems. For those in charge of transposition, discretion makes it possible to take into account national peculiarities – the idea underlying its use being established by the EU treaties: the preservation of national legal identities. It seems to me, however, that this potential of discretion is not recognised in the academic debate on EU migration law. Here, discretion is equated with, or at least treated as, a *pars pro toto* for national sovereignty. As noted by Guild: 'Inherent in the concept of state sovereignty is the right to exercise discretion in immigration policies' (1999: 64). This is not to say that discretion is not an expression of Member States' own decision-making power. But as illustrated by the previous examples, scholars seem to use this interpretation to argue against discretion. As a consequence, it is not understood as a tool facilitating decision-making and the implementation of directives. On the contrary, it is first and foremost conceived as an instrument which allows Member States to take recourse to national rules and practices, and to preserve them at any price at the risk of undermining EU law.

Without intending to ignore the potentially negative effects that may result from the transposition of discretionary directives, I believe that there is another valuable aspect that needs to be mentioned. In my view, it is too short-sighted to conclude that discretion jeopardises harmonisation. Instead, I suggest another interpretation of discretion: seeing it as a tool that initially makes it possible to achieve harmonisation in areas that are politically very

sensitive – apparently relatively 'young' EU areas where the previously strong influence of Member States is still detectable. In these areas discretion reflected, for instance, by minimum harmonisation requirements, enables the EU to get 'a foot in the door' while, at the same time, the possibility still remains to open this door more fully to progressively adapt minimum requirements to become full harmonisation measures at a later moment. In other words, discretion opens up chances for 'phased harmonisation'.

16.4 Uses of discretion

The latter observation relates to the use of discretion at the EU level. But how was discretion put to use in the national transposition of EU directives? The case study analyses benefitted in this regard from a closer look at the explanatory memoranda to the transposition measures and interviews with Dutch civil servants in charge of transposing the directives analysed. What is the picture that emerges from the case study findings?

16.4.1 Mixed picture

Starting with a cursory overview, the transposition analyses regarding the Blue Card Directive and Pyrotechnic Articles Directive show that discretion was used to slot EU requirements smoothly into already existing Dutch legislation, leaving the latter largely intact. In the former case, the use of discretion contributed to compliance with EU law whereas in the latter case positive effects of discretion did not suffice to achieve the same outcome. With regard to the Toy Safety Directive, it could not be concluded that discretion served to preserve national legal structures. But also here, discretion reflected in the choice of forms and methods of (legal) implementation was shown to have a useful function. As established earlier, it did not have a decisive role to play but it seems to have had a supporting function. And in any case, it did not impede transposition. Discretion took this latter role in the transposition of the Return Directive which was only incorporated into Dutch law with considerable delay. What all of these examples have in common is that they illustrate how discretion was used by implementing actors to shape transposition and the resulting effects.

16.4.2 Facilitating effect

Taking a closer look at the transposition cases, with regard to both Blue Card Directive and Pyrotechnic Articles Directive discretion was used by the national authorities in charge in certain ways that made it unfold its potential to facilitate transposition. Basically, what did not fit was made to fit. This could also include the decision of transposition actors not to make use of discretionary directive provisions. As illustrated by the transposition of the Blue Card Directive, (discretionary) EU requirements that did not

match with those of the Dutch Knowledge Migrant Regulation and were supposed to have undesired effects were not transposed.[4] At the same time, discretion was used to transpose directive requirements that were in line with national legislation.[5]

These latter examples show that discretion eased fitting the Directive into the national legal framework, exhibiting discretion's 'facilitating-fit-function'. It also had a bearing on the transposition of the provisions defining and categorising pyrotechnic articles and EU enforcement requirements of the Pyrotechnic Articles Directive which were not in line with the national approach. Discretion, however, implied by the choice of implementation forms and methods as well as the directive text,[6] made it possible to incorporate EU definitions and categories on pyrotechnic articles. This could be done by largely preserving national concepts already firmly established in own legislation (the categories of consumer fireworks and professional fireworks) as well as national practice aiming to keep certain pyrotechnic articles available under the Directive's framework away from consumers. Using discretion also made it possible to continue with the application of national rules and practices with regard to aspects of enforcement.[7]

16.4.3 Impeding effect

The way discretion was used led in one case, alongside other factors, to non-compliance as illustrated by the transposition of the Return Directive. Also here, transposition was geared towards preserving the national legal framework. This point notwithstanding, in the presence of low compatibility of EU and national legislation, the overall approach by the Ministry of Security and Justice and the way discretionary provisions were transposed, rather emphasised than mitigated the differences between EU and national law. This was apparent in the transposition of the provisions on voluntary departure and detention which resulted in stricter outcomes than implied by the Directive. As a result, the use of discretion undermined instead of supported the main tenor and objective of the Directive as laid down in Article 1: 'to promote voluntary instead of forced returns and to establish common standards and procedures for returning illegally residing third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.'

---

4 This concerns Articles 2(g) of the Blue Card Directive and the requirement of applicant's level of professional experience and Article 8(2) making admission for the purpose of highly qualified employment conditional on the outcome of an examination of the Member States' labour markets.

5 Discretion granted by Article 6 on volumes of admission was used to ensure the exclusion of the third undesired category of workers resulting into Article 3.32 of the Foreigners Decree.

6 Article 6(2) limitation to free movement clause.

7 This becomes evident from the use of Article 6(2) regarding the storage of fireworks.

16.4.4 Supporting transposition

Finally, how discretion was used is a relevant aspect with regard to the transposition of the Toy Safety Directive. The case study findings led to the conclusion that it had no decisive role in transposition. But in fact it did have a positive influence on transposition – albeit in a different way as compared to the Blue Card Directive and Pyrotechnic Articles Directive. In the area of product safety regulations where national rules are already into close alignment with EU law, discretion did not carry any relevance by allowing for the incorporation of EU requirements by preserving previously established legislation. In fact, the discretionary choice of forms and methods rather reflects that transposition is already directed towards the fact that legislation is made in Brussels. First of all, the traditional transposition approach of the Ministry in charge (Ministry of Health, Welfare and Sport), towards EU law in general implies the use of delegated legislation, and administrative acts such as government decrees.[8] Not only does this point to the possibility of relatively swift transposition in the absence of strong parliamentary involvement. It also points to the fact that, as was exemplified by the Toy Safety Directive, hardly any discretion is available that would require parliamentary debate on decisions to be taken regarding the interpretation and application of the directive's requirement which, in turn, underlines the high harmonisation level national law has already been subjected to. To put the point differently, the application of certain transposition techniques makes it evident that discretion for shaping transposition in a national fashion (using as much as possible elements from own legislation) has ceased to be relevant in the considerations of implementing actors. With respect to the Toy Safety Directive in particular, this is shown by the fact that the first Toy Safety Directive was transposed by the copying technique[9] which implies a transposition measure equivalent to the wording of the directive and indicates the marginal role of national legal terms and concepts in transposing the Directive. Meanwhile, this technique has been replaced by the technique of direct and dynamic referencing as exemplified by the transposition analysis of the revised Toy Safety Directive. The use of this technique underlines even more that national legislation is no longer taken as a starting point in transposing directives. This was also confirmed by the senior civil servant of the Ministry of Health, Welfare and Sport who pointed out that directives in areas such as EU product safety regulation, as well as EU pharmaceutical legislation and animal testing, are highly detailed leading to considerable changes in national legislation which nowadays largely refers to EU rules introduced in the Member States by means of directives.

8 *Parliamentary Papers II* 2007/08, 31498, no. 1-2, pp. 50-51.

9 By means of this technique a transposition measure is created which is equivalent to the wording of the directive.

While additional discretion – flexible arrangements implied by the directive text – is lacking and does not play a pertinent role in preserving national law, in my view it may still have relevance for national transposition. The transposition of the Toy Safety Directive illustrates that discretion in the form of implementation forms and methods allowed for the relatively smooth transposition of the directive – as already noted, the delay was negligible. By using direct referencing in transposing the Directive, the likelihood of misinterpretation and misapplication was largely reduced, and by means of direct referencing the future swift and efficient amendment to toy safety rules was guaranteed. National stakeholders were also involved by means of an established procedure[10] and largely approved of the transposition measure. Against the transposition background just described and taking into consideration that, as previously noted, the Ministry of Health, Welfare and Sport is known to have one of the best compliance records with regard to EU directives, it is at least conceivable that discretion has been beneficial for the transposition of EU directives. It does not seem unreasonable to assume that the way discretion has been used – in choosing transposition forms and methods – may have served the Ministry over time to establish a routine way of dealing with transposition in the area of product safety.

Up to this point, the empirical results have been assessed with the aim of answering the dissertation's questions concerning the role and effects of discretion, the circumstances under which it comes into play, and how it is used within the context of transposition. All that is missing now is elaborating on the link between discretion and legitimacy. And in particular how does discretion link up with the three dimensions of input, throughput and output legitimacy?

16.5 Discretion and legitimacy

To someone like Weber (1864-1920), a lawyer and one of the founding fathers of sociology, it may not have been obvious why discretion should be of relevance for modern legal systems and have certain implications for their legitimacies. In the academic world Weber is well known for his concept of legitimacy which has influenced contemporary debates about the rightful exercise of power but also triggered criticism (a case in point is Beetham, 1991). In Weber's view, it is primarily the rationality of the rule of law that makes people, in modern legal societies, accept and obey power exercised

10 Regulier Overleg Warenwet', ROW. See footnote 27, chapter 12.

over them.[11] Legal systems based on the rationality of the rule of law as an overarching principle have administrations that are rule-governed and work in a scientific and objective way. Hence, administrative actors exercise power rationally i.e. according to legal, rational principles (Galligan, 1990: 64-68). This prevalence of rules and principles precludes that any difficulties arise from having to choose among possible courses of action in the application of law: Hence the conclusion that 'there would be no problem of administrative discretion since the concern of the bureaucratic institutions would be to find the most rational and efficient means for implementing legislative policies' as explained by Galligan who elaborates on the implications of Weber's theory for the concept of discretion (Galligan, 1990: 68; see also Feldman, 1992). And yet, later scholars of public administration have recognised that discretion is an inevitable part of administrative action (Feldman, 1992: 164).

In the present study this latter view is shared. In addition, it has acted on the assumption that discretion matters for the functioning of modern legal systems, including their administrations which are broadly involved in the application of law. What's more, it sought to show that discretion can play a useful role in law-making and (legal) implementation processes. By looking into the role of discretion in EU decision-making and the national transposition of EU directives, its aim was to highlight the facilitating effects discretion may unfold in these processes and to show that it can contribute to their successful conclusion. Bu there is more to say to it. Taking this approach one step further, it is believed that discretion can contribute to the legitimacy of EU directives in national law. The central argument is that the legitimacy of EU directives may benefit from discretion in so far as discretion can be used in transposition processes to enhance the input, throughput and output legitimacy of these directives.

As explained in the introduction to this study, legitimacy can be described in terms of input (government by the people), throughput (government with the people), and output (government for the people). These three legitimacy dimensions can serve to assess legitimacy on a more abstract level, linking them to different principles of legitimacy which describe the content of the concept more directly. One way to conceive of legitimacy in the EU is to link it to principles of indirect, parliamentary, technocratic and procedural legitimacy which have elements of both input and output legitimacy.[12] The principles function as vectors that alongside the output and input dimensions have served to pinpoint legitimacy issues

11 Alongside the rationality of the rule of law, acceptance and obedience may be motivated by peoples' belief in a charismatic leader or custom and tradition. While charisma and tradition are two sources of legitimacy in especially pre-modern societies, the rationality of the rule of law is the prevalent pattern in modern legal societies. See Galligan, 1990, pp. 64-65. Galligan bases his observations on his reading of, amongst others, Weber's, M. Economy and Society edited by G. Roth and C. Wittick (1978) California UP: Berkeley: University of California Press.

12 The dimension of throughput legitimacy was only studied in more detail at a later stage. It largely corresponds with procedural principles of legitimacy.

regarding different aspects of the European Union, its institutions, processes and legislation (Lord and Magnette, 2004; Georgiev, 2013; Stack, 2014).

But the aim here is not to strictly stick to the vector model. For present purposes it shall rather be used to stimulate reflections about legitimacy that are of immediate relevance for the context at hand. Without necessarily combining them, both legitimacy principles (vectors) and input, throughout and output dimensions are considered useful in identifying and describing the main issues at stake with regard to the legitimacy of EU directives. To this end, the focus of the discussion alternates between EU decision-making and national transposition. Reference is made to transposition in the Netherlands by using the case studies for the sake of illustration.

16.5.1 Discretion and output legitimacy

The case studies show several features of the Dutch transposition context that were previously pointed out. To start with, they illustrate the fact that the transposition of EU directives is largely an administrative process in the Netherlands which also applies to transposition in other Member States (Steunenberg and Voermans, 2006). Except for the Waste Framework Directive and Return Directive, in all other cases (Blue Card, Pyrotechnic Articles, Toy Safety, and Stage II Petrol Vapour Recovery) transposition was carried out without a prominent role for the Dutch Parliament. From the viewpoint of democratic legitimacy, this should not be a reason for concern where directives imply technical requirements or adjustments to previously transposed EU rules – and, in any case, where they do not have more fundamental implications for Member State citizens. It is true that in Member States such as the Netherlands, the principle of primacy of the legislature serves as a key guideline in the implementation of (EU) law. But this does not necessarily imply that the national parliament is directly involved in the making of each transposition measure.[13] Where national law so provides, implementing actors are encouraged to apply delegation mechanisms to achieve timely transposition. This is in line with the above-mentioned approach to make use of already existing legislative instruments with the aim of achieving compliance with EU directives. It is well known by now that these consideration and choices can be made due to the presence and availability of discretion.

13 For instance, where elements of a directive are subject to delegation, it is not directly involved in transposition. See 'Instructions for the drafting of legislation', no. 22. In exceptional cases, The Dutch Parliament can, however, get involved by means of affirmative resolution ('voorhangprocedure'). See 'Instructions', no. 35. Generally, there also is the possibility for Parliament to scrutinise orders in council before they enter into force by means of a notification procedure ('nahangprocedure'). This may, however, be time-consuming and therefore result in fewer applications of this specific kind of notification procedure.

While compliance with EU law was not reached in all transposition cases analysed, discretion was shown to have facilitated or at least supported legal implementation in three of them. Even though the process was eventually delayed, it facilitated to some extent the transposition of the Pyrotechnic Articles Directives. Most obviously, discretion facilitated and contributed to timely and legally correct transposition in the case of the Blue Card Directive. Finally, discretion had a supportive function, enabling transposition actors to integrate EU rules into the existing legal framework with ease, with regard to the Toy Safety Directive. Very importantly, the transposition of the latter two Directives on legal migration and toy safety respectively, make clear that discretion contributed to compliance with EU law and therefore to the legitimacy of these Directives in national law. This concerns the output dimension of legitimacy in particular: if national transposition meets both conditions of timeliness and legal correctness, a directive can be expected to be fully effective at the domestic level. It is assumed then to be able to unfold its problem-solving capacity at subsequent implementation stages i.e. during the directive's practical application and enforcement. In a nutshell, the transposition examples from the case studies show that discretion facilitated good transposition performance, which being a sound basis for implementation, makes it more likely that long-term effectiveness of the directive within national law will be achieved. Discretion can, thus, contribute to the output legitimacy of directives in national law.

Where directives touch upon more fundamental issues that affect citizens and more discretion is available for their transposition, it seems reasonable, however, to wonder whether this does not require greater involvement from parliament or other national stakeholders in discussions about how to transpose a directive into national law. This could limit or preclude any 'democratic leakage' (Vandamme and Prechal, 2007: 45; Vandamme, 2008: 278). In line with these considerations, the view is taken here that by using discretion for the broader involvement of national actors, the input and throughput legitimacy of EU directives can be enhanced. In the absence of strong and direct influence by national actors on decision-making on directives at the EU level, this is deemed an aspect worth considering further.

16.5.2 Legitimacy at the EU level

The EU adopts law in various fields. For several reasons already touched upon in the introduction to the dissertation, this has given rise to issues of legitimacy. Nevertheless, it would be exaggerated to believe that legitimacy is a pervasive problem. In fact, regarding areas of EU lawmaking and policies it has been noted that legitimacy needs differ depending on the subject matter at stake (Scharpf, 1997: 21; Lord and Magnette, 2004: 190). Problematic issues have emerged in the area of justice and home affairs. In the pre-Lisbon period, democratic legitimacy in the justice and home affairs area, including the sub-domain of migration, was found to

be largely absent. This was caused by a lack of input from parliament and stakeholders and missing mechanisms to ensure transparency and accountability (Carerra and Formisano, 2005; Lavenex and Wallace, 2005: 464). EU decision-making was therefore perceived to be carried out in a 'culture of secrecy' dominated by the involvement of national officials and prevalence of national interests (Kostakopoulou, 2007: 160); like in the case of the Blue Card Directive if only because of the applicable consultation procedure which implies the absence of a more vital role of the European Parliament.[14] It appears, thus, that the legitimacy of EU migration law rested for a long time mainly on indirect legitimacy, being justified by its output (Lord and Magnette, 2004, see also Lord and Beetham, 1998; 2001): the realisation of state preferences pertaining initially to border security matters and later to the regulation of influx of migrants.[15]

In the areas of environment and public health which are also addressed in the case studies, technocratic legitimacy plays an important role in the legitimation of EU decision-making: these directives often include numerous technical requirements which have to be elaborated (Lord and Magnette, 2004: 193). Corresponding tasks are then delegated to expert committees attached to the European Commission. This was partly illustrated by EU decision-making on the environmental and consumer protection directives analysed. On a more general level and as noted above, legitimation of EU law and policies is gained from drawing on different legitimacy principles: indirect, parliamentary, technocratic and procedural (Lord and Magnette, 2004: 184-187). Accordingly, legitimacy of EU decision-making processes on directives can be gained from co-decisions by Member States' governments and the European Parliament on EU directive proposals (indirect and parliamentary legitimacy). In addition, legitimacy is created by involving experts and other stakeholders from different parts of society (e.g. civil society, business groupings and academics) already during the preparation of directives in which due consideration is also paid to procedural aspects, including the principles of subsidiarity and proportionality (technocratic and procedural legitimacy).

16.5.3 Discretion, input and throughput legitimacy

From the above it becomes obvious that several sources contribute to the legitimacy of directives at the EU level. While legitimacy is hence not lacking, it is argued that it should be enhanced when it comes to the transposition of directives at the national level; and this for good reasons. Discretion can be used to this end.

---

14 But in contrast to the Return Directive; in this case EU decision-making had already been brought out a bit of the shadow of secrecy given the applicability of the co-decision procedure.

15 This has become evident from mapping out the historical development of the area as part of the relevant case studies.

In line with the basic principle of democracy, democratic processes and political decisions to be taken should be installed at the same level within a political system (Thomassen and Schmitt, 2004: 377). In other words, these decisions should be made as close as possible to its members, reflecting a strong connection between decision-maker and those affected by the former's decisions. Naturally, EU decision-making does not sufficiently live up to this principle for it takes place remotely from national citizens with national parliaments being involved only to limited extent.[16] Turning to the national implementation stage, the fact remains that here decision-making is mainly shaped by state administrations and not parliaments. Seen in this light, it seems to be useful to consider options for the participation of national-level actors beyond parliamentary involvement. The argument is that the availability of discretion in transposition should be understood as an opportunity to bring national-level actors back in. Granted, when it comes to implementing a directive, its requirements can no longer be changed. As rightly argued in the Dutch policy debate on greater public involvement in implementation processes, once EU directives have to be implemented at the national level, their potential deficiencies can no longer be repaired (Prechal and Vandamme, 2007).[17] This, however, does not make broader involvement of national actors in subsequent decision-making on how to transpose a directive less relevant.

This brings the discussion back to the argument that where more discretion is available, democratic leakage should be avoided by greater involvement on the part of those affected by the EU directive's requirements in decisive legislative discussions. The availability of more discretion should as Vandamme notes, justify 'a full-fledged democratic transposition procedure' instead of 'swift transposition' (2008: 279). He considers discretion in transposition as 'democracy discretion' which supports the argument made here that discretion, if used, can enhance the overall democratic legitimacy of EU directives in national law (Vandamme, 2008). Viewed from this perspective, discretion functions not only as a factor which facilitates a legal

16 This describes especially the situation of the pre-Lisbon period. With the Lisbon Treaty (2009) the situation may change since it aims to strengthen the role of national parliaments in EU decision-making, providing them with a number of control mechanisms to review the application of subsidiarity in legislative proposals forwarded by the Commission. See for instance Arribas, V. and D. Bourdin (2012) 'What does the Lisbon Treaty change regarding subsidiarity within the EU institutional framework', *European Institute of Public Administraition* 2, pp. 13-17. As rightly observed in the academic debate realising the better involvement of national parliaments is, however, also a responsibility of the Member States. See Steunenberg and Voermans, 2006 as well as Steunenberg (2008) 'De hartkwaal van de Nederlandse politiek: mythes over de invloed van Europa', *Regel-Maat* 5, pp. 169-179.

17 Translated from Dutch by myself; the original citation reads as follows: 'Anders gezegd: mogelijke defecten en onvolkomenheden in het EU-wetgevingsproces kunnen niet meer worden 'gerepareerd' op het nationale niveau. Dergelijke reparatie is enkel mogelijk door grotere beïnvloeding van het Europese wetgevingsproces zelf.' See Vandamme and Prechal, 2007, p. 44.

match and, in so doing, enhances the output legitimacy of EU directives in national law – as was argued above. Discretion can also strengthen the input and throughput dimensions of the legitimacy of directives, meaning that it can contribute to fostering wider acceptance of EU requirements built into them by national stakeholders and other citizens and therefore among those who have to apply and obey these directives.

Tying in well with the idea of 'democratic discretion' regarding the transposition of EU directives, other ideas have been presented about discretion in administrative rule-making more in general. In this connection, the use of discretion by administrative actors is considered to strengthen public participation and deliberation and therefore democratic legitimacy of administrative rules and regulations (Hunold and Peters, 2004). According to such views, discretion should be used to shape administrative rule-making along the lines of collaborative forms of governance, especially negotiated rule-making, which are applied in administrative law procedures in the United States and Canada (Hunold and Peters, 2004). Hunold and Peters show how administrative discretion, if put to use, can render administrative rule-making more democratic by making accountability, transparency and other mechanisms deemed relevant from the viewpoint of democratic legitimacy, integral parts of deliberation processes (Hunold and Peters, 2004: 131-149). Put differently, discretion can be used to create these conditions, thereby turning administrative rule-making into a 'government process by and with the people', enhancing input and throughput legitimacy as a result. In more concrete terms, involving stakeholders and citizens in processes of administrative rule-making is believed to enhance commitment to and compliance with the decisions taken by all actors involved. For instance, if discretion is used to bring administrative decision-making closer to citizens, accountability is enhanced because administrative actors are obliged to act upon public input. In the case of bureaucratic drift or insufficient consideration of public interests, administrative actors can be held accountable more immediately as a result of closer collaboration between the administration and citizens (Hunold and Peters, 2004: 140). In addition, citizens are assumed to be more willing to comply with administrative rules and regulations at the practical implementation stage based on the consideration that they themselves assisted in translating these measures into national legislation. As a result and as aptly put by Hunold and Peters: 'Decisions justified with a view to publicly revealed and accepted standards of fairness and equity are believed to enjoy greater legitimacy' (2004: 141). In fact, ideas about deliberative democracy and the role of discretion therein meet here with the core idea of the procedural justice approach which acts on the assumption that people accept even unfavourable outcomes as long as they perceive the way these came into being as fair (Tyler, 1990).

To conclude, discretion has been presented here as a tool that, if put to good use, makes it possible to enhance the legitimacy of administrative rulemaking. In the present context, this means that discretion can be used to upgrade EU directives at the national level in terms of output, but especially

input and throughput legitimacy. In doing so, two important outcomes can be achieved with regard to the transposition of EU directives. The first outcome is that input (expertise) and support can be ensured not only from those primarily in charge of transposition – ministerial civil servants – but also from relevant national stakeholders who are more immediately affected by EU directive requirements. This is considered important with a view to ensuring compliance at the actual application and enforcement stages.[18] The second outcome relates to the idea that available discretionary room can be used by both political and administrative actors in charge of transposition to explain the purpose, content and implication of the directive to be transposed to national citizens who make up 'organised civil society representing a constituency's interest' (Curtin, 2009: 286-287).[19] This may strengthen the understanding and therefore arguably the acceptance of EU law and policies by the wider public. Against this backdrop, it seems that discretion turns out to be a blessing in disguise. While from the academic debate views have emerged which emphasise that discretion is problematic, if not disadvantageous for legal systems, it has been shown here that inherent in the concept of discretion is the potential to contribute to the proper implementation of EU directives and their legitimacy in national law.

16.6 Qualifying observations

It seemed to me that due to the alleged downsides of discretion emphasised in academic debates, discretion's advantages had somewhat faded into the background. While discretion has certainly not slipped from scholarly attention, this study sought to make a contribution to highlight the positive features inherent in its concept which may not yet have been fully recognised. In so doing, discretion's potential for processes of law-making and implementation, with specific regard to the transposition of EU directives, was brought to light. Discretion, however, should not be considered merely in terms of a blessing or curse. This is why attention was paid in the dissertation to both the advantages and disadvantages of discretion. The effects of discretion on transposition, whether positive or negative, should not be overestimated. As noted above, national transposition is shaped by many factors and discretion unfolds its effects in interaction with a few of these. Having said this, it is finally considered useful to put some findings about discretion into perspective, especially regarding its role and implications in creating opportunities for stakeholder and citizen participation in transposition.

---

18 Mastenbroek elaborates on the link between deliberation, transposition and compliance. See Mastenrbroek, 2007, pp. 81-86.

19 Curtin, in fact, uses the term as defined by B. Kohler Koch and C. Quittkat (2009), 'What is civil society and who represents civil society in the EU? Results of an online survey among civil society experts', *Policy and Society*, 28(1), pp. 11-22.

16.6.1 Discretion and deliberation

First, it is deemed justified to ask how processes of deliberation shaped by the use of discretion may be realised in transposition practice to enhance the democratic legitimacy of a process mainly shaped by administrative action. In order to make administrative rule-making more democratic, Hunold and Peters call for comprehensive public involvement to achieve authentic interest representation as well as continuous interaction between negotiating partners – administrative actors and public – in rule-making (Hunold and Peters, 2004: 140). From the knowledge obtained by analysing the Dutch transposition context, it becomes evident that involving other national actors outside ministries and parliaments is organised in the form of 'deliberation light' or, probably more appropriately put, 'dialogue', in which ministry civil servants and stakeholders exchange views about the draft transposition measure(s). The involvement of national stakeholders in the transposition of the Toy Safety Directive has exemplified this. From the viewpoint of practicality, the question is if it is possible to intensify communication between the transposing ministries and public along the lines proposed by Hunold and Peters. Given the time limits imposed by the transposition deadline and other possible constraints (e.g. human capacity), it is difficult to see how this can be feasible. Different, more beneficial framework conditions could possibly be created if other fora are established to involve citizens in legislative and administrative decision-making processes. This kind of citizen involvement has been noted to take place in the Netherlands (Bovens, 2005).[20] Whether the transposition process could benefit from this development remains speculative. Besides the question of practicability, it should be born in mind that where transposition involves updating technical details or implies no substantial changes for the wider public, citizen involvement is far less relevant.

16.6.2 Discretion, deliberation and delay

In the Netherlands, the involvement of parliament in transposition has been discussed as a possible cause for delay, but was not found to be a decisive reason for it (Clement, 2007; *Parliamentary Papers II* 2007-2008, 31498, no. 1-2). The same argument, that delay may occur, can be made regarding more participation of actors outside the transposing ministries in transposi-

20 With specific regard to decision-making in the Netherlands, Bovens makes concrete proposals on how to improve the involvement of citizens in legislative and administrative decision-making processes. Amongst others, he suggests establishing corrective referendums ('corrective referenda') and citizen juries ('burgerjury's') that bring together all relevant actors: politicians, experts and citizens. Deliberation then, and as argued by Bovens, does not remain confined to obtaining technically sound results, but also includes those parts of the population affected by EU law. Taking into account principles of 'representation', 'majority' and 'transparency' ('afspiegelings -, meerderheids- en transparentiebeginsel') adds to the democratic legitimacy of these fora. See Bovens, 2005, pp. 124-126.

tion processes. Delay at the transposition stage can increase deficient implementation at subsequent stages and therefore non-compliance with EU law (Mastenbroek, 2003: 391). Third party involvement (next to ministries and parliaments), on the other hand, could foreclose later problems, for example, that deficient transposition will be challenged in court – in line with the idea that greater interference of citizens in administrative rule-making results in enhanced accuracy and appropriateness of administrative action (Carolan, 2009: 131). Besides, whether belated transposition is slightly or strongly problematic or something in between, may hinge on the extent of delay. For instance and with regard to the transposition of transport directives by several Member States, discretion was found to 'merely' have contributed to short delays of a few months which make it certainly less difficult to catch up on implementation than longer delays (Kaeding, 2007a). Additionally, in case of short-term delays the European Commission may be less prompted to start an infringement proceeding. Short-term delay of the transposition of the Waste Framework Directive, for instance, did not have any such consequences.[21] Finally, empirical findings of transposition analysis have led to the conclusion that delay in transposition does not automatically lead to problems at the practical application stage (Mastenbroek, 2007: 161; Carroll, 2014).

16.6.3 Discretion in different legal contexts

In the midst of all this, it should not be overlooked that discretion is no one-size-fits-all solution to deficits of transposition or vulnerable legitimacy of EU law. This would also contradict its own *raison d'être* which is to enable compromise according to the motto of unity in diversity through which discretion facilitates not only decision-making on directives, but also the incorporation of EU directives into different legal systems. As mentioned further above in the theoretical discussion on discretion: whether or not and how discretion is used in transposition differs among Member States due to their very distinct legal frameworks in which the use of discretion for administrative rule-making may be encouraged or discouraged, depending on the interpretation that is given to the concept of separation of powers.

The latter aspect finally links up with another important issue which concerns generalising the findings of this study. It was noted earlier that case study analysis comes with limitations in this regard. The empirical analysis of this study is based on a single-country design and therefore provides insights into one specific transposition context. As illustrated by the point just made about discretion, context specificity precludes the ability to apply the results of the present analysis to other national transposition contexts, shaped by their own legal-administrative idiosyncrasies. Yet this does

21 Apart from that, the Commission is known to take action selectively anyway, depending on the saliency it ascribes to the issue at stake and the resources available for enforcement. See Steunenberg, 2010.

not make it less legitimate to highlight discretion's potential – particularly since in this dissertation this potential is not only demonstrated with regard to national transposition but also regarding EU decision-making processes. In addition, and as shown here, limitations related to generalising case study findings do not reduce the importance that these findings have for assessing the outcomes of previous research.

16.7 Contributions

Regardless of the apparent trade-off between depth and breadth in studying discretion, this dissertation, having opted for the former (in-depth) approach, offers a number of relevant insights and ideas on the subject matters addressed: discretion in administrative rulemaking, EU decision-making and the national transposition of EU directives and legitimacy in the European Union. Hence, it contributes theoretically, methodologically and empirically to the corresponding academic debates and opens up new perspectives for future research.

16.7.1 Theoretical part

From a theoretical point of view, this study contributes to a better understanding of how discretion helps in making decisions at the EU level and the way discretion is used in the national transposition process. By looking into processes at both the EU and national level, it complements other studies that have focused on discretion's effects on Member State transposition and post-transposition implementation (e.g. Kaeding, 2007; Mastenbroek, 2007; Versluis, 2007; Steunenberg and Toshkov, 2009; Carroll, 2014). The special feature of the dissertation is its multi-perspective approach to discretion by involving different strands of literature not only within one but across disciplines: law and political science which so far have had limited interaction. Literature on discretion in administrative and constitutional law as well as the socio-legal studies, legislative politics in the EU (and United States), implementation of EU directives and finally, legitimacy in the EU were shown to complement each other well in the study of discretion. Weaving together the various insights obtained has proved enriching for examining the place of discretion in modern legal systems. Light could thus be shed on different aspects of discretion, allowing for a more comprehensive understanding of the concept in the context of law-making and implementation. The legal science perspectives proved useful in addressing discretion in the light of the rule of law and separation of powers principles and to explain discretion's potential effects and implications, negative as well as positive, for democratic legal systems. Insights from studies on legislative decision-making and research on EU law implementation in political science and public administration served, on the other hand, to identify and add other valuable pieces to the research puzzle of discretion in EU decision-making

and national implementation: reasons for granting discretion as well as the circumstances under which it takes place were revealed, and it was shown how discretion affects the transposition of EU directives into national law. Taking into account relevant EU, national-level and directive characteristics, two sets of expectations were offered to describe and explain more systematically the role of discretion in EU decision-making and national transposition processes. In this connection it is worth mentioning that theoretically as well as later on empirically, discretion was analysed with regard to its link with three EU policy areas (consumer protection, environment and justice and home affairs / migration), yielding comparative insights into the role of discretion in different fields of EU law-making. This may add to the understanding of EU decision-making, integration dynamics and tensions, all of which are well illustrated by the use of directives to harmonise legal differences in the context of a unity in diversity.

Last but not least, the dissertation has sought to reduce the identified research gap regarding the link between discretion and legitimacy in the context of national transposition. By pointing out the potentials of discretion, it made a contribution to the discussion on proper ways of democratic decision-making to enhance the legitimacy of EU law (Voermans, 2001; Interinstitutional agreement 2003; Stie, 2013).

16.7.2 Methodological part

Expanding and developing the knowledge of discretion entailed that the concept of discretion granted by EU directives (defined in the dissertation as legislative discretion) was elaborated on further. By means of literature review, and classification and interpretation of the content of directives in particular, various manifestations of discretion were introduced and explained. An interdisciplinary effort was made to offer a fine-grained, small-scale[22] analysis of discretion in directives. For this purpose, the theory of legal norms and the social science research method of content analysis were combined, leading to a codebook being developed to assess the scope of discretion granted by individual directives. The aim pursued was not to provide exact measurements, but to indicate a tendency of discretion primarily for the purpose of case selection. All in all, this boiled down to a more refined approach to measuring discretion than previously applied (Kaeding, 2007, Thomson, 2007; 2010; Thomson et al., 2007, Steunenberg and Toshkov, 2009). Due attention was paid to the complex structure that directives can have in order to better capture discretion. Hence, the merit of the codebook (and coding scheme) presented in detail in the Appendix to the dissertation is that it presents a way to identify and describe discretion in more detail, also regarding its implications for national law since legal concepts are used

22 By focusing on discretion in a directive's provision instead of directive article; provision being defined not, as usually done, 'sub-division of an article' but, instead, as a phrase, and therefore smaller unit.

as indicators of discretion. It should, however, be underlined that measuring discretion as proposed in the dissertation represents an initial, preliminary effort. Hence, the codebook offered here is not considered to be a fully-fledged instrument of measurement. Rather, it is thought of as an attempt to assess discretion which does not pretend to be without flaws. At the same time, this implies the opportunity for future improvement.

16.7.3 Empirical part

Regarding the empirical contributions, the case study findings of the dissertation resonate well with other studies in the sense that they offer confirmation of discretion's mixed record with respect to its effects on national transposition. Next to the fact that the empirical results bear out both negative and positive effects of discretion, it is worth mentioning that the empirical results were used to explain the core idea of the concept of legislative discretion within the context of EU law-making and national legal implementation. The contribution made in this regard consists of showing that discretion facilitates or at least supports the incorporation of directive requirements by ironing out differences between EU and national law. It was also shown that due to discretion, Member States are able to incorporate requirements of EU law into their national legal orders by leaving these intact to the greatest extent possible evidencing the EU legislature's 'ingrained respect' for Member States' legal identities. The empirical results pointing to discretion's facilitating role substantiated theoretical claims of the dissertation as well as the consensus-building approach, according to which the delegation of discretionary decision-making competences from the EU legislature to Member States is sought as a way out of conflict (Dimitrova and Steunenberg, 2000; Thomson et al., 2007; Thomson, 2011).

Furthermore confirmed was the view that discretion does not affect transposition individually but by interacting with other factors thereby contributing to both the deficient and proper legal implementation of EU directives (Thomson, 2007; Thomson et al., 2007; Zhelazykova and Torrenvliet, 2011). This relates to factors that have earlier been linked up with discretion and were conceptualised in the dissertation as 'administrative capacity' and 'compatibility' (Mastenbroek, 2007; Kaeding, 2007, Steunenberg and Toshkov, 2009). Empirically it was shown that by interacting with these factors, discretion strengthens the latter's effects on transposition. Discretion was also identified as an interacting factor at post-transposition implementation stages which underlines the relevance of discretion beyond transposition (Carroll, 2014). In contrast to the present study, Carroll uses a different, dynamic concept of misfit with the notion of adaptation pres-

sure as one of its core elements.[23] Despite these differences, it is nevertheless interesting to note that he also addresses the link between misfit and discretion in the implementation of EU law. Carroll claims that discretion has a positive effect on implementation in the presence of high adaptation pressure implying higher misfit (or low fit): accordingly, he assumes that discretion decreases the likelihood of implementation difficulty in the presence of high adaptation pressure which was confirmed by the results of his quantitative analysis (Carroll, 2014: 222). In the present study it is also argued that discretion can positively affect transposition by increasing the positive effect of medium or high compatibility between EU and national rules. In the presence of low compatibility, however, and as evidenced by the case of the Return Directive, discretion was found to have contributed to deficient transposition. While the intention here is not to compare the two studies due to the obvious differences in terms of research design, research context and conceptualisation of the misfit factor, it is nevertheless interesting to note that the link between discretion and misfit between EU and national law also comes into play at later implementation stages, and that it might be possible that discretion takes different roles at each of these stages. In any case, it is apparently worth elaborating further on the relationship between the two factors at all stages of implementation. This would allow for an even more comprehensive picture of discretion in the overall implementation process of EU directives.

16.8 Outlook

A research endeavour such as the latter would certainly benefit from the analysis of a larger number of cases for a more consistent picture of the role and effects of discretion. At the same time, looking into uses of discretion at the various implementation stages requires an in-depth approach to the cases analysed. For future research on discretion, it would therefore be useful to combine quantitative and qualitative approaches into a 'mixed method design' which has already been applied in the study of national implementation (e.g. Mastenbroek, 2007, Kaeding, 2007; Carroll, 2014) to achieve a good compromise between depth and breadth in the study of discretion within the context of the implementation of EU directives. To this end, researchers with relevant expertise could be involved in an interdisciplinary research project on discretion on a wider scale.

23 In contrast to the one used in the dissertation, derived from Steunenberg and Toshkov (2009), Carroll complements his misfit model with considerations about adaptation pressure. In doing so, he shows how different sorts of requirements implied by EU directives or regulations create different degrees of adaptation pressure over time. See Carroll, 2014, pp. 48-53.

Earlier research has called for paying more attention to the exercise of discretion in the legal implementation of EU law (Carroll, 2014: 228) in order to more fully understand how discretion affects this process. The present dissertation took up this challenge with regard to uses of discretion in national transposition. At the same time, it has proved itself to be in the good company of other studies which, while identifying and addressing key questions in their research puzzles, have discovered further issues of central importance along the way which can, at best be highlighted as potential avenues for future research.

Two such potential avenues have already been raised: further elaboration of the codebook as an instrument for assessing the degree of legislative discretion granted by individual EU directives. In this regard, future approaches to assess or measure discretion could consider how to integrate interpretations based on EU primary legislation and case law into the analysis of discretionary provisions and concepts used in directives. Since this adds to the complexity of an already complex matter – directives frequently lack consistency in terms of structure – this must be done with a view to the practical applicability of the measurement instrument that would emerge as a result. This presents a challenging endeavour for which this dissertation hopes to have given relevant input and impetus.

The second potential research area links up to what was noted when discussing the dissertation's empirical contributions: to elaborate on the role of discretion in the national implementation of EU directives by systematically analysing how it is used and with what effects at all implementation stages including, besides transposition, the practical application and enforcement of directives. For instance, and to make it more concrete, it was briefly discussed above whether or not delayed transposition, possibly caused by discretion, amongst other factors, negatively affects subsequent implementation stages. Post-transposition implementation analysis has provided empirical evidence showing that such effects did not occur (Carroll, 2014: 223-224). Against this background, it seems particularly interesting to look into how the different stages relate to each other with specific regard to the role of discretion, uses of it by implementing actors and resulting effects on implementation.

Finally, to further broaden the knowledge on discretion in transposition contexts, future research should study discretion using a cross-country comparative design. It could thereby benefit from comparative research that already exists on transposition approaches and legal contexts in various Member States as well as studies on EU decision-making and transposition in different policy areas (e.g. Steunenberg and Voermans, 2006; Müller et al., 2010; Haverland et al., 2011). Even if implementation is carried out at the national level, this dissertation has demonstrated that the interrelatedness of processes at the EU and national level in making and implementing EU law matters when it comes to drawing a more complete picture of the role of discretion in a directive's life cycle. The various ideas, insights and additional questions raised in this study indicate pathways for future research.

They show in any case that there is no shortage of new challenges when it comes to the study of discretion. This makes continuing research on discretion worthwhile.

Appendices

Annex 1: List of directives subjected to content analysis

	Directive*	Policy content**	Subject matter***
1	*Pyrotechnic Articles Directive* (2007/23/EC)	Industrial policy and internal market / Internal market: approximation of laws Environment, consumers and health protection / Protection of health and safety	Internal market – Principles *Consumer protection* Approximation of laws
2	Consumer Credit Directive (2008/48/EC)	Environment, consumers and health protection / Consumers / Protection of economic interests	Approximation of laws Products from third countries Consumer protection
3	*Toy Safety Directive* (2009/48/EC)	Industrial policy and internal market / Internal market: approximation of laws Environment, consumers and health protection / Protection of health and safety	Internal market – Principles Technical barriers *Consumer protection* Approximation of laws
4	Floods Directive (2007/60/EC)	Environment, consumers and health protection / Environment / General provisions and programmes	Environment
5	Ambient Air Quality Directive (2008/50/EC)	Environment, consumers and health protection / Pollution and nuisances / Monitoring of atmospheric pollution	Environment

	Directive*	Policy content**	Subject matter***
6	Marine Strategy Framework Directive (2008/56/EC)	Environment, consumers and health protection / General provisions and programmes Environment / Pollution and nuisances / Water protection and management	Environment
7	*Waste Framework Directive* (2008/98/EC)	Environment, consumers and health protection / Environment / Space, environment and natural resources / Waste management and clean technology	Environment
8	Environmental Crime Directive (2008/99/EC)	Environment, consumers and health protection / Environment / General provisions and programmes	Environment
9	Insurance Directive (2009/20/EC)	Transport policy / Shipping / Safety at sea Environment, consumers and health protection / Pollution and nuisances / Water protection and management	Transport Environment
10	Road Transport Vehicles Directive (2009/33/EC)	Transport policy / General Environment, consumers and health protection / Environment	Environment Transport
11	Nuclear Safety Directive (2009/71/Euratom)	Environment, consumers and health protection / Environment / Pollution and nuisances / Nuclear safety and radioactive waste	Nuclear common market Provisions governing the Institutions

	Directive*	Policy content**	Subject matter***
12	*Stage II Petrol Vapour Recovery Directive* (2009/126/EC)	Energy / Oil and gas Environment, consumers and health protection / Pollution and nuisances / Monitoring of atmospheric pollution	Approximation of laws Internal market – Principles *Environment*
13	Sustainable Use Directive (2009/128/EC)	Agriculture / Approximation of laws and health measures / Plant health Environment, consumers and health protection / Environment / General provisions and programmes	Environment Plant health legislation
14	*Return Directive* (2008/115/EC)	Area of freedom, security and justice / Free movement of persons	*Justice and home affairs* Free movement of persons Employment asylum policy
15	Mediation Directive (2008/52/EC)	Area of freedom, security and justice / Programmes	Justice and home affairs
16	*Blue Card Directive* (2009/50/EC)	Area of freedom, security and justice / Free movement of persons / Immigration and the right of nationals of third countries	Free movement of persons *Justice and home affairs*
17	Employer Sanction Directive (2009/52/EC)	Area of freedom, security and justice / Free movement of persons / Immigration and the right of nationals of third countries	Free movement of persons Justice and home affairs

* In italics: directives and policy areas analysed in the case studies
** Indicated by the directory code in the legal database EUR-Lex
*** Indicated in EUR-Lex

Annex 2:
List of interview partners

Return Directive (2008/115/EC)
Maykel Bouma – Migration Policy Department, Ministry of Security and Justice
Edwin Brijder – Legislation and Legal Affairs Department, Ministry of Security and Justice

Blue Card Directive (2009/50/EC)
Jeroen Raukema – Legislation and Legal Affairs Department, Ministry of Security and Justice
Jan Verboom – Migration Policy Department, Ministry of Security and Justice

Waste Framework Directive (2008/98/EC)
Annemarieke Grinwis – Directorate-General for Spatial Development and Water Affairs, Ministry of Infrastructure and the Environment
Hans Spiegeler – Directorate-General for the Environment & International Affairs Department, Ministry of Infrastructure and the Environment
Maarten van het Bolscher – Directorate-General for the Environment & International Affairs, Ministry of Infrastructure and the Environment

Stage II Petrol Vapour Recovery Directive (2009/126/EC)
Michel Janssens – Climate, Air and Noise Department, Ministry of Infrastructure and the Environment

Pyrotechnic Articles Directive (2007/23/EC)
Rob Duba – Safety and Risks Department, Ministry of Infrastructure and the Environment
Maik Schmahl – Directorate-General Enterprise, European Commission

Toy Safety Directive (2009/48/EC)
Bert Jan Clement – Legislation and Legal Affairs Department Ministry of Health, Welfare and Sports
Melanie van Vugt – Nutrition, Health Protection and Prevention Department, Ministry of Health, Welfare and Sports

Discretion in European directives
Ludwig Krämer – Head of Unit on Environmental Governance, European Commission (2001-2004); Professor of European and German environmental law, University of Bremen

Josien Stoop – Legislative lawyer and senior advisor on EU law, Directorate for Administrative and Legal Affairs, Ministry of Infrastructure and the Environment

Tineke Strik – Assistant Professor Migration Law, Centre for Migration Law, Radboud University Nijmegen; Member European Affairs Committee, Dutch Senate

Patrick van den Berghe – Jurisconsult / Legal Counsel to the Minister on European Law, Ministry of Economic Affairs

Thomas van Rijn – Director Business Law, Legal Service, European Commission

Jonathan Verschuuren – Professor of European and International Public Law, Tilburg Law School

Annex 3: Codebook

1. Introduction

The codebook was drawn up for the purpose of analysing European directives, and in particular for assessing their individual margins of discretion. The objectives and structure of the codebook are outlined in a first step. This is followed, in a second step, by a presentation of the coding scheme: main categories, sub-categories, indicators and examples, all of which are used to identify and describe discretion in directives.

1.2 Objectives

The codebook, first of all, has a pragmatic aim. Discretion margins are one of the criteria determining the selection of directives for the case studies of negotiation and transposition processes. Since directives do not come with a fact sheet listing their properties, including the margin of discretion they grant to Member States, they have to be further analysed to find out more about the discretionary leeway they offer for implementation. The codebook, however, is not applied to achieve exact measurement results. Rather its objective is to make it possible to indicate a tendency regarding the directive's scope of discretion: does the directive which is analysed confer rather more or less discretion upon Member States? Furthermore, the detailed approach to discretion pursues aims which are considered important for the study of discretion in the present context. It is used to show – without claiming to be exhaustive – how diverse the forms are that discretion takes in directives and which specify the 'range of options or alternatives' Member States have in implementing them. The codebook therefore serves to provide for a better understanding of legislative discretion. At the same time, by capturing the various discretion manifestations, the aim is to illustrate the EU's normative treaty commitment to respect deeply entrenched rules and practices in its Member States – a point which was highlighted as one of the motives underlying the use of discretion, and which sheds additional light on the conducive role that discretion can play in the (legal) implementation of directives. All in all, this codebook should be understood as a preliminary attempt to describe discretion in directives more comprehensively and as an instrument to indicate a tendency towards larger or smaller margins of discretion of directives.

1.3 Structure

The codebook lays down the coding rules in a so-called coding scheme also referred to as 'coding frame'. Formal aspects are addressed first, including the definition of a directive provision which takes different forms hinging on the structure of the given (sub-)article. The second part introduces the types of provisions, standard and relevant provisions, as well as the main categories of permissive and obligatory language. The main categories are reflected in directives by discretionary and non-discretionary provisions, in other words, sub-categories which are further divided into several permission and obligation types. These sub-categories are usually indicated by may- and shall-clauses. All of these elements constitute the coding scheme. To keep explanations of definitions in a concise and accessible form, they are preceded by 'information texts' which provide brief descriptions of the key terms repeatedly used in defining discretion manifestations. To further facilitate the understanding of definitions, examples are derived from the directives examined in preparing the coding scheme. On the basis of this exploratory study, it was, however, not possible to offer examples for all definitions.

II. Formal aspects

The definitions provided throughout the codebook take a directive sub-article (or sub-division) as a point of departure. Sub-article is another word for directive provision (see Joint Practical Guide, 2013: 35). A sub-article coincides with a provision in the following example: 'Member States may adopt a separate administrative or judicial decision or act ordering the removal.'[1] Taking a closer look at the syntax of a sub-article, however, shows that they can be more complex and comprise more than one provision:

> Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. ‖ They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.[2]

To clearly indicate the ending of one provision, and the beginning of the next, a symbol of two vertical bars (‖) is used. With a view to the coding of directives it is important to properly define provision(s) within a sub-article. It guarantees that all provisions, and therefore also all permissions or obligations within a sub-article are captured. Each provision is described by one code identifying the discretion instance it contains – in line with the 'one-to-one' rule (the aforementioned criterion of strict differentiation). In other words, the code indicates whether the provision is discretionary (permis-

1 Cf. Article 8(3) of the EU's Return Directive.
2 Cf. Article 8(4).

sion) or non-discretionary (obligation). Another code is ascribed, identifying the addressee of the provision.

As just noted, directive provisions have different structures. This is not necessarily due to their content but may result from the arbitrary nature of the structure and wording of directives. To make it more concrete, the following examples show that obligations for Member States are laid down in one paragraph whereas, in another case, they are enumerated in sub-points:

> Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban ‖ and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement.[3]

But

> Manufacturers of pyrotechnic articles shall:
>
> (a) submit the pyrotechnic article to a notified body as referred to in Article 10 which shall perform a conformity assessment in accordance with Article 9; and
>
> (b) affix a CE marking to, and label the pyrotechnic article in accordance with Article 11, and Article 12 or 13.[4]

Information text	
Coding Unit:	sentences and clauses.
Verb group:	auxiliary (usually may or shall) + main verb, e.g. ‘shall ensure’ (the mode of conduct of a legal norm).
Main clause:	a group of words that contains a verb and makes sense on its own.
Simple sentence:	If a sentence contains a subject, clause (including main verb) it is considered as a ‘simple sentence’.
Complex sentence:	If a sentence is composed of several parts and contains next to a main clause a subordinate clause which depends on the main clause for its meaning, it is considered as a ‘complex sentence’.
Subordinate clause:	is only meaningful in combination with a main clause.
Compound sentence:	If a sentence is composed of two main clauses which are linked by a conjunction such as ‘and’, ‘but’, or ‘so’, it is considered as a ‘compound sentence’.

3 See Article 11(4) of the Return Directive.
4 See Article 4(4) of the Pyrotechnic Articles Directives.

A. Simple sentences

The following applies:

1. If a directive article is a sub-article which is composed of a simple sentence it is considered as *one single provision*.

> Member States *shall ensure* that the national framework in place requires arrangements for education and training to be made by all parties for their staff having responsibilities relating to the nuclear safety of nuclear installations in order to maintain and to further develop expertise and skills in nuclear safety.
> *Article 6(2) of Directive 2009/71/EURATOM*

2. If a sub-article is composed of more than one simple sentence, each simple sentence is considered as *one single provision*.

> Member States *shall ensure* that information in relation to the regulation of nuclear safety is made available to the workers and the general public. ‖This obligation *includes* ensuring that the competent regulatory authority informs the public in the fields of its competence. ‖ Information shall be made available to the public in accordance with national legislation and international obligations, provided that this does not jeopardise other interests such as, inter alia, security, recognised in national legislation or international obligations.
> *Article 8 of Directive 2009/71/EURATOM*

3. If a sub-article is composed of a simple sentence and simple sentences which are enumerated in sub-points, the simple sentence and each enumeration are considered as *provisions in their own right*.

> For the purposes of this paragraph, the following provisions shall apply: ‖
>
> (a) for the calculation of the denominator, that is the total amount of energy consumed in transport for the purposes of the first subparagraph, only petrol, diesel, biofuels consumed in road and rail transport, and electricity *shall be taken into account*; ‖
>
> (b) for the calculation of the numerator, that is the amount of energy from renewable sources consumed in transport for the purposes of the first subparagraph, all types of energy from renewable sources consumed in all forms of transport *shall be taken into account*; ‖
>
> (c) for the calculation of the contribution from electricity produced from renewable sources and consumed in all types of electric vehicles for the purpose of points (a) and (b), Member States *may choose* to use either the average share of electricity from renewable energy sources in the Community or the share of electricity from renewable energy sources in their own country as measured two years before the year in question.
> *Article 3(4) of Directive 2009/28/EC*

Note that all provisions contain a main clause. The last main clause, however, contains a different verb group.

4. If a sub-article is composed of a simple sentence and enumerated nouns, the simple sentence and each enumerated noun are considered together as *provisions in their own right*.

1. Pyrotechnic articles *shall not be sold* or otherwise *made available* to consumers below the following age limits:

(a) *Fireworks*
Category 1: 12 years.
Category 2: 16 years.
Category 3: 18 years. ‖

(b) *Other pyrotechnic articles and theatrical pyrotechnic articles*
Category T1 and P1: 18 years
Article 7 of Directive 2007/23/EC

Note that enumerations (a) and (b), on their own, cannot be considered as a provision. Only together with the preceding main clause including the legal norm, they constitute a provision in its own right.

5. If a sub-article is composed of a complete simple sentence and followed by enumerated nouns which are completed by enumerations listed in sub-points, both the enumerated nouns and sub-points are considered, together with the main clause of the complete sentence, as *one single provision*.

Member States sharing a marine region or subregion *shall cooperate* to ensure that, within each marine region or subregion, the measures required to achieve the objectives of this Directive, in particular the different elements of the marine strategies referred to in points (a) and (b), are coherent and coordinated across the marine region or subregion concerned, in accordance with the following plan of action for which Member States concerned endeavour to follow a common approach: ‖

(a) preparation:
(i) an initial assessment, to be completed by 15 July 2012 of the current environmental status of the waters concerned and the environmental impact of human activities thereon, in accordance with Article 8;
(ii) a determination, to be established by 15 July 2012 of good environmental status for the waters concerned, in accordance with Article 9(1);
(iii) establishment, by 15 July 2012, of a series of environmental targets and associated indicators, in accordance with Article 10(1);
(iv) establishment and implementation, by 15 July 2014 except where otherwise specified in the relevant Community legislation, of a monitoring programme for ongoing assessment and regular updating of targets, in accordance with Article 11(1); ‖

(b) programme of measures:
  (i) development, by 2015 at the latest, of a programme of measures designed to achieve or maintain good environmental status, in accordance with Article 13(1), (2) and (3);
  (ii) entry into operation of the programme provided for in point (i), by 2016 at the latest, in accordance with Article 13(10).
Article 5(2) of Directive 2008/56/EC

Note that, as mentioned in the previous example, the enumerations (a) and (b) can only be regarded as provisions in their own right when they are considered as supplementing part of the preceding simple sentence.

6. If a sub-article is composed of one incomplete simple sentence which is completed by more than one enumeration, each match of incomplete simple sentence and enumeration is considered as *one single provision*. If an enumeration includes another simple sentence, this simple sentence is considered as *another provision in its own right*.

The national framework *shall establish* responsibilities for:

(a) the adoption of national nuclear safety requirements. || The determination on how they are adopted and through which instrument they are applied *rests* with the competence of the Member States; ||

(b) the provision of a system of licensing and prohibition of operation of nuclear installations without a license; ||

(c) the provision of a system of nuclear safety supervision; ||

(d) enforcement actions, including suspension of operation and modification or revocation of a license.
Article 4(1) of Directive 2009/71/EURATOM

7. If a sub-article is composed of an incomplete sentence and followed by simple sentences which are enumerated in sub-points, it is considered as comprising *two provisions in their own right*.

Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities:

(a) Member States *shall ensure* that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of electricity produced from renewable energy sources; ||

(b) Member States s*hall* also *provide* for either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources;
Article 16(2) of Directive 2009/28/EC

Note that the incomplete sentence and first enumeration are considered together as one single provision, followed by another single provision (main clause).

B. *Complex sentences*

The following applies:

8. If a sub-article is composed of a complex sentence it is considered as *one single provision*.

> Where the market surveillance authorities of one Member State *have taken* action pursuant to Article 20 of Regulation (EC) No 765/2008, or where they *have* sufficient reason to believe that a toy covered by this Directive presents a risk to the health or safety of persons, they *shall carry out* an evaluation in relation to the toy concerned covering all the requirements laid down in this Directive.
> *Article 42 of Directive 2009/48/EC*

9. If a sub-article is composed of a complex sentence which contains verb groups with different auxiliaries, it is considered as *one single provision*.

> Where, in the course of that evaluation, the market surveillance authorities *find* that the toy does not comply with the requirements laid down in this Directive, they *shall* without delay *require* the relevant economic operator to take appropriate corrective action to bring the toy into compliance with those requirements, to withdraw the toy from the market, or to recall it within a reasonable period, commensurate with the nature of the risk, as they *may prescribe*.
> *Article 42(1) of Directive 2009/48/EC*

10. If a sub-article is composed of a complex sentence and the subordinated clauses are enumerated as exceptions, it is considered as *one single provision*.

> Given that mediation is intended to take place in a manner which respects confidentiality, Member States *shall ensure* that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, *except*:
>
> (a) where this *is* necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
>
> b) where disclosure of the content of the agreement resulting from mediation *is* necessary in order to implement or enforce that agreement.
> *Article 7(1) of Directive 2008/52/EC*

C. *Compound sentences*

The following applies:

11. If a sub-article is composed of a compound sentence, it is considered as comprising *two provisions*.

> Member States *shall lay down* rules on penalties for economic operators, which may include criminal sanctions for serious infringements, applicable to infringements of the national provisions adopted pursuant to this Directive, || and *shall take* all measures necessary to ensure that they are implemented.
> *Article 51 of Directive 2009/48/EC*

12. If a sub-article is composed of a compound sentence and the main clauses are enumerated, it is considered as comprising *two provisions*.

> Manufacturers of pyrotechnic articles *shall*:
>
> (a) *submit* the pyrotechnic article to a notified body as referred to in Article 10 which shall perform a conformity assessment in accordance with Article 9; || and
>
> (b) *affix* a CE marking to, and label the pyrotechnic article in accordance with Article 11, and Article 12 or 13.
> *Article 4(4) of Directive 2007/23/EC*

Note that the preceding shall-clause is also part of the second provision and that both provisions contain a different verb group ('shall submit', 'shall affix').

III. Content-related aspects

This part introduces the types of provisions that are distinguished in the analysis and coding of directives. First, a distinction is made between standard provisions and relevant provisions. Standard provisions are provisions that, as a rule, are part of every directive: these are the initial and final provisions but also provisions concerning standard procedures (e.g. comitology procedures) or relating to the applicability of specific directive requirements. The other group of provisions are those which are relevant to Member States, grant or reduce their discretion and are therefore considered when discretion is measured. They are further divided into sub-categories that describe the permissive and obligatory language categories, and hence those provisions granting discretion by larger or smaller degrees (discretionary and non-discretionary provisions). Additionally, a third category is established for those provisions that cannot be assigned to either of the two main categories but represent a combination of both and are therefore classified as 'hybrid provisions'. The various sub-categories of both permissive and obligatory language categories, i.e. the different discretion manifestations, are illustrated and, where applicable, the legal concepts they pertain to are identified. Regarding the degree of detail, the sub-categories capture up to three different aspects which are considered to make part of a discretion manifestation: First, permissions and obligations are coded without further conditions being attached to them (e.g. 'Member States may or shall do something') and are therefore referred to as simple permissions' and 'simple obligations'. Permissions and obligations can, however, be subjected to further conditions. In this case they are coded as permissions or obligations that apply under certain conditions (e.g. 'Member States may

or shall do something *if*…'). Finally, a third aspect that a discretion manifestation can include is taken into account. It is referred to as 'reference to the national legal order'. It indicates that a directive requirement takes as a reference point Member States' legal situation:

> If the EU Blue Card issued by the first Member State expires during the procedure, Member States *may issue*, *if required by national law*, national temporary residence permits, or equivalent authorisations, allowing the applicant to continue to stay legally on its territory until a decision on the application has been taken by the competent authorities.
> *Article 18(5) of the EU's Blue Card Directive*

Information text
Addressees of a provision are immediate addressees:
a) Member States or national authority acting on their behalf
b) European Commission, Council of Ministers (CoM) or European Parliament (EP)
c) Member States and European Commission
d) European Commission and / or EU-level institutions other than CoM or EP (e.g. European Central Bank, European Standards Organisations like CEN, CENELEC etc.)
Addressees of a provision are intermediate addressees (not liable for infringements of directives):
e) third parties (e.g. economic operators, third-country nationals)
Discretionary discretion manifestation (permission): indicated by variants of may-clauses, or other expressions, in a few cases shall-clauses.
Non-discretionary discretion manifestation (obligation): indicated by variants of shall-clauses, or other expressions.
Hybrid discretion manifestation (combination of permission and obligation): indicated by may-clause and shall-clause.

I. Standard provision

The following applies:

13. If a sub-article contains an addressee and makes part of the initial or final provisions including rules that are part of every directive it is considered as a *standard provision*.

> Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 July 2010 at the latest. They shall forthwith communicate to the Commission the text of those provisions.
> *Article 26(1) of Directive 2008/56/EC*

14. If a sub-article concerns standard procedures (e.g. comitology procedures) or the applicability of specific parts of the directive, it is also considered as a *standard provision*.

> The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.
> *Article 29(2) of Directive 2008/50/EC*
>
> This paragraph is applicable from 19 December 2011.
> *Article 15(6) of Directive 2009/50/EC*

Note that the first example is a provision that relates to rules on the committee procedure which involves the European Commission as well as the Member States. Therefore this provision is coded as a standard provision addressing both. The second provision is understood as being addressed to Member States.

II. Relevant provision

The following applies:

15. If a sub-article contains an addressee and an indicator of a discretionary, non-discretionary or hybrid discretion manifestation, it is considered as a *relevant provision*.

> a) *Member States may decide* not to apply this Directive to third-country nationals (…).
> *Article 2(2) of Directive 2008/115/EC*
>
> The EU Blue Card *shall be issued by the competent authorities* of the Member State.
> *Article 7(3) of Directive 2009/50/EC*
>
> b) *The Commission shall publish* in the Official Journal of the European Union the references of such harmonised standards.
> *Article 8(2) of Directive 2007/23/EC*
>
> c) Where *a Member State or the Commission* considers that the harmonised standards referred to in paragraph 2 of this Article do not fully satisfy the essential safety requirements set out in Annex I, the Commission or the Member State concerned shall refer the matter to the Standing Committee set up by Directive 98/34/EC, giving its reasons.
> *Article 8(4) of Directive 2007/23/EC*
>
> d) Where the national measure is considered to be justified and the non-compliance of the toy is attributed to shortcomings in the harmonised standards referred to in Article 42(5)(b), the Commission […]shall bring the matter before the Committee set up by Article 5 of Directive 98/34/EC. *That Committee shall consult* the relevant European standardisation body or bodies and deliver its opinion without delay.
> *Article 43(3) of Directive 2009/48/EC*
>
> (e) *Manufacturers shall ensure* that pyrotechnic articles placed on the market comply with the essential safety requirements set out in Annex I.
> *Article 4(1) of Directive 2007/23/EC*

Note that sometimes the addressee is not mentioned in a provision. In such a case the addressee can usually be derived from the context of the whole article.

Information text	
Certain conditions:	Conditions under which a permission or obligation applies, indicated by grammatical structures, e.g. 'where', 'if', 'only', 'unless', 'may only', 'may only… provided that'.
Conditions referring to the national legal order:	Certain conditions under which a permission or obligation applies, including a so-called 'reference to the national legal order'.
Reference to the national legal order:	mentioned in a discretionary or non-discretionary provision together as part of the permission or obligation and indicated by expressions like e.g. 'in conformity with national law', 'in accordance with national law', 'if required by national law', and 'defined by national law'.

II.1 Discretionary provision (permission)

The following applies:

16. If a relevant provision contains an indicator of a discretionary discretion manifestation, it is considered as a *discretionary provision (permission)*.

> Member States *may increase* the age limits under paragraph 1 where justified on grounds of public order, security or safety. Member States *may* also *lower* the age limits for persons vocationally trained or undergoing such training.
> *Article 7(2) of Directive 2007/23/EC*

II.1.1 Sub-categories

PERMISSION TO DO SOMETHING (SIMPLE PERMISSION)

17. If a discretionary provision allows Member States to do something, it is considered as *permission to do something (simple permission)*.

> Member States *may require* the applicant to provide his address in the territory of the Member State concerned.
> *Article 5(2) of Directive 2009/50/EC*

> The determination on how they are adopted and through which instrument they are applied *rests with the competence of* the Member States.
> *Article 4(1) of Directive 2009/71/EURATOM*

PERMISSION TO DO SOMETHING WITH REFERENCE TO THE NATIONAL LEGAL ORDER

18. If a discretionary provision allows Member States to do something and contains a reference to the national legal order it is considered as *permission to do something with reference to the national legal order*.

> The information on reasons in fact *may be limited where national law allows for* the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.
> *Article 12(1) of Directive 2009/50/EC*

PERMISSION UNDER CERTAIN CONDITIONS

19. If a discretionary provision allows Member States to do something and contains certain conditions under which the permission applies, it is considered as *permission to do something under certain conditions.*

> The body concerned *may perform* the activities of a notified body *only where* no objections are raised by the Commission or the other Member States within two weeks of a notification *where* an accreditation certificate is used *or* within two months of a notification where accreditation is not used.
> *Article 31(5) of Directive 2009/48/EC*

PERMISSION UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

20. If a discretionary provision allows Member States to do something and contains certain conditions under which the permission applies and a reference to the national legal order, it is considered as *permission to do something under certain conditions referring to the national legal order*.

> Member States *may retain* restrictions on access to employment, *provided* such employment activities entail occasional involvement in the exercise of public authority and the responsibility for safeguarding the general interest of the State and *where*, *in accordance with existing national or Community law*, these activities are reserved to nationals.
> *Article 12(3) of Directive 2009/50/EC*

PERMISSION TO GO BEYOND WHAT IS PRESCRIBED

21. If a discretionary provision allows Member States to take more far-reaching measures than established by the directive, it is considered as *permission to go beyond what is prescribed*.

> Member States *may introduce stricter* protective measures than those provided for under the Directive.
> *Article 14 of Directive 2009/147/EC*

Note that this discretionary provision gives expression to the legal concept of minimum harmonisation which implies a higher discretion margin for Member States for the purpose of implementation. It is usually expressed by the sentence (or variant of it): 'Member States may introduce (or take) stricter (or more favourable) measures.'

PERMISSION TO GO BEYOND WHAT IS PRESCRIBED WITH REFERENCE TO THE NATIONAL LEGAL ORDER

22. If a discretionary provision allows Member States to take more far-reaching measures than established by the directive and contains a reference to the national legal order, it is considered as *permission to go beyond what is prescribed with reference to the national legal order*.

Note that, as pointed out earlier, not all definitions are illustrated by an example.

PERMISSION TO GO BEYOND WHAT IS PRESCRIBED UNDER CERTAIN CONDITIONS

23. If a discretionary provision allows Member States to take more far-reaching measures than established by the directive and contains certain conditions under which the permission applies, it is considered as *permission to go beyond what is prescribed under certain conditions*.

> This Directive shall be without prejudice to the right of Member States to adopt or maintain provisions that are more favourable to third-country nationals to whom it applies in relation with Articles 6 and 13, *provided that* such provisions are compatible with this Directive.
> *Article 15 of Directive 2009/52/EC*

PERMISSION TO GO BEYOND WHAT IS PRESCRIBED UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

24. If a discretionary provision allows Member States to take more far-reaching measures than established by the directive as well as a reference to the national legal order, it is considered as *permission to go beyond what is prescribed under certain conditions referring to the national legal order.*

PERMISSION TO CHOOSE BETWEEN RULES

25. If a discretionary provision allows Member States to choose between application and non-application of directive standards, criteria or other options, it is considered as *permission to choose between rules*.

> The Member State *may require* the person concerned to report his / her presence within its territory within a reasonable and non-discriminatory period of time.
> *Article 5(5) of Directive 2004/38/EC*

> End-of-waste specific *criteria should be considered*, among others, at least for aggregates, paper, glass, metal, tyres and textiles.
> *Article 6(2) of Directive 2008/98/EC*

> The permission to choose between rules can be expressed by a shall-clause:

> The requirements of paragraphs 1 and 2 *shall be fulfilled in accordance with the following options:*

(a) by setting technical specifications for energy and environmental performance in the documentation for the purchase of road transport vehicles on each of the impacts considered, as well as any additional environmental impacts; or

(b) by including energy and environmental impacts in the purchasing decision, whereby:

- in cases where a procurement procedure is applied, this shall be done by using these impacts as award criteria, and
- in cases where these impacts are monetised for inclusion in the purchasing decision, the methodology set out in Article 6 shall be used.

Article 5(3) of Directive 2009/33/EC

Note that the first example gives expression to the legal concept of optional harmonisation. The Member States can decide whether or not they would like to implement certain rules which are established by the directive. Moreover, optimal harmonisation can also refer to the fact that Member States or economic operators may choose between the application of national standards or harmonised EU standards. Optional harmonisation implies that discretion is granted by larger degrees to Member States or producers of goods. They can decide whether or not they apply EU rules.

PERMISSION TO CHOOSE BETWEEN RULES WITH REFERENCE TO THE NATIONAL LEGAL ORDER

26. If a discretionary provision allows Member States to choose between application and non-application of directive standards or criteria, or among options more generally, and refers to the national legal order, it is considered as *permission to choose between rules referring to the national legal order.*

PERMISSION TO CHOOSE BETWEEN RULES UNDER CERTAIN CONDITIONS

27. If a discretionary provision allows Member States to choose between application and non-application of directive standards or criteria, or among options more generally, and contains certain conditions under which the permission applies, it is considered as *permission to choose between rules under certain conditions.*

Member States *may decide not to undertake* the preliminary flood risk assessment referred to in Article 4 for those river basins, sub-basins or coastal areas where they have *either*:

(a) already undertaken a risk assessment to conclude, before 22 December 2010, that a potential significant flood risk exists or might be considered likely to occur leading to the identification of the area among those referred to in Article 5(1)

or

(b) decided, before 22 December 2010, to prepare flood hazard maps and flood risk maps and to establish flood risk management plans in accordance with the relevant provisions of this Directive.

Article 13(1) of Directive 2007/60/EC

PERMISSION TO CHOOSE BETWEEN RULES UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

28. If a discretionary provision allows Member States to choose between application and non-application of directive standards or criteria, or among options more generally, contains certain conditions under which the permission applies and a reference to the national legal order, it is considered as *permission to choose between rules under certain conditions referring to the national legal order.*

> Member States *may not extend* the period referred to in paragraph 5 *except for* a limited period not exceeding a further twelve *months in accordance with national law in cases where* regardless of all their reasonable efforts the removal operation is likely to last longer owing to:
>
> (a) a lack of cooperation by the third-country national concerned, or
>
> (b) delays in obtaining the necessary documentation from third countries.
> *Article 15(6) of Directive 2008/115/EC*

PERMISSION TO DEVIATE FROM EU RULES

29. If a discretionary provision allows Member States to do something different from a directive requirement, it is considered as permission to deviate from EU rules.

> Until 15 March 2009, each Member State *may postpone* application of this Directive to the retention of communications data relating to Internet Access, Internet telephony and Internet e-mail.
> *Article 15(3) of Directive 2006/24/EC*
>
> Member States may exempt from the requirement laid down in Article 23(1) establishments or undertakings for the following operations:
>
> (a) disposal of their own non-hazardous waste at the place of production; or
>
> (b) recovery of waste.
> *Article 24 of Directive 2009/128/EC*

Note that deviation from EU rules is linked to the legal concepts of derogation and exemption which release Member States from the obligation to apply specific directive requirements or, if justified, exempt them from the application of larger parts or the directive as a whole.

PERMISSION TO DEVIATE FROM EU RULES WITH REFERENCE TO THE NATIONAL LEGAL ORDER

30. If a discretionary provision allows Member States to do something different from a directive requirement and refers to the national legal order, it is considered as *permission to deviate from EU rules with reference to the national legal order*.

PERMISSION TO DEVIATE FROM EU RULES UNDER CERTAIN CONDITIONS

31. If a discretionary provision allows Member States to do something different from a directive requirement and applies under certain conditions, it is considered as *permission to deviate under certain conditions*.

> Member States *may decide not to apply* paragraph 1 *where* the employers are natural persons and the employment is for their private purposes.
> *Article 4(2) of Directive 2009/52/EC*

PERMISSION TO DEVIATE FROM EU RULES UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

32. If a discretionary provision allows Member States to do something different from a directive requirement, applies under certain conditions and refers to the national legal order, it is considered as *permission to deviate under certain conditions referring to the national legal order*.

> The information on reasons in fact *may be limited where national law allows for* the right to information to be restricted, in particular in order to safeguard national security, defense, public security and for the prevention, investigation, detection and prosecution of criminal offences.
> *Article 12(1) of Directive 2008/115/EC*

PERMISSION TO DELEGATE

33. If a discretionary provision allows Member States to assign implementing tasks to national authorities, expressed by a may-clause or shall-clause, it is considered as *permission to delegate.*

> Member States *shall designate* a notifying authority that shall be responsible for setting up and carrying out the necessary procedures for the assessment and notification of conformity assessment bodies for the purposes of this Directive, and for the monitoring of notified bodies, including compliance with Article 29.
> *Article 23(1) of Directive 2009/48/EC*

> Member States *may confer* upon the courts, or administrative authorities, powers enabling them, with a view to eliminating the continuing effects of misleading advertising or unlawful comparative advertising, the cessation of which has been ordered by a final decision.
> *Article 5(4) of Directive 2006/114/EC*

Note that the permission to delegate relates to the legal concept of delegation. Indicators can be both shall- and may clauses. While Member States have the duty to implement EU law, they may delegate rule-making powers to public authorities they consider the most suitable in line with the principle of institutional autonomy. The permission to delegate is usually not linked to any other conditions or references to the national legal order.

II.2 Non-discretionary provision (obligation)

The following applies:

34. If a relevant provision contains an indicator of a non-discretionary discretion manifestation, it is considered as *non-discretionary provision (obligation)*.

> If the Commission considers that the national measures are not justified, the Member State concerned *shall withdraw* them.
> *Article 16(1) of Directive 2007/23/EC*

II.2.1 Sub-categories

OBLIGATION TO DO SOMETHING (SIMPLE OBLIGATION)

35. If a non-discretionary provision requires from Member States to do something, it is considered as an *obligation to do something (simple obligation)*.

> Member States *shall ensure* that creditors and, where applicable, credit intermediaries provide adequate explanations to the consumer (…).
> *Article 5(6) of Directive 2008/48/EC*

OBLIGATION TO DO SOMETHING WITH REFERENCE TO THE NATIONAL LEGAL ORDER

36. If a non-discretionary provision requires from Member States to do something and contains a reference to the national legal order, it is considered as an *obligation to do something with reference to the national legal order*.

> Member States *shall ensure* that the necessary legal assistance and / or representation is granted on request free of charge *in accordance with relevant national legislation* or rules regarding legal aid (…)
> *Article 13(4) of Directive 2008/115/EC*

OBLIGATION TO DO SOMETHING UNDER CERTAIN CONDITIONS

37. If a non-discretionary provision requires from Member States to do something and contains certain conditions under which the obligation applies, it is considered as an *obligation to do something under certain conditions*.

> Member States *shall ensure* that, *if* the parties agree to change the total amount of credit after the conclusion of the credit agreement, the creditor updates the financial information at his disposal concerning the consumer and assesses the consumer's creditworthiness before any significant increase in the total amount of credit.
> *Article 8(2) of Directive 2008/48/EC*

OBLIGATION TO DO SOMETHING UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

38. If a non-discretionary provision requires from Member States to do something and contains certain conditions under which the obligation applies and refers to the national legal order, it is considered as *obligation to do something under certain conditions referring to the national legal order*.

> Information *shall be made available* to the public in accordance with national legislation and international obligations, *provided that* this does not jeopardise other interests such as, inter alia, security, *recognised in national legislation* or international obligations.
> *Article 8 Directive 2009/71/EURATOM*

OBLIGATION NOT TO DEVIATE FROM THE DIRECTIVE

39. If a non-discretionary provision does not allow Member States to make rules, other than those laid down by the directive, it is considered as an *obligation not to deviate from the directive.*

> For the products defined in Annex I, Member States *shall not adopt national provisions not provided for by this Directive.*
> *Article 4 of Directive 2000/36/EC*

> Insofar as this Directive contains harmonised provisions, Member States *may not maintain or introduce in their national law provisions diverging from* those laid down in this Directive.
> *Article 22(1) of Directive 2008/48/EC*

Note that this obligation gives expression to the legal concept of total harmonisation which precludes any discretion for Member State implementation. A total harmonisation requirement is indicated by a may-clause or shall-clause in combination with the verbs 'impede, prohibit, restrict' or by similar expressions. In the absence of any discretion being available to Member State implementation, it does not include any reference to national legal orders.

OBLIGATION NOT TO DEVIATE FROM THE DIRECTIVE UNDER CERTAIN CONDITIONS

40. If a non-discretionary provision does not allow Member State to make rules other than those the directive lays down and contains certain conditions under which the obligation applies, it is considered as an *obligation not to deviate from the directive under certain conditions.*

OBLIGATION TO AVOID MARKET RESTRICTIONS

41. If a non-discretionary provision requires from Member States to ensure that a product is not prevented from being placed on the market if it complies with a directive requirement, it is considered as an *obligation to avoid market restrictions*.

> Member States *shall take* all appropriate measures to ensure that equipment is placed on the market and / or put into service only *if* it *complies with the requirements of this Directive* when properly installed, maintained and used for its intended purpose.
> *Article 3 of Directive 2004/108/EC*

Note that this obligation relates to the legal concept of *mutual recognition*. Even though it does not prescribe European standards, mutual recognition does have harmonising effects regarding the national legal-administrative procedures concerning market access for goods. The concept is indicated by a shall-clause like e.g. 'shall take appropriate measures', 'shall not impede'. The concept does not imply any reference to the national legal order.

OBLIGATION TO AVOID MARKET RESTRICTIONS UNDER CERTAIN CONDITIONS

42. If a non-discretionary provision requires from Member States to avoid market restrictions and contains certain conditions under which this obligation applies, it is considered as an *obligation to avoid market restrictions under certain conditions*.

> At trade fairs, exhibitions and demonstrations for the marketing of pyrotechnic articles, Member States *shall not prevent* the showing and use of pyrotechnic articles not in conformity with the provisions of this Directive, *provided that* a visible sign clearly indicates the name and date of the trade fair, exhibition or demonstration in question and the non-conformity and non-availability for sale of the articles until brought into conformity by the manufacturer, where such manufacturer is established within the Community, or by the importer.
> *Article 6(3) of Directive 2007/23/EC*

OBLIGATION TO SHARE IMPLEMENTING POWERS

43. If a non-discretionary provision implies that the European Commission shall be assisted by a committee of national representatives in areas where implementing power are conferred upon the Commission, it is considered, from a Member State point of view as an *obligation to share implementing powers*.

> Committee procedure – The Commission shall be assisted by a committee.
> *Article 47 of Directive 2009/48/EC*

Note that the obligation refers to both the European Commission and the Member States. Even though it implies that Member States can control the Commission in exercising implementing powers, the very fact that these powers have to be shared means that Member States' discretion is reduced. This obligation precludes any additional conditions or references to national legal orders.

II.3 Hybrid provisions

Alongside discretionary (permissive) and non-discretionary (obligatory) provisions there is the sub-category of *hybrid* provisions that contain both permission and obligation. Hybrid provisions can be further divided into 'permission hybrids' and 'obligation hybrids'.

The following applies:

44. If a relevant provision contains both discretionary discretion manifestation and non-discretionary discretion manifestation, in other words permissive as well as obligatory language, it is considered as a *hybrid provision*.

II.3.1 Sub-categories: Permission hybrids

PERMISSION WITH RESTRICTION

45. If a hybrid provision allows Member States to do something but imposes restrictive conditions, it is considered as *permission with restriction*.

> When a market surveillance authority requests the technical documentation or a translation of parts thereof from a manufacturer, it *may fix* a deadline for receipt of such file or translation, which *shall be* 30 days (…).
> *Article 21(3) of Directive 2009/48/EC*

II.3.2 Sub-categories Obligation hybrids

OBLIGATION WITH LEEWAY UNDER CERTAIN CONDITIONS

46. If a hybrid provision contains an obligation which is further described by a may-clause and contains certain conditions under which it applies, it is considered as an *obligation with leeway under certain conditions*.

> *Where*, in the course of that evaluation, the market surveillance authorities find that the toy does not comply with the requirements laid down in this Directive, they *shall* without delay *require* the relevant economic operator to take appropriate corrective action to bring the toy into compliance with those requirements, to withdraw the toy from the market, or to recall it within a reasonable period, commensurate with the nature of the risk, *as* they *may* prescribe.
> *Article 42(1) of Directive 2009/48/EC*

OBLIGATION WITH EXCEPTIONS

47. If a hybrid provision contains an obligation and conditions under which the obligation does not apply (exceptions), it is considered as an *obligation with exceptions*.

Given that mediation is intended to take place in a manner which respects confidentiality, Member States *shall ensure* that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, *except:*

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
Article 7(1) of Directive 2008/52/EC

48. If a hybrid provision contains an obligation and conditions under which the obligation does not apply (exceptions) and a reference to the national legal order, it is considered as an *obligation with exceptions with reference to the national legal order*.

Member States *may not extend* the period referred to in paragraph 5 *except for* a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.
Article 15(6) of Directive 2008/115/EC

Types of directive provisions at one glance

Standard povision	Relevant provision
– Requirement – Addressee – Rules of general or final provisions, rules concerning standard procedures, applicability of parts of directive	– Requirement – Addressee – Discretionary, non-discretionary discretion manifestation (e.g. may-, shall-clauses)
Relevant discretionary and relevant non-discretionary provisions	
Permission (discretionary provision): simple, with certain conditions and/or reference to the national legal order	Obligation (non-discretionary provision): simple, with certain conditions and/or reference to the national legal order
– To do something (simple permission) – To go beyond what is prescribed – To choose between rules – To deviate from EU rules – To delegate	– To do something (simple obligation) – Not to deviate from the directive – To avoid market restrictions – To share implementing powers
Hybrids with certain conditions and/or reference to the national legal order	
Permission hybrid: permission with restriction	Obligation hybrids: obligation with leeway, obligation with exception

CODES AND VALUES

Variable (V) 1 = Addressee

Code = 1-5

Immediate addressees

1 Member State or other national authorities
2 European Commission, and / or the EU Council of Ministers (CoM) or the European Parliament (EP)
3 Member State and the European Commission
4 European Commission and / or EU-level institutions other than CoM or EP such as the European Standards Organisation (CEN, CENELEC etc.), the European Central Bank or others

Intermediate addressees

5 Third parties such as economic operators, citizens or others

V 2 = Permissive / discretionary (relevant) provision

Code = 6-10

6 Permission to do something
  61 Permission to do something and reference to the national legal order
  62 Permission to do sth. and certain condition
    621 Permission to do sth. and certain condition with reference to the national legal order

7 Permission to go beyond what is prescribed
  71 Permission to go beyond what is prescribed and reference to the national legal order
  72 Permission to go beyond what is prescribed and certain condition
    721 Permission to do more than is prescribed and certain condition with reference to the national legal order

8 Permission to choose between rules
  81 Permission to choose between rules and reference to the national legal order
  82 Permission to choose between rules and certain condition
    821 Permission to choose between standards and certain condition with reference to the national legal order

9 Permission to deviate from EU rules
  91 Permission to deviate from EU rules and reference to the national legal order
  92 Permission to deviate from EU rules and certain condition
    921 Permission to deviate and certain condition with reference to the national legal order

10 Permission to delegate

V3 = Obligatory/non-discretionary (relevant) provision

Code = 11-14

11 Obligation to do something
- 111 Obligation to do something and reference to the national legal order
- 112 Obligation to do sth. and certain condition
  - 1121 Obligation to do sth. and certain condition with reference to the national legal order

12 Obligation not to deviate from the directive
- 121 Obligation not to deviate from the directive and reference to the national legal order
- 122 Obligation not to deviate from the directive and certain condition
  - 1221 Obligation not to deviate from the directive and certain condition with reference to the national legal order

13 Obligation to avoid market restrictions
- 132 Obligation to avoid market restrictions and certain condition
  - 1321 Obligation to avoid market restrictions and certain condition with reference to the national legal order

14 Obligation to share implementing powers

V4 = Hybrid provision

Code = 15-17

15 Permission hybrids: Permission with restriction

16 Obligation hybrids: Obligation with leeway under certain conditions

17 Obligation with exceptions
- 171 Obligation with exceptions with reference to the national legal order

V5 = Standard provision

Code = 18

Afterword

As noted earlier, the codebook is primarily used for case selection purposes. The analysis of individual directives, and the role and relevance of discretion in particular cases, follows at later stages in this study. Having coded the directives under consideration here (3 consumer protection directives, 10 environmental directives and 4 migration directives), a few outcomes are striking, however, and therefore worth mentioning. These outcomes relate to one focal point which was mentioned in the theoretical discussion and concerns the empirical analysis of EU decision-making processes regarding directives: the link between a directive's margin of discretion and the policy area and subject matter addressed by the directive. In a nutshell, where the EU has not (yet) gained a strong foothold in legal and institutional terms, more discretion is available for Member States to transpose a directive into national law as they see fit. The coding results seem to point into the same direction when considering the distribution of discretion manifestations in the three areas addressed: consumer protection, environmental and migration law.

Distribution of permissions

– All directives analysed by means of content analysis include more obligatory requirements than permissive ones. At the same time, however, nearly all directives also include permissions. It is interesting to note that migration directives show much greater variety regarding the sorts of permissions identified in the codebook than directives from the areas of consumer protection and environmental law. Most directives of the latter two EU areas lack two particular sorts of permissions: the permission to go beyond what is prescribed – usually reflected in minimum harmonisation requirements and the permission to choose between rules (national standards or harmonised EU standards) as expressed by the concept of optional harmonisation.

References to the national legal order

– Furthermore, consumer protection and environmental directives hardly include any discretion manifestations with reference to the national legal order (neither in case of permissions nor obligations). References to the national legal order are, on the other hand, prevalent in discretion manifestations of migration directives.

Obligation hybrids

– Migration directives also include obligation hybrids: EU requirements that in spite of their obligatory nature leave a bit of discretionary room. These hybrid provisions are less frequent in environmental directives and absent from the consumer protection directives analysed.

Policy-specific features

– The obligation to avoid market restrictions shows in consumer protection directives but not in directives of the other two areas. Both consumer protection directives and nearly all environmental directives include the obligation to share implementing powers, which, however, is absent from all migration directives.

All in all, this cursory look at the coding outcomes shows that the distribution of discretionary and non-discretionary discretion manifestations can be used to illustrate and, at least, speculate about the scope of the EU's influence in a policy area, and thus also about the overall relevance of discretion in that very area. To make it more concrete: the absence of specific sorts of permissions (reflecting minimum harmonisation, optional harmonisation) and references to the national legal order as well as the presence of delegation of implementing powers to the European Commission in the field of consumer protection and environmental law suggests strong EU leverage and therefore points to a minor role of discretion. To render speculations into findings, however, an empirical analysis is required. For this purpose, the dissertation includes a (comparative) case study approach which examines in-depth a set of European directives from the three areas addressed, with the aim of shedding light on the role and relevance of discretion in EU negotiations and national transposition processes regarding directives.

References

Adcock, R. and D. Collier (2001) 'Measurement validity: A shared standard for qualitative and quantitative research', *American Political Science Review* 95(3): 529-546.

Antoniolli, L. (2006) 'Consumer Law as an instance of the law of diversity', *Vermont Law Review* 30(3): 855-882.

Aufauvre, L. (2007) *How to deal with the essential safety requirements of the EU directive in the placing on the market of pyrotechnic articles*, Paper presented at the International Pyrotechnic Automotive Safety Symposium (IPASS), Nov. 2007, Bordeaux, France: 173-181.

Aufauvre, L. (2008) *European directive 2007/23/EC on the placing on the market of pyrotechnical articles: are you concerned?*, Paper presented at the 35. International Pyrotechnics Seminar (IPS), Jul. 2008, Fort Collins, United States: 57-61.

Backes, C., P. C. Gilhuis and G. H. Addink (2006) *Milieurecht*, 6th edition, Deventer: Kluwer.

Bakker, W. E. and F. Van Waarden (1999) 'Discretionaire ruimte bij de formulering en handhaving van regelgeving', in: W. E. Bakker and F. Van Waarden (eds.), *Ruimte rond regels: stijlen van regulering en beleidsuitvoering vergeleken*, pp. 13-39. Amsterdam: Boom.

Baldaccini, A. (2009) 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive', *European Journal of Migration and Law* 11(1): 1-17.

Baldaccini, A. (2010) 'The EU Directive on return: principles and protests', *Refugee Survey Quarterly* 28(4): 114-138.

Beach, D. and R. B. Pedersen (2013) *Process Tracing methods – Foundations and Guidelines*. Ann Arbor, Mi.: University of Michigan Press.

Beetham, D. (1991) *The Legitimation of Power,* Basingstoke: Macmillan.

Beetham, D. and C. Lord (1998) *Legitimacy and the EU*, London: Longman.

Berelson, B. (1952) *Content Analysis in Communication Research*, Glencoe, Illinois: The Free Press.

Beijen, B. A. (2011) *De kwaliteit van milieurichtlijnen: Europese wetgeving als oorzaak van implementatieproblemen*. Den Haag: Boom Juridische Uitgevers.

Beijen, B. A. (2011) 'The Implementation of European Environmental Directives: Are Problems Caused by the Quality of the Directives?', *European Energy and Environmental Law Review* 20(4): 150-163.

Bell, J. (1992) 'Discretionary decision-making: a jurisprudential view', in K. Hawkins (ed.), *The uses of discretion,* pp. 89-112. Oxford: Clarendon Press.

Bia, M. T. (2004) 'Towards an EU Immigration Policy: Between Emerging Supranational Principles and National Concerns', *European Diversity and Autonomy Papers* 2: 1-18.

Biezeveld, G. A. (2010) 'Illegaal vuurwerk: biedt Pyrorichtlijn uitzicht op oplossing?', in *Tijdschrift voor Omgevingsrecht* 2: 42-51.

Björklund, A. (2011) *Skilled workers leaving for the European Union. Possible Impacts of the EU Blue Card Directive on Developing Countries of Origin through Migration of Skilled Workers – An Assessment Based on the Case of the Malian System for Higher Education*, Stockholm: Stockholm University.

Blatter, J. and M. Haverland (2012) *Designing Case Studies. Explanatory Approaches in Small-N Research*, Houndsmills Basingstoke: Palgrave Macmillan.

Bokhorst, M. (2014) *Bronnen van legitimiteit: over de zoektocht van de wetgever naar zeggenschap en gezag*. Den Haag: Boom Juridische uitgevers.

Bonfadelli, H. (2002) *Medieninhaltsforschung. Grundlagen, Methoden, Anwendung*. Konstanz: UVK-Verl.-Ges.

Börzel, T. A. (2003) *Environmental Leaders and Laggards in Europe. Why There is (Not) A Southern Problem*. London: Ashgate.

Börzel, T. A. (2005) 'Europeanization: How the European Union interacts with its Member States', in S. Bulmer and C. Lequesne (eds.), *The member states of the European Union*, pp. 45-69. Oxford: Oxford University Press.

Börzel, T. (2007) 'Environmental Policy', in P. Graziano and M. P. Vink (eds.), *Europeanization: New Research Agendas*, pp. 226-238. Houndmills: Palgrave Macmillan.
Börzel, T. A. and T. Risse (2000) 'When Europe Hits Home. Europeanization and Domestic Change', *European Integration online Papers (EioP)* 4(15), retrieved from http://eiop.or.at/eiop/pdf/2000-015.pdf (Last consulted 23 November 2015).
Börzel, T. A. and T. Risse (2003) 'Conceptualising the Domestic Impact of Europe', in: K. Featherstone and C. Radaelli (eds.): *The Politics of Europeanisation*, pp. 57-82. Oxford: Oxford University Press.
Börzel, T. A., T. Hofmann, D. Panke and C. Sprungk (2010) 'Obstinate and Inefficient: Why Member States Do Not Comply with European Law', *Comparative Political Studies* 43(11): 1363-1390.
Börzel, T. A., T. Hofmann and D. Panke (2012) 'Caving in or sitting it out? Longitudinal patterns of non-compliance in the European Union', *Journal of European Public Policy* 19(4): 454-471.
Boswell, C. and A. Geddes (2011) *Migration and Mobility in the European Union*. Basingstoke: Palgrave Macmillan.
Bovens, M. (2005) 'De verspreiding van de democratie', *Beleid en Maatschappij* 32(3): 119-127.
Bovens, M. and K. Yesilkagit (2010) 'The EU as Lawmaker: The Impact of EU Directives on National Regulation in the Netherlands', *Public Administration Review* 88(1): 57-74.
Bowler, S. and D. M. Farrell (1995) 'The Organizing of the European Parliament: Committees, Specialization and Co-ordination', *British Journal of Political Science* 25(2): 219-243.
Brand, M. (2008) 'Discretion, Divergence, and Unity', in S. Prechal and B. v. Roermund (eds.), *The coherence of EU law: the search for unity in divergent concepts*, pp. 217-231. Oxford: Oxford University Press.
Breeman, G.E. and A. Timmermans (2012) 'Myths and milestones: the Europeanization of the legislative agenda in the Netherlands', in S. Brouard, T. König, C. Olivier (eds.), *The Europeanization of Domestic Legislatures. The Empirical Implications of the Delors' Myth in Nine Countries*, pp. 151-172. New York: Springer.
Brochier, M. and R. Branka (2007) 'EU directive on the placing on the market of pyrotechnic articles. Elements to deal with the essential safety requirements for fireworks', Paper presented at the *34. International Pyrotechnics Seminar and 9. International GTPS seminar (EUROPYRO)*, Beaune, France: 619-632.
Burkens, M. C., H. R. B. M. Kummeling, B. P. Vermeulen, and R. J. G. Widdershoven (2006) *Beginselen van de democratische rechtsstaat: inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht*, 6th edition. Alphen aan den Rijn: Kluwer.
Calvert, R. L., M. D. McCubbins and B. R. Weingast (1989) 'A Theory of Political Control and Agency Discretion', *American Journal of Political Science* 33(3): 588-611.
Caranta, R. (2008) 'On discretion', in S. Prechal and B. v. Roermund (eds.), *The coherence of EU law: the search for unity in divergent concepts*, pp. 185-215. Oxford: Oxford University Press.
Carolan, E. (2009) *The New Separation of Powers: A theory of the Modern State*. Oxford: Oxford University Press.
Carrera, S. and M. Formisano (2005) 'EU Approach to Labour Migration: What is the Added Value and the Way Ahead?' *CEPS Working Documents* 232, Brussels: Centre for European Policy Studies.
Carrera, S., A. F. Atger, E. Guild and D. Kostakopoulou (2011) 'Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020', *CEPS Policy Brief* 240, Brussels: Centre for European Policy Studies.
Carroll, B. J. (2014) *Adaptation*, *discretion*, and the *application* of *EU animal welfare legislation*. Leiden: Institute of Public Administration, Campus The Hague, Leiden University.
Cerna, L. (2013) 'Understanding the diversity of EU migration policy in practice: the implementation of the Blue Card initiative', *Policy Studies* 34(2): 180-200.
Clement, L. J. (2007) 'De parlementaire behandeling van implementatieregelgeving', *RegelMaat* 4: 163-170.
Collins, K. and D. Earnshaw (1992) 'The Implementation and Enforcement of European Community Environment Legislation', *Environmental Politics* 1(4): 213-249.

Corkin, J. (2013) 'Constitutionalism in 3D: mapping and legitimating our lawmaking underworld', *European Law Journal* 19(6): 636-661.
Cornelisse, G. N. (2011) 'Terugkerend thema voor rechter en wetgever: recente jurisprudentie over de Terugkeerrichtlijn in vogelvlucht', *Asiel & Migrantenrecht* 1: 12-15.
Coumans, M. (2010) 'De overgang naar een nieuwe Speelgoedrichtlijn is geen spelletje', *Journaal Warenwet* 10: 36-38.
Craig, P. and G. de Burca (2015) *EU law: text, cases, and materials*, 6th edition. Oxford: Oxford University Press.
Creswell, J. W. (2009) *Research design: qualitative, quantitative, and mixed methods approaches*, 3rd edition. Los Angeles, CA: Sage.
Crosby, A. (2014) 'The political potential of the return directive', *Laws* 3(1): 116-140.
Curtin, D. (2009) 'Making Visible the Invisible', in: D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, pp. 277-303. Oxford: Oxford University Press.
Cutts, M. (2001) *Clarifying Eurolaw. How European Community Directives Could Be Written More Clearly So That Citizens of Member States, Including Lawyers, Would understand them better*, High Peak: Plain Language Commission.
Cutts, M. and E. Wagner (2002) *Clarifying EC Regulations. How European Community Regulations Could be Written More Clearly So That Citizens of Member States, Including Lawyers, Would Understand Them Better*, High Peak: Plain Language Commission.
Davis, K. C. (1969) *Discretionary justice: a preliminary inquiry*. Urbana: University of Illinois Press.
De Boer, S., M. J. Bogaardt, P. H. Kersten, F. H. Kistenkas, M. G. G. Neven and M. van der Zouwen, (2010) *Zoektocht naar nationale beleidsruimte in de EU-richtlijnen voor het milieu- en natuurbeleid : een vergelijking van de implementatie van de Vogel- en Habitatrichtlijn, de Kaderrichtlijn Water en de Nitraatrichtlijn in Nederland, Engeland en Noordrijn-Westfalen*. Wageningen: Wettelijke Onderzoekstaken Natuur & Milieu.
Dimitrova, A. and B. Steunenberg (2000) 'The search for convergence of national policies in the European Union: an impossible quest?', *European Union Politics* 1(2): 201-226.
Dörrenbacher, N., E. Mastenbroek and D. Toshkov (2015) 'National Parliaments and Transposition of EU Law: A Matter of Coalition Conflict?', *Journal of Common Market Studies* 53(5): 1010-1026.
Düvell, F. and B. Vollmer (2011) *Improving US and EU Immigration Systems: European Security Challenges*. Florence: European University Institute.
Dworkin, R. M. (1977) *Taking rights seriously*. Cambridge, Mass.: Harvard University Press.
Ederveen, R. (2011) 'Minister Leers' implementatie van de Terugkeerrichtlijn en sanctionering van illegaal verblijf', *Asiel & Migrantenrecht* 1: 16-19.
Eijlander, P. and W. J. M. Voermans (2000) *Wetgevingsleer.* Den Haag: Boom Juridische Uitgevers.
Eisele, K. (2013) "Why Come Here if I Can Go There? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants'', *Centre for European Policy Studies* 60: 1-33.
Epstein, D. and S. O'Halloran (1994) 'Administrative Procedures, Information, and Agency Discretion', *American Journal of Political Science,* 38(3): 697-722.
Epstein, D. and S. O'Halloran (1997) *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers.* Cambridge: Cambridge University Press.
European Migration Network (2007) *Conditions of Entry and Residence of Third Country Highly-Skilled Workers in the EU, Small-Scale Study III*, Brussels: EMN.
European Migration Network (2012) *The Organisation of Asylum and Migration Policies in the Netherlands*, Brussels: EMN.
Falkner, G., O. Treib, M. Hartlapp, and S. Leiber (2005) *Complying with Europe? The Impact of EU Minimum Harmonisation and Soft Law in the Member States.* Cambridge: Cambridge University Press.
Favell, A. (1998) 'The Europeanisation of Immigration Politics', *European Integration online Papers (EIoP)* 2(10), retrieved 8 May 2015, from http://eiop.or.at/eiop/pdf/1998-010.pdf (Last consulted 23 November 2015).

Feldman, M. (1992) 'Social limits to discretion: an organizational perspective', in K. Hawkins (ed.), *The uses of discretion*, pp. 163-184. Oxford: Clarendon Press.
Fletcher, G. P. (1984) 'Some unwise reflections about discretion', *Law and Contemporary Problems* 47(4): 269-286.
Føllesdal, A. (2004) 'Legitimacy Theories of the European Union', *Arena – Centre for European Studies* 4(15): 1-38.
Føllesdal, A. and S. Hix (2006) 'Why there is a Democratic Deficit in the EU: A response to Majone and Moravcsik', *Journal of Common Market Studies* 44(3): 533-562.
Franchino, F. (2004) 'Delegating powers in the European Community', *British Journal of Political Science* 34(2): 269-293.
Franchino, F. (2005) 'A formal model of delegation in the European Union', *Journal of Theoretical Politics* 17(2): 217-247.
Galligan, D. J. (1990) *Discretionary powers: a legal study of official discretion*. Oxford: Clarendon Press.
Galligan, D. J. (1997) 'Introductory report: discretionary powers and the principle of legality', in *Administrative discretion and problems of accountability. Proceedings 25th Colloquy on European Law Oxford United Kingdom, 27-29 September 1995*, pp. 11-35. Strasbourg: Council of Europe Publishing.
Garde, A. (2012) 'The best interests of the child and EU consumer law and policy: a major gap between theory and practice?', in J. Devenney and M. Kenny (eds), *European Consumer Protection Theory and Practice*, pp. 3-5. Cambridge: Cambridge University Press.
George, A. L. and A. Bennett (2005) *Case Studies and Theory development in the Social Sciences*, Cambridge, Mass.: MIT Press.
Georgiev, V. (2013) 'Too much executive power? Delegated lawmaking and comitology in perspective', *Journal of European Public Policy*, 20(4): 535-551.
Gerring, J. (2007) *Case Study Research. Principles and Practices*. Cambridge: Cambridge University Press.
Gil Ibáñez, A. J. (1999) *The administrative supervision and enforcement of EC law: powers, procedures and limits*, Oxford: Hart.
Goodin, R. E. (1986) 'Welfare, Rights and Discretion', *Oxford Journal of Legal Studies* 6(2): 232-261.
Groen, S.M. and T. de Lange (2011) 'De Europese 'Blue Card' verblijfsvergunning voor hooggeschoolde arbeidsmigranten', *Asiel & Migrantenrecht* 8: 338-348.
Guild, E. (1999) 'Discretion, Competence and Migration in the European Union', *European Journal of Migration Law* 1(1): 61-87.
Guild, E. (2007) 'EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative', *CEPS Policy Brief 145*, Brussels: Centre for European Policy Studies.
Guiraudon, V. (2000) 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping', *Journal of Common Market Studies* 38(2): 251-271.
Gümüs, Y. K. (2010) 'EU Blue Card Scheme: The Right Step in the Right Direction?', *European Journal of Migration and Law* 12(4): 435-453.
Häge, F. M. (2007) 'Committee Decision-making in the Council of the European Union', *European Union Politics* 8(3): 299-328.
Häge, F. M. (2013) *Bureaucrats as law-makers: committee decision-making in the EU Council of Ministers*. London: Routledge.
Hailbronner, K. (2010) 'Introduction into the EU immigration and asylum law', in K. Hailbronner (ed.), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives*, pp. 1-28. München: Beck.
Hailbronner, K. and J.M. Schmidt (2010) 'Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment', in K. Hailbronner (ed.), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives*, pp. 683-802. München: Beck.
Handler, J. F. (1982) 'Discretion in Social Welfare: The Uneasy Position in the Rule of Law', *The Yale Law Journal* 92(5): 1270-1286.
Handler, J. (1992) 'Discretion, Power, Quiescience, and Trust', in K. Hawkins (ed.), *The uses of discretion*, pp. 331-360. Oxford: Clarendon Press.

Hardacre, A. and M. Kaeding (2013) 'Delegated and Implementing Acts: The New Comitology', *European Institute of Public Administration* 5: 1-28.
Härtel, I. (2006) *Handbuch Europäische Rechtsetzung*. Berlin: Springer.
Haverland, M. and M. Romeijn (2007) 'Do member states make European policies work? Analysing the EU transposition deficit', *European Union Politics* 85(3): 757-778.
Haverland, M., B. Steunenberg and F. van Waarden (2011) 'Sectors at different speeds: Analysing transposition deficits in the European Union', *Journal of Common Market Studies* 49(2): 265-291.
Hawkins, K. (1992) 'The Use of legal discretion: perspectives from law and social science', in K. Hawkins (ed.), *The uses of discretion,* pp. 11-46. Oxford: Clarendon Press.
Hercog, M. (2008) 'The Role of the State in Attracting Highly-skilled Migrants. The Case of the Netherlands', *European Institute of Public Administration* 3: 19-24.
Héritier, A. (1996) 'The Accommodation of Diversity in European Policy-making and Its Outcomes: Regulatory Policy as a Patchwork', *Journal of European Public Policy* 3(2): 149-176.
Héritier, A. (1999) 'Elements of democratic legitimation in Europe: an alternative perspective', *Journal of European Public Policy* 6(2): 269-282.
Héritier, A. (2001) *Differential Europe: the European Union impact on national policymaking*, Lanham, MD: Rowman & Littlefield.
Hix, S. (2005) 'Neither a Preference-Outlier nor a Unitary Actor: Institutional Reform Preferences of the European Parliament', *Comparative European Politics* 3(2): 131-154.
Hofmann, H., G. C. Rowe and A. H. Türk (2011) 'Rules and Principles governing the substance of administrative decision-making', in C. H. Herwig, C.H, Hofmann and A. H. Türk (eds.), *Administrative Law and Policy of the European Union*, pp. 491-506. Oxford: Oxford University Press.
Hooghe, L. and G. Marks (2001) *Multi-Level Governance and European Integration*, Boulder: Rowman & Littlefield.
Huber, J. D. and C. R. Shipan (2002) *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy*. Cambridge: Cambridge University Press.
Hunold, C. and B. G. Peters (2004) 'Bureaucratic discretion and deliberative democracy', in M. Mälkiä, A., V. Anttiroiko and R. Savolainen (eds.), *ETransformation in Governance: New Directions in Government and Politics*, pp. 131-149. Hershey, PA: Idea Group Inc (IGI).
Hupe, P. (2013) 'Dimensions of discretion', *dms – der moderne staat – Zeitschrift für Public Policy, Recht und Management* 6(2): 425-440.
Jordan, A. (1999) The implementation of EU environmental policy: a policy problem without a political solution? *Environment and Planning C: Government and Policy* 17(1): 69-90.
Jordan, A., and D. Liefferink (2004) 'The Europeanization of national environmental policy', in A. Jordan and D. Liefferink (eds.), *Environmental policy in Europe: the Europeanization of national environmental policy*, pp. 1-14. London: Routledge.
Kaeding, M. (2006) 'Determinants of transposition delay in the European Union. The member state perspective', *Journal of Public Policy* 26(3): 229-253.
Kaeding, M. (2007a) 'Active Transposition of EU Legislation', *EIPAscope* 3: 27-34.
Kaeding, M. (2007b) *Better regulation in the European Union: Lost in translation or full steam ahead? The transposition of EU transport directives across member state*. Leiden: Leiden University Press.
Kaeding, M. (2008) 'Lost in Translation or Full Steam Ahead: The Transposition of EU Transport Directives across Member States', *European Union Politics* 9(1): 115-143.
Kapteyn, P. J. G. and P. Veloren van Themaat (2003) *Het recht van de Europese Unie en van de Europese Gemeenschappen*. Den Haag: Kluwer.
Kassim, H. and A. Menon (2003) 'The principal-agent approach and the study of the European Union: promise unfulfilled?', *Journal of European Public Policy* 10(1): 121-139.
Kessedjian, C. (2007) 'Public Order in European Law', *Erasmus Law Review* 1(1): 25-36.
Knill, C. (2001) *The Europeanization of National Administrations: Patterns of Institutional Change and Persistence.* Cambridge: Cambridge University Press.
Knill, C. and A. Lenschow (1998) 'Coping with Europe: the Impact of British and German Administrations on the Implementation of EU Environmental Policy', *Journal of European Public Policy* 5(4): 595-615.

Knill, C. and A. Lenschow (2000) 'Introduction: new approaches to reach effective implementation – political rhetoric or sound concepts', in C. Knill & A. Lenschow (eds.), *Implementing EU environmental policy*, pp. 3-35. Manchester: Manchester University Press.
Koch, C. H. (1986) 'Judicial Review of Administrative Discretion', *George Washington Law Review* 54: 469-511.
König, T. (2008) 'Analysing the Process of EU Legislative Decision-Making to make a Long Story Short', *European Union Politics* 9(1): 145-165.
König, T. and B. Luetgert (2008) 'Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives', *British Journal of Political Science* 39(1): 163-194.
Kostakopoulou, D. (2007) 'The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue', in C. Barnard (ed.), *The Fundamentals of EU Law Revisited*, pp. 153-191. Oxford: Oxford University Press.
Koukoudakis, G. (2014) 'European Integration and the Re-conceptualization of State Sovereignty: A Challenge for Neorealism', *Spectrum: Journal of Global Studies* 4(1): 91-105.
Krämer, L. (2002) 'Thirty Years of EC Environmental Law: Perspectives and Prospectives' *Yearbook of European Environmental Law* 2: 155-182.
Kromrey, H. (2009) *Empirische Sozialforschung*. Stuttgart: UTB Härter.
Lacey, N. (1992) 'The jurisprudence of discretion: escaping the legal paradigm', in K. Hawkins (ed.), *The uses of discretion*, pp. 361-388. Oxford: Clarendon Press.
Ladrech R. (1994) 'Europeanization of Domestic Politics and Institutions: The Case of France', *Journal of Common Market Studies*, 32(1): 69-88.
Lavenex, S. (2010) 'Justice and Home Affairs: Communitarization with Hesitation', in Wallace, H., M. A. Pollack and A. R. Young (eds.) *Policy-Making in the European Union*, pp. 457-477. Oxford: Oxford University Press.
Lavenex, S. and W. Wallace (2005) 'Justice and Home Affairs: Towards a European public order?', in H. Wallace, W. Wallace, and M. Pollack (eds.), *Policy-making in the European Union*, pp. 457-480. Oxford: Oxford University Press.
Leerkes, A. S. and E. Boersema (2014) *Het lot van het inreisverbod. Een onderzoek naar de uitvoeringspraktijk en gepercipieerde effecten van de Terugkeerrichtlijn in Nederland*, WODC: Den Haag.
Lenschow, A. (2010) 'Environmental Policy. Contending Dynamics of Policy Change', in H. Wallace, M. A. Pollack and A. R. Young (ed.): *Policy-Making in the European Union*, pp. 307-330. Oxford: Oxford University Press.
Lieberman, E. S. (2005) 'Nested analysis as a mixed-method strategy for comparative research', *American Political Science Review* 99(3): 435-452.
Liefferink, D. and M. S. Andersen (1998) 'Strategies of the 'green' member states in EU environmental policy-making', *Journal of European Public Policy* 5(2): 254-270.
Liefferink, D. and M. van der Zouwen (2004) 'The Netherlands: The Advantages of Being "Mr. Average"', in A. Jordan and D. Liefferink (eds.), *Environmental policy in Europe: the Europeanization of national environmental policy*, pp. 136-153. London: Routledge.
Lijphart, A. (1971) 'Comparative Politics and the Comparative Method', *The American Political Science Review* 65(3): 682-693.
Lijphart, A. (1975) 'The Comparable-Cases Strategy in Comparative Research', in *Comparative Political Studies* 8(2): 158-177.
Lindhal, H. (2008) 'Discretion and Public Policy: Timing the Unity and Divergence of Legal Orders', in S. Prechal and B. v. Roermund (eds.), *The coherence of EU law: the search for unity in divergent concepts*, pp. 291-313. Oxford: Oxford University Press.
Lord, C. and D. Beetham (2001) 'Legitimizing the EU: Is there a 'Post-parliamentary Basis' for its Legitimation?', *Journal of Common Market Studies* 39(3): 443-462.
Lord, C. and P. Magnette (2004) 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU', *Journal of Common Market Studies* 42(1): 183-202.
Lutz, F. (2010) *The negotiations on the return directive: comments and materials*. Nijmegen: Wolf Legal Publishers.
Majone, G. (1997) 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance', *Journal of Public Policy* 17(2): 139-167.

Majone, G. (1998) 'Europe's Democratic Deficit: The Question of Standards', *European Law Journal* 4(1): 5-28.
Majone, G. (1999) 'The Regulatory State and its Legitimacy Problems', *West European Politics* 22(1): 1-24.
Majone, G. (2001) 'Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance', *European Union Politics* 2(1): 103-122.
Majone, G. (2002) 'Delegation of Regulatory Powers in a Mixed Polity', *European Law Journal* 8(3): 319-339.
Majone, G. (2005) *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth*. Oxford: Oxford University Press.
Mastenbroek, E. (2003) 'Surviving the deadline: Transposition of EU directives in the Netherlands', *European Union Politics* 4(4): 371-355.
Mastenbroek, E. (2005) 'EU Compliance: Still a 'black hole'?', *Journal of European Public Policy* 12(6): 1103-1120.
Mastenbroek, E. (2007) *The Politics of Compliance: Explaining the Transposition of EC Directives in the Netherlands*. Wageningen: Ponson & Looijen BV.
Mayntz, R. (2010) 'Legitimacy and Compliance in Transnational Governance', *MPIfG,* 10(5), Max-Planck-Institut für Gesellschaftsforschung: Köln, retrieved 2 February 2015 from http://www.mpifg.de/pu/workpap/wp10-5.pdf (Last consulted 21 November 2015).
Mayring, P. (2000) 'Qualitative Inhaltsanalyse', *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* 1(2), retrieved 26 June 2015 from http://www.qualitative-research.net/index.php/fqs/article/view/1089/2383 (Last consulted 23 November 2015).
McCubbins, M. D., R. G. Noll and B.R. Weingast (1987) 'Administrative procedures as instruments of political control', *Journal of Law, Economics & Organization* 3(2): 243-277.
Möllers, C. (2013) *The Three branches: A Comparative Model of Separation of Powers*. Oxford: Oxford University Press.
Müller, W. C., M. Bovens, J. G. Christensen, M. Jenny, and K. Yesilkagit (2010) 'Legal Europeanization', *Public Administration* 88(1): 75-87.
Muntean, A. M. (2000) 'The European Parliament's Political Legitimacy and the Commission's "Misleading Management"': Towards a "Parliamentarian" European Union?' *European Integration online Papers (EIoP)* 4(5), retrieved from http://eiop.or.at/eiop/texte/2000-005a.htm (Last consulted 23 November 2015).
Neuendorf, K. A. (2002) *The content analysis guidebook*. Thousand Oaks, CA: Sage.
Oosterhuis, F. H., H. D. van Asselt, T. F. M. Etty, N. M. van der Grijp, and W. T. Douma (2011) *Handboek Implementatie EU-milieubeleid in Nederland*. Amsterdam: Vrije Universiteit Amsterdam and Instituut voor Milieuvraagstukken.
Parkes, R. and S. Angenendt (2010) 'After the Blue Card: EU policy on highly skilled migration, Three ways out of the impasse', Berlin: Heinrich Böll Stiftung.
Peers, S. (2008) 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon', *European Journal of Migration and Law* 10(2): 219-247.
Peers, S. (2009) 'Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives', *European Journal of Migration and Law* 11(4): 387-426.
Pennings, P., J.E. Keman and J. Kleinnijenhuis (1999) *Doing research in political science: an introduction to comparative methods and statistics*, London: Sage.
Pfadenhauer, M. (2009) 'At-eye-level: The expert interview – A talk between expert and quasi-expert', in A. Bogner, B. Littig, and W. Menz (eds.) *Interviewing Experts*, pp. 81-97. Basingstoke: Palgrave Macmillan.
Pollack, M. A. (1997) 'Delegation, agency, and agenda setting in the European Community', *International Organization* 51(1): 99-134.
Pollack, M. A. (2010) 'Theorizing EU policy-making', in H. Wallace, M. A. Pollack, A. R. Young, *Policy-making in the European Union*, pp. 15-43. Oxford: Oxford University Press.
Ponzano, P., C. Hermanin and D. Corona (2012) 'The power of initiative of the European Commission: A progressive erosion?', *Notre Europe Studies and Research 89*, retrieved 8 May 2015 from http://www.notre-europe.eu/media/commission_power_of_initiative_ne_feb2012.pdf?pdf=ok (Last consulted 23 November 2015).

Prechal, S. (2005) *Directives in EC Law*, 2nd edition. Oxford: Oxford University Press.
Prechal, S. and T. Vandamme (2007) *EU Besluiten in de Nederlandse rechtsorde. Op weg naar een draaiboek voor een houdbaar en geïntegreerd wetgevingsproces, adviesrapport voor de Raad van State*, Den Haag: Raad van State [Council of State].
Prechal, S. and B. van Roermund (2008) 'Binding Unity in EU Legal Order', in S. Prechal & B. van Roermund (eds.), *The coherence of EU law: the search for unity in divergent concepts*, pp. 1-20. Oxford: Oxford University Press.
Raffaelli, R. (2011) 'The returns directive in light of the El Dridi judgment' *Perspectives on Federalism*' 3(1): 32-45.
Reich, N. (2012a) 'EU Strategies in Finding the Optimal Consumer Law Instrument', *European Review of Contract Law* 8(1): 1-29.
Reich, N. (2012b) 'From minimal to full to 'half' harmonisation', in J. Devenney and M. Kenny (eds.) *European Consumer Protection Theory and Practice*, pp. 3-5. Cambridge: Cambridge University Press.
Ringeling, A.B. (1978) *Beleidsvrijheid van ambtenaren: het spijtoptantenprobleem als illustratie van de activiteiten van ambtenaren bij de uitvoering van beleid*. Alphen aan den Rijn: Samsom.
Risse, T., J. Caporaso and M. Green Cowles (2001) 'Europeanization and Domestic Change. Introduction', in M. Green Cowles, J. Caporaso and T. Risse (eds.), *Transforming Europe: Europeanization and Domestic Change*, pp. 1-20. Ithaca NY: Cornell University Press.
Roodenburg. H., R. Euwals and H. ter Rele (2003) *Immigration and the Dutch economy*, The Hague: CPB Netherlands Bureau for Economic Policy Analysis.
Scharpf, F. W. (1997) 'Economic integration, democracy and the welfare state', *Journal of European Public Policy* 4(1): 18-36.
Scharpf, F. W. (1999) *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.
Scharpf, F. W. (2010) 'Legitimacy in the Multi-level European Polity', in P. Dobner and M.Loughlin (eds.), *The Twilight of Constitutionalism?,* pp. 89-119. Oxford: Oxford University Press.
Schieffer, M. (2010) 'Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals', in Hailbronner, K., (ed.), *EU Immigration and Asylum Law, Commentary on EU Regulations and Directives*, pp. 1489-1552. München: Beck.
Schmidt, V. A. (2004) 'The European Union: Democratic legitimacy in a regional state?', *Journal of Common Market Studies* 42(5): 975-997.
Schmidt, V. A. (2009) 'Re-Envisioning the European Union: Identity, Democracy, Economy', *Journal of Common Market Studies* 47(1): 17-42.
Schmidt, V. A. (2012) 'Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput', *Political Studies* 61(1): 2-22.
Schneider, C. E. (1992) 'Discretion and rules: a lawyer's view', in K. Hawkins (ed.), *The uses of discretion,* pp. 47-88. Oxford: Clarendon Press.
Schwarze, J. (2006) *European administrative law*, London: Sweet & Maxwell.
Seawright, J. and J. Gerring (2008) 'Case selection techniques in case study research. A Menu of Qualitative and Quantitative Options', *Political Research Quarterly* 61(2): 294-308.
Seerden R. J.G.H. and M. Heldeweg (2002) 'Public environmental law in the Netherlands', in R. J.G.H. Seerden, M. A. Heldeweg and K. R. Deketelaere (eds.), *Public environmental law in the European Union and the United States: a comparative analysis*, pp. 341-393. The Hague: Kluwer Law International.
Selck, T. J. and B. Steunenberg (2004) 'Between Power and Luck: The European Parliament in the EU Legislative Process', in F. N. Stokman and R. Thomson (eds.), 'Winners and Losers in the European Union', *European Union Politics* 5(1): 25-46.
Senden, L. A. J. (2005) 'Soft Law and Its Implications for Institutional Balance in the EC', *Utrecht Law Review* 1(2): 79-99.
Shapiro, D. L. (1983) 'Administrative Discretion: The Next Stage', *The Yale Law Journal* 92(5): 1487-1522.
Shapiro, D. L. (1985) 'Jurisdiction and discretion', *New York University Law Review* 60(4): 543-589.

Sherrington, P. (2000) *Council of Ministers: Political Authority in the European Union*, London: Pinter.
Stack, K. M. (2014) 'The Irony of Oversight: Delegated Acts and the Political Economy of the European Union's Legislative Veto Under the Lisbon Treaty', *Theory and Practice of Legislation* 2(1): 62-84.
Steunenberg, B. (2006) 'Turning swift policymaking into deadlock and delay: National policy coordination and the transposition of EU directives', *European Union Politics* 7(3): 293-319.
Steunenberg, B. (2007) 'A Policy Solution to the European Union's Transposition Puzzle: Interaction of Interests in Different Domestic Arenas', *West European Politics* 30(1): 23-49.
Steunenberg, B. and W. J. M. Voermans (2005) 'De Bermuda-driehoek van de versnelde Implementatie', RegelMaat 6: 205-217.
Steunenberg, B. and W. J. M. Voermans (2006) *The Transposition of EU Directives. A Comparative Study of Instruments, Techniques and Processes in Six Member States*. Leiden: Leiden University.
Steunenberg, B. and M. Kaeding (2009) '"As time goes by": explaining the transposition of maritime directives', *European Journal of Political Research* 48(3): 432-454.
Steunenberg, B. and D. Toshkov (2009) 'Comparing transposition in the 27 Member States of the EU: the impact of discretion and legal fit', *Journal of European Public Policy* 16(7): 951-970.
Steunenberg, B. and M. Rhinard (2010) 'The transposition of European law in EU member states: between process and politics', *European Political Science Review* 2(3): 495-520.
Steunenberg, B., M. Beerkens, C. van den Berg, J. Hartmann, A. de Ruiter and R. de Ruiter (2012) *'Wij doen dat zo'. Onderzoek naar de grenseffecten van Europees beleid*, Den Haag: Ministeries van Binnenlandse Zaken en Koninkrijksrelaties.
Stie, A. E. (2013) *Democratic Decision-making in the EU: Technocracy in Disguise?* Abingdon: Routledge.
Strik, T. (2011) *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*. Den Haag: Boom Juridische Uitgevers.
Sverdrup, U. (2007) 'Policy implementation', in P. Graziano and M. P. Vink (eds.), *Europeanization. New Research Agendas,* pp. 197-211. Basingstoke: Palgrave Macmillan.
Tallberg, J. (2002) 'Delegation to Supranational Institutions: Why, How, and with What Consequences?', *West European Politics* 25(1): 23-46.
Thatcher, M. and A. Stone Sweet (2002), 'Theory and practice of delegation to non-majoritarian institutions', *West European politics* 25(1): 1-22.
Thomassen, J. and H. Schmitt (2004) 'Democracy and Legitimacy in the European Union', *Tidsskrift for samfunnsforskning* 45(2): 377-410.
Thomson, R. (2007) 'Time to Comply: National Responses to Six EU Labour Market Directives Revisited', *West European Politics,* 30(5): 987-1008.
Thomson, R. (2009) 'Same effects in different worlds: the transposition of EU directives', *Journal of European Public Policy* 16(1): 1-18.
Thomson, R. (2010) 'Opposition through the back door in the transposition of EU directives', *European Union Politics* 11(4): 577-596.
Thomson, R. (2011) *Resolving Controversy in the European Union Legislative Decision-Making before and after Enlargement*. Cambridge: Cambridge University Press.
Thomson, R. and M. Hosli (2006) 'Who Has Power in the EU? The Commission, Council and Parliament in Legislative Decision-making', *Journal of Common Market Studies* 44(2):391-417.
Thomson, R., R. Torenvield, and J. Arregui (2007) 'The Paradox of Compliance: Infringements and Delays in Transposing European Union Directives', *British Journal of Political Science* 37(4): 685-709.
Toshkov, D. (2007) 'Transposition of EU social policy in the new member states', *Journal of European Social Policy* 17(4): 335-348.
Toshkov, D. (2008) 'Embracing European Law: Compliance with EU directives in Central and Eastern Europe', *European Union Politics* 9(3): 379-402.
Toshkov, D., M. Knoll and L. Wewerka (2010) 'Connecting the dots: Case studies and EU implementation research', *Institute for European Integration Research Working Paper Series* 10: 1-32.
Tsebelis, G. (2002) *Veto players: How political institutions work*. Princeton, NJ: Princeton University Press.

Twigg-Flesner, C. (2011) '"Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?" – A way forward for EU Consumer Contract Law', *European Review of Contract Law* 7(2): 235-256.
Twigg-Flesner, C. (2012) 'Comment: the future of EU consumer law – the end of harmonisation?', in J. Devenney and M. Kenney (eds.) *European Consumer Protection. Theory and Practice*, pp. 6-20. Cambridge: Cambridge University Press.
Tyler, T. R. (1988) 'What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures', *Law and Society* 22(1): 103-135.
Tyler, T. R. (1990) *Why people obey the law*. New Haven, CT: Yale University Press.
Vandamme, T. (2008) 'Democracy and direct effect: EU and national perceptions of discretion', in S. Prechal and B. van Roermund (eds.), *The coherence of EU law: the search for unity in divergent concepts*, pp. 271-290. Oxford: Oxford University Press.
Van der Burg, F.H. and W. J. M. Voermans (2015) *Unierecht in de Nederlandse rechtsorde*. Deventer: Kluwer.
Van der Burgt, N., C. Dupont, O. White, and D. Wuebbe (2011) *Horizontal Report on the Implementation by Member States of Directive 2007/23/EC*, Brussels: Milieu Law & Policy Consulting.
Van Ommeren, F. J. (2010) 'Het legaliteitsbeginsel als hoeksteen van het staats- en bestuursrecht', *Ars Aequi* 9: 645-647.
Van Riel, M. (2012) 'Nieuwe wetgeving ter implementatie van de Terugkeerrichtlijn', *Asiel & Migrantenrecht* 2: 68-75.
Van Roermund, G. C. G. J. (2008) 'Law at cross-purposes: conceptual confusion and political divergence', in S. Prechal & G. C. G. J. van Roermund (eds.), *The coherence of EU law: the search for unity in divergent concepts*, pp. 315-341. Oxford: Oxford University Press.
Van Schooten, H. (1998) 'De legitmiteit van het moderne recht', *Bestuurswetenschap* 52(1), 228-248.
Van Wijk, H. D., W. Konijnenbelt and R. van Male (2008) 'Beleidsvrijheid en vage normen', in H. D. van Wijk, W. Konijnenbelt and R. van Male (eds.), *Hoofdstukken van bestuursrecht*, pp. 147-157. Den Haag: Elsevier Juridisch.
Veltkamp, B. M. (1998) *Implementatie van EG-milieurichtlijnen in Nederland*. Deventer Kluwer.
Versluis, V. (2007) 'Even Rules, Uneven Practices: Opening the 'Black Box' of EU Law in Action', *West European Politics* 30(1): 50-67.
Vibert, F. (2007) *The Rise of the Unelected: Democracy and the New Separation of Powers*. New York: Cambridge University Press.
Voermans, W. J. M. (2001), 'Nieuwe wetgevingsprocedures en regelingsinstrumenten voor de EU?' *RegelMaat* 6: 204-215.
Voermans, W. J. M. (2011a) 'Delegation is a Matter of Confidence: The New Delegation System Under the Lisbon Treaty', *European Public Law* 17(2): 313-330.
Voermans, W. J. M. (2011b) 'Legaliteit als middel tot een doel. Controverses rondom legaliteit en legitimatie', *Handelingen Nederlandse Juristen Vereniging* 141: 1-101.
Voermans, W.J.M., J. M. Hartmann and M. Kaeding (2014) 'The Quest for Legitimacy in EU Secondary Legislation', *The Theory and Practice of Legislation* 1(2): 5-32.
Waldron, J. (1999) *The dignity of legislation*. Cambridge: Cambridge University Press.
Waldron, J. (2013) 'Separation of Powers in Thought and Practice', *Boston College Law Review* 54(2): 433-468.
Wallace, H. (2010) 'An Institutional Autonomy and Five Policy Modes', in H. Wallace, W. Wallace and M. Pollack (eds.), *Policy-Making in the European Union*, pp. 69-104. Oxford: Oxford University Press.
Weale, A., G. Pridham, M. Cini, D. Konstadakopulos, M. Porter, and B. Flynn (2000) *Environmental Governance in Europe*. Oxford: Oxford University Press.
Weatherill, S. (2013) *EU consumer law and policy*, 2nd edition. Northampton, Mass.: Edward Elgar Pub.
Weber, F. (2013) 'European integration assessed in the light of the 'rules vs. standards debate', *European Journal of Law and Economics* 35(2): 187-210.
Wiesbrock A. (2010) *Legal Migration to the European Union*. Leiden: Brill.

Winter, H. and K. Bolt (2007) 'Quality in Dutch asylum law: from 'strict but fair', to 'fast but good'?', in *Quality of Decision-Making in Public Law* 18: 133-150.
Wimmel, A. (2009) 'Theorizing the Democratic Legitimacy of European Governance: a Labyrinth with No Exit?', *Journal of European Integration* 31(2): 181-199.
Wright, J. S. (1971) 'Beyond Discretionary Justice', *Yale Law Journal* 81(1): 575-597.
Wurzel, R. K. W. (2008) 'Environmental Policy: EU Actors, Leader and Laggard States', in J. Hayward (ed.) *Leaderless Europe*, pp. 66-88. Oxford: Oxford University Press.
Young, A.R. (2005) 'The single market: a new approach to policy', in H. Wallace and W. Wallace (eds.), *Policy-making in the European Union*, pp. 93-111. Oxford: Oxford University Press.
Zhelyazkova, A. and R. Torenvlied (2011) 'The successful transposition of European provisions by member states: application to the Framework Equality Directive', *Journal of European Public Policy* 18(5): 690-708.
Zhelyazkova, A. (2013) 'Complying with EU directives' requirements: the link between EU decision-making and the correct transposition of EU provisions', *Journal of European Public Policy* 20(5): 702-721.
Zwaan, K. (2011a) 'Interpretatie en implementatie van de Terugkeerrichtlijn in verschillende EU-lidstaten', *Asiel & Migrantenrecht* 2(7): 266-272.
Zwaan, K. (2011b) *The returns directive: central themes, problem issues, and implementation in selected member states*. Nijmegen: Wolf Legal Publishers.

Table of documents[1]

European Commission

Blue Card Directive

European Commission (1985) *A new impetus for consumer protection policy*, COM(85) 314 final, Brussels, 27 June 1985.

European Commission (1998) *Consumer policy action plan 1999-2001. Communication from the Commission*, COM(98) 696 final, Brussels, 1 December 1998.

European Commission (2005a) *Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten priorities for the next five years, The partnership for European renewal in the field of Freedom, Security and Justice*, COM(2005)184 final, Brussels, 10 May 2005.

European Commission (2005b) *Communication from the Commission – Policy Plan on Legal Migration*, COM(2005) 669 final, Brussels, 21 December 2005.

European Commission (2007a) *Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment*, COM(2007) 637 final, Brussels, 23 October 2007.

European Commission (2007b) 'Opening remarks of President Barroso – Legal Immigration', Press Conference Speech, Speech/07/650. Strasbourg, 23 October 2007.

European Commission (2014) *Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment*, COM(2014) 287 final, Brussels, 22 May 2014.

Pyrotechnic Articles Directive

European Commission (2002) *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Consumer Policy Strategy 2002-2006*, COM(2002) 208 final, Brussels, 7 May 2002.

European Commission (2005) *Proposal for a Directive of the European Parliament and of the Council on the placing on the market of pyrotechnic articles*, COM(2005) 457 final, Brussels, 11 October 2005.

European Commission (2010) *Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, Brussels, 3 March 2010.

European Commission (2014) *Memo: January infringements package: main decisions*, Memo/14/36, Brussels, 23 January 2014.

Waste Framework Directive

European Commission (1986) *Draft for a resolution of the Council of the European Communities on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992)*, COM(86) 485 final, Brussels, 14 October 1986.

European Commission (1992) *Proposal for a resolution of the Council of the European Communities on a Community programme of policy and action in relation to the environment and sustainable development (1993-2000)*, COM(92) 23 final, Brussels, 30 March 1992.

---

1 The documents are listed according to the order of appearance in the case study chapters and therefore not always listed in chronological order.

European Commission (1995) *Waste management policy. Report from the Commission to the Council and the European Parliament*, COM(95) 522 final, Brussels, 8 November 1995.
European Commission (1997) *Commission's Guide to the approximation of EU environmental legislation*, SEC(97) 1608 final, Brussels, 25 August 1997.
European Commission (2001) *Proposal for a Decision of the European Parliament and of the Council Laying down the Community Environment Action Programme 2001-2010*, COM(2001) 31 final, Brussels, 24 January 2001.
European Commission (2005a) *Proposal for a Directive of the European Parliament and of the Council on waste*, COM(2005) 667 final, Brussels, 21 December 2005.
European Commission (2005b) *Impact assessment on the Thematic Strategy on the prevention and recycling of waste and the immediate implementing measures*, SEC(2005) 1681, Brussels, 21 December 2005.
European Commission (2005c) *New waste strategy: Making Europe a recycling society*, IP/05/1673, Brussels, 21 December 2005.
European Commission (2007) *Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products*, COM(2007) 59 final, Brussels, 21 February 2007.
European Commission (2011) *Environment: Commission prompts Belgium and Romania to comply with the EU Waste Framework Directive*, IP/11/1103, 29 September 2011.
European Commission (2012) *Guidance on the interpretation of key provisions of Directive 2008/98/EC on waste*, Brussels: European Commission Directorate-General for Environment.

Toy Safety Directive

European Commission (2002) *Communication from the Commission of 7 May 2002 to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Consumer Policy Strategy 2000-2006*, COM(2002) 208 final, Brussels, 8 June 2002.
European Commission (2003) *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Updating and simplifying the Community acquis*, COM(2003) 71 final, Brussels, 11 February 2003.
European Commission (2007a) *Safety first: Commission proposes new strict rules for toys*, IP/08/91, Brussels, 25 January 2007.
European Commission (2007b) *Toy safety – Mattel recall on lead paint toys*, IP/07/1605, Brussels, 25 October 2007.
European Commission (2008) *Proposal for a Directive of the European Parliament and of the Council amending Directive 88/378/EEC on the safety of toys*, COM(2008) 9 final, Brussels, 25 January 2008.
European Commission (2012) *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions A European Consumer Agenda – Boosting confidence and growth*, COM(2012) 225 final, Brussels, 22 May 2012.
European Commission (2013) *Technical Documentation Guidance Document on Directive 2009/48/EC on the Safety of Toys: Technical documentation*, European Commission Enterprise and Industry Directorate-General, Brussels, 2 December 2013.
European Commission (2014) *Memo: October infringements package: main decisions*, MEMO/14/589, Brussels, 16 October 2014.

Return Directive

European Commission (2001) *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration*, COM(2001) 672 final, Brussels, 15 November 2001.
European Commission (2002a) *Commission Green Paper on a Community Return Policy on Illegal Residents*, COM(2002) 175 final, Brussels, 10 April 2002.

European Commission (2002b) *Communication from the Commission to the Council and the European Parliament on a community return policy on illegal residents*, COM(2002) 564 final, Brussels, 14 October 2002.
European Commission (2005) *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, COM(2005) 391 final, Brussels, 1 September 2005.

Stage II Petrol Vapour Recovery Directive

European Commission (2001) *Environment 2010: Our future, our choice, 6th Environmental Action Programme, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions*, COM(2001) 31 final, Brussels, 24 January 2001.
European Commission (2005) *Communication from the Commission to the Council and the European Parliament – Thematic Strategy on air pollution*, COM(2005) 446 final, Brussels, 21 September 2005.
European Commission (2008a) *Air quality: Commission proposes legislation to limit harmful vapour emissions from service stations*, IP/08/1888, Brussels, 4 December 2008.
European Commission (2008b) *Proposal for a directive of the European Parliament and of the Council on Stage II petrol vapour recovery during refuelling of passenger cars at service stations*, COM(2008) 812 final, Brussels, 4 December 2008.
European Commission (2008c) *Accompanying document to the proposal from the Commission to the European Parliament and Council for a directive proposal for stage II petrol vapour recovery during the refuelling of petrol cars at service stations – Impact Assessment*, SEC(2008) 2937, Brussels, 4 December 2008.
European Commission (2012) *Proposal for a decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet"*, COM(2012) 710 final, Brussels, 29 November 2012.

Council of the European Union

Blue Card Directive

Council of the European Union (1999) *Conclusions of the Tampere European Council of 15-16 October*, Tampere, 16 Ocotober 1999.
Council of the European Union (2008a) *Outcome of Proceedings – Working Party on Migration and Expulsion*, 5255/08, Brussels, 18 January 2008.
Council of the European Union (2008b) *Outcome of Proceedings Working Party on Migration and Expulsion*, 6051/08, Brussels, 28 February 2008.
Council of the European Union (2008c) *Outcome of Proceedings Working Party on Migration and Expulsion*, 8249/08, Brussels, 8 May 2008.
Council of the European Union (2008d) *Outcome of Proceedings Working Party on Migration and Expulsion*, 9666/08, Brussels, 19 June 2008.
Council of the European Union (2008e) *Outcome of Proceedings Working Party on Migration and Expulsion*, 11512/08, Brussels, 24 July 2008.
Council of the European Union, 2008f, *Outcome Proceedings Working Party on Migration and Expulsion*, 12320/08, Brussels, 1 August 2008.
Council of the European Union (2009) *The Stockholm Programme – an open and secure Europe serving and protecting the citizens*, 17024/09, Brussels, 2 December 2009.

Pyrotechnic Articles Directive

Council of European Union (1986) *Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests*, OJ 1986 C167/1, Brussels, 23 June 1986.

Council of the European Union (2007) *Proposal for a Directive of the European Parliament and of the Council on the placing on the market of pyrotechnic articles (first reading) – Voting result*, 2793rd meeting of the Council of the European Union (Agriculture and Fisheries), 8363/07, Luxembourg, 16-17 April 2007, Luxembourg, 16 April 2007.

Waste Framework Directive

Council of the European Union (2006a) *Proposal for a Directive of the European Parliament and of the Council on waste – Preparation of the Council Meeting (Environment) on 9 March 2006,* 6155/06, Brussels, 9 February 2006.

Council of the European Union (2006b) *Proposal for a Directive of the European Parliament and of the Council on waste and Thematic Strategy on the prevention and recycling of waste – Questions for policy debate*, DS 175/1/06 REV 1, Brussels, 8 March 2006.

Council of the European Union (2006c) *Proposal for a Directive of the European Parliament and of the Council on waste*, 16574/06, Brussels, 14 December 2006.

Council of the European Union (2007a) *Proposal for a Directive of the European Parliament and of the Council on waste*, 8696/07, Brussels, 26 April 2007.

Council of the European Union (2007b) *Proposal for a Directive of the European Parliament and of the Council on waste – Political agreement. Preparation of the Council Meeting (Environment) on 28 June 2007,* 10391/07, Brussels, 7 June 2007.

Council of the European Union (2007c) *Proposal for a Directive of the European Parliament and of the Council on waste,* 7328/07, Brussels, 13 March 2007.

Council of the European Union (2007d) Proposal for a Directive of the European Parliament and of the Council on waste – Outcome of the European Parliament's first reading, 6242/07, Brussels, 23 February 2007.

Council of the European Union (2007e) *Proposal for a Directive of the European Parliament and of the Council on waste*, 9066/07, Brussels, 3 May 2007.

Council of the European Union (2007f) *Proposal for a Directive of the European Parliament and of the Council on waste – Political agreement*, 10804/07, Brussels, 17 April 2007.

Council of the European Union (2007g) *Proposal for a Directive of the European Parliament and of the Council on waste – Political agreement*, 10804/07, Brussels, 20 June 2007.

Council of the European Union (2008a) *Proposal for a Directive of the European Parliament and of the Council on waste – Outcome of the European Parliament's second reading*, 10731/08, Strasbourg, 16-19 June 2008, Brussels, 26 June 2008.

Council of the European Union (2008b) *Proposal for a Directive of the European Parliament and of the Council on waste (second reading) – Voting result*, 2898th meeting of the Council of the European Union (Environment), 14504/08, Luxembourg, 20-21 October 2008, Luxembourg, 20 October 2008.

Toy Safety Directive

Council of the European Union (2008a) *Proposal for a Directive of the European Parliament and of the Council on the safety of toys*, 11244/08, Brussels, 2 July 2008.

Council of the European Union (2008b) *Proposal for a Directive of the European Parliament and of the Council on the safety of toys*, 12520/08, Brussels, 27 August 2008.

Council of the European Union (2008c) *Proposal for a Directive of the European Parliament and of the Council on the safety of toys*, 13066/1/08 REV 1, Brussels, 2 October 2008.

Return Directive

Council of the European Union (1999) *Conclusions of the Tampere European Council*, *15-16 October* 1999.

Council of the European Union (2001) *Conclusions of the European Council*, 23-24 March 2001.

Council of the European Union (2001) *Conclusions of the Laeken European Council*, 14-15 December 2001.

Council of the European Union (2002) *Conclusions of the Seville European Council*, 21-22 June 2002.

Council of the European Union (2005) *The Hague Programme: strengthening freedom, security and justice in the European Union*, 2005/C 53/01, Brussels 3 March 2005.
Council of the European Union (2006a) *Outcome of Proceedings – Working Party on Migration and Expulsion*/Mixed Committee (EU-Iceland / Norway / Switzerland), 10002/06, Brussels, 6 June 2006.
Council of the European Union (2006b) *Outcome of Proceedings – Working Party on Migration and Expulsion*/Mixed Committee (EU-Iceland / Norway / Switzerland), 11051/06, Brussels, 6 July 2006.
Council of the European Union (2006c) *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals – Dutch position*, 15701/06, Brussels, 22 November 2006.
Council of the European Union (2006d), *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals,* 14814/05, Brussels, 19 January, 2006.
Council of the European Union (2006e), *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, 6008/06, Brussels, 22 February, 2006.
Council of the European Union (2006f), *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, 11456/06, Brussels, 26 July 2006.
Council of the European Union (2006g), *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, 13025/06, Brussels, 16 October 2006.
Council of the European Union (2007a) *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, 14321/07, Brussels, 29 October 2007.
Council of the European Union (2007b) *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, 14738/07, Brussels, 12 November 2007.
Council of the European Union (2008) *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, 6541/08, Brussels, 15 February 2008.

Stage II Petrol Vapour Recovery Directive

Council of the European Union (2009a) *Proposal for a Directive of the European Parliament and of the Council on the placing on* stage II petrol vapour recovery during the refuelling of petrol cars at service stations (first reading) – Voting results, 2963rd meeting of the Council of the European Union (Competitiveness, Internal Market, Industry and Research), 13683/09, Brussels, 24 September 2009.
Council of the European Union (2009b) *Proposal for a Directive of the European Parliament and of the Council on the placing on stage II petrol vapour recovery during the refuelling of petrol cars at service stations*, 8002/09, Brussels, 31 March 2009.
Council of the European Union (2009c) *Proposal for a Directive of the European Parliament and of the Council on the placing on stage II petrol vapour recovery during the refuelling of petrol cars at service stations – Preparation of the informal trialogue with a view to a first reading agreement*, 8290/09, Brussels, 2 April 2009.
Council of the European Union (2009d) *Proposal for a Directive of the European Parliament and of the Council on the placing on stage II petrol vapour recovery during the refuelling of petrol cars at service stations*, 7424/1/09 REV 1, Brussels, 20 March 2009.
Council of the European Union (2009e) *Proposal for a Directive of the European Parliament and of the Council on the placing on stage II petrol vapour recovery during the refuelling of petrol cars at service stations* – Approval of the final compromise text *with a view to a first reading agreement*, 8710/09, Brussels, 17 April 2009.

European Parliament

Blue Card Directive

European Parliament (2008) Report on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, Committee on Civil Liberties, Justice and Home Affairs (rapporteur Ewa Klamt), A6-0432/2008, Brussels, 10 November 2008.

Pyrotechnic Articles Directive

European Parliament (2006a) *Report on the proposal for a directive of the European Parliament and of the Council on the placing on the market of pyrotechnic articles, Committee on the Internal Market and Consumer Protection* (rapporteur: Joel Hasse Ferreira), A6-0289/2006, Brussels, 19 September 2006.

European Parliament (2006b) *Legislative resolution on the proposal for a directive of the European Parliament and of the Council on the placing on the market of pyrotechnic articles*, P6_TA(2006)0515, Brussels, 30 November 2006.

Waste Framework Directive

European Parliament (2004) *Legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Directive 94/62/EC on packaging and packaging waste*, P6_TA(2004)0055, Brussels, 17 November 2004.

European Parliament (2006) *Report on the proposal for a directive of the European Parliament and of the Council on waste*, Committee on the Environment, Public Health and Food Safety (rapporteur: Caroline Jackson), A6-0466/2006, Brussels, 15 December 2006.

Toy Safety Directive

European Parliament (2007) *Dangerous toys manufactured in China – European Parliament resolution of 26 September 2007 on the safety of products and particularly toys*, P6_TA(2007)0412, Brussels, 26 September 2007.

European Parliament (2008) Report on the proposal for a directive of the European Parliament and of the Council on the safety of toys, Committee on the Internal Market and Consumer Protection (rapporteur: Marianne Thyssen), A6-0441/2008, Brussels, 12 November 2008.

Return Directive

European Parliament (2007) Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, Committee on Civil Liberties, Justice and Home Affairs (rapporteur: Manfred Weber), A6-0339/2007, Brussels, 20 September 2007.

Stage II Petrol Vapour Recovery Directive

European Parliament (2009) Report on the proposal for a directive of the European Parliament and of the Council on Stage II petrol vapour recovery during refuelling of passenger cars at service stations, Committee on the Environment, Public Health and Food Safety (rapporteur: Dimitrios Papadimoulis), A6-0208/2009, Brussels, 2 April 2009.

Samenvatting

Context en onderzoeksvragen

Het boek 'A *blessing in disguise*?! Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives' analyseert de rol van beleidsvrijheid bij de EU onderhandelingen en nationale omzettingsprocessen betreffende Europese richtlijnen. Onder welke omstandigheden wordt beleidsvrijheid gelaten aan de lidstaten en wat voor effect heeft dit op de onderhandelingen in de EU-ministerraad? En met betrekking tot het nationale omzettingsproces, heeft beleidsvrijheid een bevorderende of een belemmerende rol hierin? Door de analyse van de processen betreffende richtlijnen op zowel EU niveau als nationaal niveau wordt in het proefschrift rekening gehouden met het levenscyclus van richtlijnen die op het EU vlak worden voorbereid en aangenomen en aansluitend door de lidstaten, vooral hun bestuur, worden geïmplementeerd. Bovendien poogt deze studie de vertaalslag te maken van enerzijds de effecten van beleidsvrijheid op de formele implementatie van richtlijnen naar anderzijds de legitimiteit van richtlijnen in nationale wetgeving. Met andere woorden, naast de rol van beleidsvrijheid, wordt ook de relatie tussen beleidsvrijheid en legitimiteit nader onderzocht in de context van de omzetting van richtlijnen. De centrale onderzoeksvragen zijn:

Centrale onderzoeksvragen

1) Wat is de rol van beleidsvrijheid in het EU besluitvormingsproces en het nationale omzettingsproces betreffende Europese richtlijnen?
2) Wat is de relatie tussen beleidsvrijheid en legitimiteit in het nationale omzettingsproces van EU richtlijnen?

Subonderzoeksvragen

EU-niveau

a) Onder welke omstandigheden wordt beleidsvrijheid door de EU wetgever toegekend aan de lidstaten voor de omzetting van richtlijnen?
b) Welke uitwerking heeft beleidsvrijheid op de onderhandelingen betreffende richtlijnen?

Nationaal niveau

a) Hoe wordt beleidsvrijheid gebruikt in het nationale omzettingsproces?
b) Welke uitwerking heeft beleidsvrijheid op de omzetting van EU richtlijnen in Nederland?

De omzetting of formele implementatie van EU richtlijnen in nationale wetgeving is de eerste stap in het gehele implementatieproces dat voorafgaat aan de feitelijke implementatie en handhaving. EU richtlijnen zijn naast verordeningen een van de meest gebruikte instrumenten van EU wetgeving. Het hoofddoel van richtlijnen is de harmonisatie van nationale wet- en regelgeving in de inmiddels 28 lidstaten van de Europese Unie. In tegenstelling tot verordeningen die rechtstreekse werking hebben, moeten richtlijnen in de nationale rechtsorde worden geïncorporeerd waarbij lidstaten discretionaire ruimte of beleidsvrijheid ter beschikking hebben. Deze beleidsvrijheid, in het Engels 'discretion' genoemd, is een fundamenteel kenmerk van richtlijnen. Beleidsvrijheid vloeit enerzijds voort uit Artikel 288 van het EU Werkingsverdrag: terwijl de richtlijn een bepaald resultaat voorschrijft, beschikken de lidstaten in grote mate over de vrijheid vormen en middelen te kiezen waarmee de richtlijn in nationale wetgeving wordt geïmplementeerd. Anderzijds, kan beleidsvrijheid worden afgeleid van de bepalingen van een richtlijn en de manier waarop deze geformuleerd zijn. Een richtlijn kan bijvoorbeeld inhouden dat nationale wetgeving meer of minder aan Europese regels aangepast, wordt, en dus min of meer beleidsvrijheid aan de lidstaten overlaat. Daarnaast zijn er zogenaamde 'may' en 'shall' bepalingen die aangeven dat een lidstaat een optie of geen optie heeft bij de implementatie van de bepalingen van een richtlijn.

Inhoud in vogelvlucht

Het proefschrift is ingedeeld in vier delen. Het eerste deel introduceert de context van het proefschrift en de centrale onderwerpen en concepten van beleidsvrijheid, omzetting en legitimiteit. Hierna volgen drie hoofdstukken die een theoretische behandeling van beleidsvrijheid omvatten. Hierin worden, in lijn met de multi- en interdisciplinaire karakter van het onderzoek, verschillende benaderingen en perspectieven op beleidsvrijheid vanuit de rechtswetenschappen en de politieke wetenschappen gepresenteerd. Op basis hiervan wordt een theoretisch toetsingskader ontwikkelt voor de empirische analyse, bestaande uit een aantal verwachtingen over de rol van beleidsvrijheid in het EU onderhandelings- en nationale omzettingsproces betreffende richtlijnen. De presentatie van een klein aantal factoren waarvan wordt aangenomen dat ze, naast en in interactie met beleidsvrijheid, invloed kunnen hebben op het nationale omzettingsproces gaat hiermee gepaard. In het tweede deel van het boek wordt de methodologische benadering van de onderzoeksvragen toegelicht. De methoden en technieken waarvan gebruik wordt gemaakt omvatten de inhoudsanalyse (van teksten van richtlijnen), de case studie analyse (betreffende zes richtlijnen), inclusief een vergelijkende analyse, de literatuurstudie en expert interviews (vooral met bij de onderhandeling en omzetting betrokkene Nederlandse ambtenaren). Met andere woorden, in de methodologische hoofdstukken wordt het gereedschap gepresenteerd waarmee de empirische analyse uitgevoerd wordt. Verder wordt de selectie van de case studies onderbouwd

en de manier van dataverzameling, -bespreking en -beoordeling uitgelegd. Bovendien wordt ingegaan op het kernconcept van beleidsvrijheid, de conceptualisering en operationalisering ervan en de methodologische aanpak van andere, voor de omzetting relevante factoren, besproken. In het vierde en afsluitende deel worden de empirische bevindingen bij elkaar gebracht en beoordeeld in het licht van het theoretische toetsingskader en met betrekking op de verwachtingen over de rol van beleidsvrijheid. Naast het beantwoorden van de hoofd- en subvragen werpt het proefschriftonderzoek ook vragen op die als toekomstige onderzoekspaden worden uitgewezen. Bovendien worden de bijdragen die het proefschrift in theoretische, methodologische en empirische opzicht levert, gesignaleerd.

Inhoud in meer detail

Terwijl het Nederlandse recht wat betreft discretionaire ruimte voor nationale regelgeving een verdere specificatie kent,[1] wordt 'discretion' toegekend door een EU richtlijn, gewoonlijk verstaan als 'beleidsvrijheid'. In het proefschrift wordt echter wel de aanname geuit dat dat er een verschil kan zijn tussen enerzijds de omvang van beleidsvrijheid gebaseerd op alleen de richtlijn (tekst) en anderzijds de omvang van beleidsvrijheid die nationale omzettingsactoren (ambtenaren) uiteindelijk ter beschikking hebben. Om die reden wordt het onderscheidt tussen 'legislative discretion' en 'executive discretion' gemaakt. Desalniettemin wordt in het boek met name de term 'beleidsvrijheid' gebezigd.

Nederland is gekozen als land dat nader wordt onderzocht ten aanzien van de omzetting van EU richtlijnen en het gebruik van beleidsvrijheid hierbij. Dat heeft meerdere redenen. Ten eerste biedt Nederland een interessante omgeving voor een dieper gaande analyse: ondanks het feit dat Nederland algemeen bekend staat als een van de koplopers onder de EU lidstaten wat betreft haar invloed op de wetgeving van de EU en de toepassing ervan, heeft Nederland sinds eind jaren 70 problemen ondervonden, vooral wat betreft de tijdige omzetting van EU richtlijnen maar ook naleving van verordeningen. Daar komt bij dat Nederland een van de EU lidstaten is waar

1 Zoals in het proefschrift toegelicht wordt in het Nederlandse bestuursrecht het onderscheid gemaakt tussen beleidsvrijheid of beleidsruimte en beoordelingsvrijheid of beoordelingsruimte. Kort samengevat komt het erop dat een bestuurorgaan dat beleidsvrijheid of beleidsruimte ('(free) discretion') heeft de vrijheid heeft om te kiezen welk beleid / welke beleidsmaatregelen zullen worden genomen om een bepaald doel te bereiken dat door wetgeving wordt nagestreeft. Bij beoordelingsruimte en beoordelingsvrijheid ('scope for appraisal', 'freedom of assessment') gaat het erom dat een bestuursorgaan een beslissing moet nemen maar de vrijheid heeft om te beoordelen of aan de voorwaarden waaronder dit geschiedt en die zijn vastgesteld in de relevante wetgeving, is voldaan. Met andere woorden, beleidsvrijheid gaat over keuzes betreffende de inhoud van beleid terwijl beoordelingsruimte / beoordelingsvrijheid gaat over keuzes betreffende de toepassing van een beslissing, afhankelijk van het voldoen aan bepaalde voorwaarden. Zie ook paragraaf 2.2.1.1.

naast het bestuur ook het nationale parlement betrokken kan zijn bij de omzetting van richtlijnen, een gegeven dat zeker met oog op de omgang met beleidsvrijheid en het standpunt van legitimiteit een belangwekkend gegeven is. Maar nog belangrijker voor het onderzoek naar beleidsvrijheid is dat het Nederlandse bestuurs- en wetgevingsstelsel relatief open is ten opzichte van de uitvoering van discretionaire bevoegdheden door bestuursorganen in vergelijking met bijvoorbeeld Duitsland waar dit niet het geval is, vooral vanwege de invloed die het bestuurs- en wetteljke stelsel in het verleden door het totalitaire nazi-regime heeft ondergaan met als gevolg het streven om administratieve beleidsvrijheid beperkt te houden.

Deel 1: Achtergrond en theorie (hoofdstukken 1 t/m 5)

De rol van beleidsvrijheid wordt in de omzettingsliteratuur verschillend beoordeeld. Vooral wat betreft de effecten van richtlijnen met grotere marges van beleidsvrijheid op de tijdigheid van de omzetting gaan de meningen uit elkaar. De theoretische en empirische bevindingen laten zien dat beleidsvrijheid, in de vorm van discretionaire bevoegdheden die door de EU wetgever gedelegeerd worden naar de lidstaten (en hun nationale instanties), kan bijdragen aan een tijdige omzetting maar deze ook kan vertragen. Studies die de link tussen beleidsvrijheid en wettelijke correctheid nader onderzoeken zijn er minder. Hierin wordt de conclusie getrokken dat beleidsvrijheid een positieve rol kan vervullen. Het belangrijkste argument met betrekking tot zowel tijdigheid als wettelijke correctheid is dat een grotere marge van beleidsvrijheid de lidstaten de benodigde ruimte geeft om de richtlijn op een manier om te zetten die past bij hun nationale wettelijke kader. Anderzijds wordt beweerd en aangetoond dat beleidsvrijheid, juist door ruimte te laten voor verschillende omzettingsopties, tot vertraging van dit proces kan leiden. Tegen de achtergrond van de verschillende beoordelingen van de effecten van beleidsvrijheid op de omzetting van richtlijnen is het interessant dat beleidsvrijheid ook verschillende reacties oproept in het academisch debat die niet voortkomen uit het onderzoek naar de implementatie van EU wetgeving maar die raken aan juridische aspecten van de uitoefening van (discretionaire) bevoegdheden bij de implementatie van wetgeving in het algemeen. Vanuit het perspectief van bijvoorbeeld het constitutionele recht en het bestuursrecht kan op nadelen worden gewezen die discretionaire bevoegdheden in handen van het bestuur voor wettelijke stelsels kunnen hebben. Discretionaire ruimte wordt geassocieerd met rechtsonzekerheid, onrechtvaardige regelgeving en het ondermijnen van een duidelijke machtenscheiding, vooral wat betreft de scheiding tussen wetgevende en uitvoerende (bestuurlijke) macht.

Ondanks deze negatieve zichtwijze van beleidsvrijheid, worden met name vanuit de rechtssociologie argumenten aangevoerd die beleidsvrijheid in een positief licht zetten. Zo wordt bijvoorbeeld betoogd dat beleidsvrijheid tot rechtvaardige regelgeving kan bijdragen. De beschikbaarheid van discretionaire ruimte voor verdere uitwerking van wetgeving maakt het

mogelijk dat abstracte, algemene wetten op een manier worden toegepast die past bij de bijzonderheden van individuele gevallen in de rechtspraktijk. De redenering dat beleidsvrijheid ondanks vermeende nadelen vooral ook voordelen voor de implementatie van wetgeving kan hebben wordt in het proefschrift gedeeld. Sterker nog: de intentie is om deze voordelen in de context van de omzetting van EU richtlijnen beter tot uitdrukking te brengen omdat deze overschaduwd lijken te worden door de negatieve gevolgen die worden toegeschreven aan bestuurlijke beleidsvrijheid.

Ook in de politieke wetenschappen wordt beleidsvrijheid als problematisch beschouwd, zoals in het concept van 'bureaucratic drift' tot uitdrukking komt. Toegepast op de context van het proefschrift houdt dit concept in dat het nationale bestuur de ruimte die de EU wetgever laat om een richtlijn om te zetten gebruikt voor andere doeleinden dan beoogd door de richtlijn. In tegenstelling tot de rechtswetenschappen wordt in het wetgevingsmaar ook Europeaniseringsonderzoek – waarvan het omzettingsonderzoek deel uitmaakt – echter meer naar de context gekeken waarin beleidsvrijheid voorkomt. Er wordt dus sterker rekening gehouden met kenmerken van processen en actoren en hoe deze gerelateerd zijn aan beleidsvrijheid. Met behulp van dit onderzoek wordt in het proefschrift nader onderzocht in welke omstandigheden en om welke redenen beleidsvrijheid aan de lidstaten wordt toegekend en wat de effecten ervan zijn voor de onderhandelingen en omzetting betreffende richtlijnen. Op basis hiervan en corresponderend met een exploratieve, kwalitatieve benadering van beleidsvrijheid worden een reeks verwachtingen geformuleerd waarmee de rol van beleidsvrijheid in de empirische analyse verder belicht zal worden.

EU-onderhandelingen

Een viertal verwachtingen heeft betrekking op het EU onderhandelingsproces en de omstandigheden die invloed kunnen hebben op de marge van beleidsvrijheid die de wetgever aan de lidstaten voor de omzetting ter beschikking stelt. Dienovereenkomstig geeft een richtlijn meer beleidsvrijheid wanneer hiermee een onderwerp van een beleidsdomain wordt gereguleerd dat op het vlak van wetgeving en institutionele ontwikkeling nog niet veel invloed door de EU heeft ondergaan (*policy area expectation*), wanneer het onderwerp politiek gevoelig is en daardoor tot controversies en onenigheid leidt onder de lidstaten (*political sensitivity expectation*) of wanneer de voorgestelde richtlijn niet goed verenigbaar is met de administratief-wettelijke stelsels in de lidstaten (*compatibility expectation*). Tot slot en in tegenstelling tot de voorafgaande aannames, is de verwachting dat het Europees Parlement, als voorstander van EU integratie van nationale wetgeving en met name in de functie van medewetgever, de marge van beleidsvrijheid zal beperken om wettelijke diversiteit te voorkomen die moeilijk verenigbaar is met het doel van vergaande harmonisatie (*European Parliament matters expectation*). De verwachtingen betreffende de politieke gevoeligheid enerzijds en anderzijds de comaptibiliteit tussen een EU richtlijn en het nationale wetgevingskader zijn gebaseerd op een specifieke benadering

van EU onderhandelingsgprocessen: de *consensus-building approach*. Deze gaat ervan uit dat het toekennen van beleidsvrijheid ertoe leidt dat conflicten tussen de lidstaten kunnen worden bijgelegd. Een richtlijn die flexibiliteit in de vorm van discretionaire ruimte in het vooruitzicht stelt lijkt de bereidwilligheid van lidstaten tot compromissen te stimuleren, met name wanneer EU regels moeten worden ingepast in de nationale rechtsorde die minder goed hierop aansluiten. Kortom, beleidsvrijheid kan een faciliterende rol hebben in omstandigheden van onenigheid en (juridische) incompatibilteit.

Nationale omzetting
Ook met het oog op het nationale omzettingsproces wordt van de mogelijkheid van een faciliterende rol van beleidsvrijheid uitgegaan. Ten eerste, hoe meer beleidsvrijheid lidstaten ter beschikking hebben voor de omzetting, des te beter wordt de EU richtlijn omgezet (*invidiual discretion effect expectation or discretion-in-national-law expectation*). Uit de literatuur blijkt echter dat beleidsvrijheid vooral in samenwerking met andere factoren het omzettingsproces beïnvloedt. Wanneer weinig beleidsvrijheid wordt gegeven voor een richtlijnbepaling die reeds op het EU vlak tot kritiek of afkeer heeft geleid, kan dit in een gebrekkige omzetting van die bepaling resulteren (*disagreement interaction expectation*). Verder wordt aangenomen dat beleidsvrijheid het positieve effect van een bestaande goede compatibiliteit tussen EU richtlijn en nationale wetgevingskader nog verder bevordert (*compatibility interaction expectation*). Hetzelfde geldt met betrekking tot de administratieve capaciteit van een lidstaat. Dus wanneer de omzettingsactoren (doorgaans nationale ministeries) voldoende kennis hebben over hoe een richtlijn omgezet moet worden en er tussen de departementen die gewoonlijk betrokken zijn bij de onderhandelingen respectievelijk de omzetting (beleids- en juridische afdelingen) geen meningsverschil of miscommunicatie bestaat over de interpretatie en toepassing van EU regels, kan beleidsvrijheid de positieve werking van administratieve capaciteit versterken. Dit geldt vooral bij een grotere marge van beleidsvrijheid (*capacity interaction expectation*). Echter, hoe meer actoren betrokken zijn bij de omzetting en hoe meer beleidsvrijheid er is, des te groter de kans dat de omzetting gebrekkig zal zijn: de redenering daarachter is dat meer discretionaire ruimte ook meer kans laat voor conflicten tussen omzettingsactoren die verschillende voorkeuren hebben voor wat betreft de manier waarop de richtlijn moet worden omgezet (*actor interaction expectation*). Kortom, op het nationale vlak kan beleidsvrijheid een faciliterende of belemmerende impact hebben. Het lijkt in beide gevallen op te treden als een interveniërende of bemiddelende factor, dat wil zeggen dat beleidsvrijheid het positieve of negatieve effect van andere relevante factoren versterkt.

Verder wordt in het proefschrift aangenomen dat beleidsvrijheid niet zomaar in werking treedt. Doordat het al dan niet door de verantwoordelijke nationale autoriteiten bij de omzetting van richtlijnen wordt gebruikt heeft het een effect (of geen effect). Er lijken nog maar weinig studies in te gaan

op het gebruik van beleidsvrijheid bij de omzetting van richtlijnen maar een nadere kijk op de hierin besproken voorbeelden bevestigt de faciliterende werking van beleidsvrijheid. Blijkbaar helpt beleidsvrijheid om onverenigbaarheden tussen de Europese en nationale regels weg te nemen waarbij de omzetting zo kan worden uitgevoerd dat het nationale wetgevingskader zo veel mogelijk intact blijft. Dit blijkt uit onderzoek naar de implementatie van EU-milieuwetgeving in Nederland. Daarnaast maakt ook de analyse van de algemene Nederlandse implementatiecontext aanneembaar dat beleidsvrijheid in de vorm van discretionaire keuze van vormen en middelen van omzetting ertoe bijdraagt dat EU wetgeving wordt nageleefd.

Dit kan worden opgemaakt uit het feit dat nationale ministeries, zoals het Ministerie van Volksgezondheid, Welzijn en Sport, een omzettingsroutine lijken te hebben ontwikkeld – door de keuze van bepaalde instrumenten en technieken van omzetting – die doorgaans uitmondt in tijdige en wettelijk correcte omzetting van EU richtlijnen die onder de portefeuille van dit ministerie vallen. De functies waarvan wordt aangenomen dat beleidsvrijheid deze kan hebben bij de EU onderhandelingen en nationale omzetting van richtlijnen worden in figuur 1 samengevat.

Figuur 1: Functies van beleidsvrijheid

Beleidsvrijheid	
EU-onderhandelingen	Verzoent verschillende belangen → Bevordert besluitvorming & compromis betreffende een richtlijn
Nationale omzetting	Nemt onverenigbaarheden weg tussen EU en nationale wetgeving → Bevordert de tijdige en wettelijk correcte omzetting 'Facilitating-fit-function' en opname van EU regels in de nationale rechtsorde onder behoud van het nationale wegevingskader

Deel 2: Methodologie (hoofdstukken 6 t/m 8)

De onderzoeksopzet en de onderzoeksmethodes- en technieken worden in het tweede methodologische deel van het proefschrift besproken. Dit deel begint met een conceptualisering en operationalisering van beleidsvrijheid in EU richtlijnen. Dit is een belangrijke stap in de selectie van richtlijnen voor de latere empirische analyse. Conform de aannames dat kleinere en grotere marges van beleidsvrijheid verschillende effecten hebben op de omzetting van richtlijnen, worden in de case studie analyses richtlijnen geanalyseerd die minder én meer beleidsvrijheid aan de lidstaten toestaan. Omdat van individuele richtlijnen echter niet bekend is hoeveel beleidsvrijheid ze geven, moet vooraf een manier bedacht worden waarmee de omvang van beleidsvrijheid van richtlijnen kan worden bepaald.

Voor dit doel wordt ten eerste de structuur van een richtlijn behandeld om te laten zien welke bepalingen discretionair zijn, dat wil zeggen beleidsvrijheid aan de lidstaten geven. De bespreking van de structuur en types van rechtsnormen (gedrags- en bevoegdheidsnormen) laat vervolgens zien dat discretionaire en non-discretionaire bepalingen geïdentificeerd kunnen worden met behulp van de normoperatoren 'kunnen' en 'moeten' ('may' and 'shall' clauses) die in de richtlijn tekst aangeven of een lidstaat al dan niet beleidsvrijheid ter beschikking heeft. Op basis van deze discretionaire en non-discretionaire verschijnselen wordt het onderscheid aangebracht tussen 'permissive language' en 'obligatory language' dat verder wordt uitgewerkt in een zogenaamd codeboek. Deze benadering van beleidsvrijheid in richtlijnen gaat terug op de zogenaamde inhoudsanalyse. De manier waarop deze in het proefschrift wordt toegepast houdt een systematische en kwantitatieve beschrijving van de inhoud van richtlijnen in. Kwantitatief slaat hier op het feit dat codes worden gedefinieerd en toegepast om een bepaling van de richtlijn te beschrijven. Op die manier wordt aangegeven aan wie een bepaling zich richt (bv. de lidstaten of Europese Commissie) en of deze bepaling beleidsvrijheid aan de lidstaten geeft, of juist niet geeft (discretionaire of non-discretionair is). Het codeboek is het kerninstrument van de inhoudsanalyse en legt in een coding scheme (coderingsplan) enerzijds de regels voor de codering vast. Anderzijds worden met behulp van sub-categorieën, indicatoren en voorbeelden verschillende vormen van discretionaire en non-discretionaire bepalingen geïntroduceerd die in de tekst van een richtlijn kunnen worden aangetroffen en de twee hoofdcategorieën van permissive en obligatory language nader beschrijven. Met behulp van een formule uit het implementatieonderzoek en de resultaten van het coderingsproces wordt vervolgens de marge van beleidsvrijheid van de richtlijnen bepaald die tot de onderzoeksgroep (directive sample) behoren. Het codeboek wordt in de bijlage van het proefschrift in z'n geheel geïntroduceerd maar reeds in het methodologische deel wordt er een beknopte samenvatting van de opzet en inhoud ervan gegeven. Hierbij wordt ook ingegaan op het feit dat enkele van de sub-categorieën (vormen van (non-)discretionaire bepalingen) uitdrukking geven aan bepaalde juridische begrippen die nader worden toegelicht (bv. minimum en maximum harmonisatie, delegatie e.a.).

Voor een belangrijk deel is bij de ontwikkeling van het codeboek gebruik gemaakt van inzichten die zijn gewonnen door een voorafgaande exploratieve analyse van een willekeurige groep van nieuwe richtlijnen (dus geen modificaties) uit verschillende beleidsdomeinen. Het codeboek wordt beschouwd als een voorstel om beleidsvrijheid te beoordelen op een manier die meer rekening houdt met het complexe karakter van de teksten van richtlijnen en een benadering toepast die gedetailleerder is in vergelijking met eerder gedane pogingen om marges van beleidsvrijheid te bepalen. Tegelijkertijd wordt hiermee gepoogd om de verschillende vormen van beleidsvrijheid in een richtlijn in kaart te brengen. Het codeboek wordt echter niet aangezien als een instrument waarmee marges van beleidsvri-

jheid precies worden berekend maar waarmee op basis van alleen de tekst van een richtlijn louter een inschatting wordt gegeven of een richtlijn eerder meer of minder beleidsvrijheid aan de lidstaten toekent. Tevens wordt het codeboek aangezien als een voorlopige (zij het rudimentaire) poging om de marge van beleidsvrijheid van een richtlijn te beoordelen.

Op basis van drie criteria worden de richtlijnen voor de inhoudsanalyse geselecteerd: nieuwe richtlijnen (conform de toepasbaarheid van het codeboek), richtlijnen die zijn aangenomen in de periode 1 januari 2007 tot 1 december 2009 (voor een vergelijkbare juridische context) en richtlijnen uit de beleidsdomeinen consumentenbescherming, milieu en migratie. Dat levert een groep van in totaal zeventien richtlijnen op waaruit uiteindelijk, in aansluiting aan de inhoudsanalyse en het coderingsproces, zes worden gekozen voor een diepgaande empirische analyse. Aangezien de analyse van individuele richtlijnen gecompleteerd zal worden met een gepaarde vergelijking worden de zes richtlijnen in drie cases ingedeeld. Elk van die cases omvat twee richtlijnen die verschillen met betrekking tot hun marges van beleidsvrijheid: de een geeft eerder minder, de ander meer beleidsvrijheid. Een hoofddoel van de case studie analyse is om inzicht te geven in de relatie tussen de vermeende oorzaak of in kwantitatief onderzoek 'onafhankelijke variabel', dat is beleidsvrijheid, en het verondersteld effect of de 'afhankelijke variabele', dat is het resultaat van de omzetting. Overeenkomstig de kerngedachte van het proefschrift dat beleidsvrijheid een belangrijke rol bij de omzetting van richtlijnen kan spelen, is de achterliggende gedachte van de comparatieve analyse dat de beschikbaarheid van (meer) beleidsvrijheid (en het gebruik ervan) zal leiden tot tijdige en wettelijke correcte omzetting (naleving). Naast de link tussen de beleidsvrijheid van de richtlijn en het omzettingsresultaat, wordt volgens het *most similar systems design*, met andere zogenaamde achtergrondfactoren rekening gehouden waarvan wordt aangenomen dat ze de omzetting van een richtlijnen beïnvloeden: de soort van richtlijn, het aantal omzettingsactoren, het aantal en de aard van de omzettingsinstrumenten. Om zo goed mogelijk te kunnen uitsluiten dat deze factoren een cruciale invloed hebben op de omzetting en om in te zoomen op de link tussen beleidsvrijheid en omzettingsresultaat wordt ernaar gestreefd dat deze factoren ongeveer gelijk zijn ten aanzien van de twee richlijnen die worden vergeleken. Hetzelfde geldt voor het omzettingstermijn. Ter aflsuiting van het methodologische deel van het proefschrift wordt een overzicht gegeven van een aantal aspecten van de empirische analyse: doeleinden en structuur, alsmede de dataverzameling. Aangezien, zoals uit de reeks van verwachtingen valt af te leiden, het concept van de (juridische) compatibiliteit tussen EU richtlijn en nationale rechtsorde een belangrijke rol speelt in verband met het onderzoek naar de rol van beleidsvrijheid, wordt tot slot de methodologische benadering van dit concept nader toegelicht.

Deel 3: Empirische analyse (hoofdstukken 9 t/m 15)

Het empirische deel van het proefschrift is het omvangrijkst: het omvat de analyse van zes richtlijnen alsmede een hoofdstuk waarin de drie vegelijkende analyses worden gepresenteerd. De bespreking van de individuele richtlijnen houdt telkens in dat een beschrijvende en toelichtende analyse (descriptive and exploratory analysis) van zowel het onderhandelings- als het nationale omzettingsproces in Nederland wordt gegeven. Het empirisch onderzoek is achtereenvolgend gericht op: de EU Blue Card Richtlijn (migratie), de Pyrorichtlijn (consumentenbescherming), de Kaderrichtlijn Afvalstoffen (milieu), de Speelgoedrichtlijn (consumentenbescherming), de Terugkeerrichtlijn (migratie) en de Richtlijn inzake Fase II-benzinedampterugwinning (consumentenbescherming). Vervolgens worden met elkaar vergeleken: de twee eerstgenoemde richtlijnen, de derde en vierde richtlijn, en tenslotte de vijfde en zesde richtlijn.

Deze analyse levert het volgende beeld op: Beide migratierichtlijnen laten een grotere marges van beleidsvrijheid zien maar naleving in Nederland werd echter alleen in het geval van de Blue Card Richtlijn bereikt. De omzetting van de Terugkeerrichtlijn blijkt daarentegen gebrekkig waardoor er een inbreukprocedure door de Europese Commissie werd ingeleid en naleving pas na meer dan een jaar na het verstrijken van het omzettingstermijn gerealiseerd was. Ook de Pyrorichtlijn die maar weinig beleidsvrijheid aan de lidstaten toekent werd met enige vertraging omgezet. De Kaderrichtlijn Afvalstoffen die een aantal discretionaire bepalingen bevat maar, zoals uit de interviews blijkt, strikt geïnterpreteerd werd, is ook niet tijdig omgezet maar met een lichte vertraging van twee maanden. Met een geringe vertraging werd tenslotte de Speelgoedrichtlijn in Nederland omgezet. Deze Richtlijn bevat nauwelijks discretionaire bepalingen.

Uit de individuele analyses blijkt dat beleidsvrijheid een rol heeft gespeeld bij de onderhandelingen en omzetting van de twee migratierichtlijnen alsmede de Pyrorichtlijn. De bevindingen van de analyse van de Kaderrichtlijn Afvalstoffen laten een dergelijke conclusie niet toe voor wat betreft de EU onderhandelingen. Ofschoon de richtlijn een aantal discretionaire bepalingen bevat, wijzen de inzichten in het onderhandelingsproces echter niet duidelijk uit dat beleidsvrijheid van enige betekenis is geweest tijdens het totstandkomingsproces van de richtlijn. Beleidsvrijheid blijkt helemaal geen rol te hebben gespeeld bij de omzetting van de Richtlijn waarbij nauwelijks gebruik werd gemaakt van beleidsvrijheid. Ook de bevindingen omtrent de onderhandelingen over de Speelgoedrichtlijn laten niet zien dat beleidsvrijheid relevant is geweest. Vanuit het perspectief van Nederland was er, zoals in het geval van de Kaderrichtlijn Afvalstoffen, sprake van een goede match tussen de voorgestelde herziening van de Speelgoedrichtlijn en reeds bestaande nationale wetgeving waardoor er geen aanleiding was voor de Nederlandse delegatie om te streven naar meer beleidsvrijheid voor de nationale omzetting. Voor de omzetting was er dus nauwelijks beleidsvrijheid (op basis van de tekst van de richtlijn) beschikbaar en blijkbaar was

er voor beleidsvrijheid geen cruciale rol weggelegd tijdens de omzetting. Door de goede match tussen de Richtlijn en de reeds bestaande Nederlandse wetgeving, bestond er kennelijk geen noodzaak voor het wegnemen van onverenigbaarheden tussen EU en nationale regelgeving. Hierbij dient echter opgemerkt te worden dat de wijze van omzetting laat zien dat de discretonaire ruimte in de keuze van vormen en technieken van omzetting een ondersteunende werking lijkt te hebben gehad. De omzettingsanalyse toont aan dat zowel het instrument (secundaire wetgeving in vorm van een algemene maatregel van bestuur) als de techniek (copy-out techniek, en dynamische verwijzing) die zijn gebruikt, voor een probleemloze omzetting hebben gezorgd en dus in ieder geval niet tot een belemmering hebben geleid. Ten aanzien van de migratierichtlijnen valt op te merken dat beleidsvrijheid een faciliterende werking op beide onderhandelingsprocessen heeft gehad. Zowel in het geval van de Blue Card Richtlijn als de Terugkeerrichtlijn werd door de analyse van de EU-onderhandelingen duidelijk dat de voorgestelde EU regels afweken van de reeds bestaande wet- en regelgeving in de lidstaten. Bovendien kwamen in de debatten over de ontwerprichtlijnen politieke gevoeligheden en controversies naar voren die getriggered werden door de beoogde mate van EU- harmonisatie. In beide gevallen blijkt het toekennen van beleidsvrijheid in dienst te hebben gestaan van het bereiken van een compromis en tot de aanname van de definitieve versies van de richtlijnen te hebben bijgedragen. In tegenstelling tot de Terugkeerrichtlijn is de match tussen de Blue Card Richtlijn en de Nederlandse wetgeving uiteindelijk echter vrij goed geweest en is door de aanwezigheid en het gebruik van beleidsvrijheid de hieruit resulterende positieve werking kennelijk versterkt. Het verschil tussen de Terugkeerrichtlijn en Nederlandse wetgeving was daarentegen groter. De beschikbaarheid van meer beleidsvrijheid leidde in dit geval niet tot het versterken van de positieve effecten van compatibilieit. De analyse laat eerder zien dat door de manier waarop beleidsvrijheid bij de omzetting werd gebruikt de incompatibiliteit tussen de Richtlijn en reeds bestaande nationale wetgeving werd benadrukt. Daar komt bij dat beleidsvrijheid een belemmerende werking had en tot vertraging van de omzetting van de Terugkeerrichtlijn heeft bijgedragen – dit in samenspel met het aantal omzettingsactoren want naast het ministerie was ook het Nederlandse parlement betrokken bij de omzetting. De Pyrorichtlijn, tenslotte, is een interessant geval. De ontwerp-richtlijn maakt reeds duidelijk dat het een marktwerkingsrichtlijn betreft die de nieuwe aanpak naar technische harmonisatie impliceert en ook door haar beoogde doelstellingen (consumentenbescherming en vrij verkeer van pyrotechnische artikelen) een grotere mate van harmonisatie met zich meebrengt en dus minder beleidsvrijheid bevat. Ondanks dit feit laat het onderhandelingsproces zien hoe belangrijk het toekennen van beleidsvrijheid is geweest en dat het een faciliterend impact op de onderhandelingen heeft gehad. Hierbij moet echter de kanttekening worden gemaakt dat de relevante discretionaire bepaling (uitzondering op het vrije verkeer om o.a. veiligheidsredenen) reeds deel uitmaakte van de ontwerp-richtlijn, voortkomend uit de overwe-

gingen van de Europese Commissie dat politieke gevoeligheden tot controversies zouden hebben geleid. Die bepaling kwam dus niet tijdens de onderhandelingen maar daarvoor, dus in de fase dat de tekst van het Richtlijnvoorstel door de Commissie werd voorbereidt, tot stand. De analyse van het omzettingsproces laat zien dat beleidsvrijheid een ondersteunende factor is geweest die echter de negatieve impact van de incompatibiliteit op het vlak van EU en nationaal beleid ('policy misfit'), niet heeft kunnen compenseren. Tegen de achtergrond van de analyse van al deze voorbeelden kan geconcludeerd worden dat de empirische bevindingen de centrale aanname van het proefschrift ondersteunen: beleidsvrijheid kan een belangrijke rol bij de onderhandelings- en omzettingsprocessen betreffende EU richtlijnen spelen. Daarnaast wordt het beeld van de verschillende effecten die beleidsvrijheid op de omzetting van richtlijnen zou hebben, bevestigd. Dit komt nog eens duidelijk naar voren in het aansluitende comparatieve hoofdstuk. Hierin wordt benadrukt om te onderzoeken welke effecten enerzijds richtlijnen met weinig beleidsvrijheid en anderzijds richtlijnen met meer beleidsvrijheid hebben op het omzettingsproces en of er, op basis van de uitkomsten van die analyse, een patroon waar te nemen valt. Dit, zo kan worden opgemaakt, is echter niet het geval. Uit de vergelijking van het eerste paar richtlijnen (Blue Card Richtlijn en Pyrorichtlijn) blijkt dat meer beleidsvrijheid tot naleving leidt, terwijl, wanneer er minder beleidsvrijheid wordt toegekend aan de lidstaten, dit resultaat niet wordt bereikt. In tegendeel, de omzetting was duidelijk vertraagd. Terwijl deze vergelijking de kerngedachte van de nuttige rol van beleidsvrijheid onderstreept, laten de andere analyses geen soortgelijke conclusies toe. Met de eerste vergelijking contrasteert de derde vergelijking tussen de Terugkeerrichtlijn en de Richtlijn inzake fase II-benzinedampterugwinning: zoals boven genoemd draagt veel beleidsvrijheid bij tot vertraging en wettelijke incorrectheid van de omzetting van de migratierichtlijn, terwijl de milieurichtlijn die in nagenoeg geen beleidsvrijheid voorziet, door de lidstaten correct en tijdig werd omgezet. De vergelijking van het tweede paar laat tenslotte zien dat de omvang van beleidsvrijheid niet uitmaakt bij de omzetting aangezien beleidsvrijheid in geen van beide gevallen een cruciale rol speelt: Voor de omzetting van de Kaderrichtlijn Afvalstoffen was beleidsvrijheid helemaal niet relevant en hetzelfde geldt voor de incorporatie van de herziene Speelgoedrichtijn, een richtlijn die nauwelijks discretionaire ruimte toekent aan de lidstaten. Wat de EU- onderhandelingsprocessen betreft, kan op basis van de empirische inzichten met enige zekerheid geconcludeerd worden dat beleidsvrijheid in de helft van de gevallen een belangrijke rol heeft gespeeld: zoals eerder genoemd is dit van toepassing op de onderhandelingen van de twee migratierichtlijnen en de Pyrorichtlijn. Bij de onderhandelingen van zowel de Speelgoedrichtlijn als de Richtlijn inzake fase II-benzinedampterugwinning was beleidsvrijheid irrelevant en ook de bevindingen van de analyse van de Kaderrichtlijn Afvalstoffen wijzen in dezelfde richting – ondanks het feit dat de Richtlijn een aantal discretionaire bepalingen bevat.

Deel 4: Conclusie en vooruitzichten (hoofdstuk 16)

In het laatste deel worden de bevindingen uit de empirische analyse bij elkaar gebracht en beoordeeld. De case studies maken duidelijk dat, wat betreft de onderhandelingen, beleidsvrijheid een faciliterende (Blue Card Richtlijn, Terugkeerrichtlijn, Pyrorichtlijn) of helemaal geen actieve rol heeft gehad (Kaderrichtlijn Afvalstoffen, Speelgoedrichtlijn, Richtlijn inzake fase II-benzinedampterugwinning). De empirische resultaten bevestigen gedeeltelijk de verwachtingen betreffende de omstandigheden waaronder beleidsvrijheid wordt toegestaan. Allereerst is de link tussen de beleidsvrijheid van een richtlijn en het politieke beleidsdomein relevant. Inderdaad wordt meer beleidsvrijheid toegestaan wanneer de invloed van de EU in termen van wettelijke en institutionele ontwikkeling minder groot is: migratie is relatief beschouwd een beleidsdomein waar de EU veel later dan op het gebied van consumentenbescherming en milieu vaste voet aan de grond heeft gekregen. De twee onderzochte migratierichtlijnen zijn dan ook discretionaire richtlijnen die meer beleidsvrijheid laten dan de andere richtlijnen die betrekking hebben op het gebied van consumentenbescherming en milieu. De de *policy area expectation* is dus van toepassing zowel in haar oorspronkelijke betekenis (minder EU invloed, dus meer beleidvrijheid) als in omgekeerde zin (meer EU invloed, dus minder beleidsvrijheid). De andere verwachtingen sluiten hier grotendeels op aan. Zowel de *political sensitivity expectation* als de *compatibility expectation* zijn van toepassing in gevallen waar de lidstaten nog meer invloed hebben dan de EU en ze dus (nog) niet snel bereid zijn om macht en bevoegdheden af te staan en trachten hun eigen regelgeving in stand te houden (migratierichtlijnen maar ook Pyrorichtlijn zoals eerder hierboven besproken). Indien deze aspecten allemaal irrelevant zijn, zijn de verwachtingen dan ook niet van toepassing (Kaderrichtlijn Afvalstoffen, Speelgoedrichtlijn, Richtlijn inzake fase II-benzinedampterugwinning). De verwachting van de invloed van het Europees Parliament (met name in de rol van medewetgever) op de mate van beleidsvrijheid die wordt toegekend aan de lidstaten, kan door de empirische bevindingen van de analyses in geen van de onderzochte gevallen worden bevestigd. Uit een deel van de analyses blijkt dat het Europees Parlement, anders dan verwacht, het verlenen van beleidsvrijheid in het algemeen niet afwijst, maar juist aanbeveelt wanneer beleidsvrijheid de naleving van het subsidiariteitsbeginsel en de nationale implementatie volgens het Parlement zou kunnen bevorderen (bv. Kaderrichtlijn Afvalstoffen, Speelgoedrichtlijn).

Het ontbreken van een duidelijk beeld omtrent de invloed van het Europees Parlement op de marge van beleidsvrijheid leidt tot de aanname dat een dergelijk vraagstuk, een gedetailleerde analyse van de positie van het Europees Parlement vereist. Dit zou toekomstig onderzoek kunnen uitwijzen. Een bijdrage van het proefschrift is dat de empirische resultaten de centrale aanname van de *consensus-building* benadering bevestigen: beleidsvrijheid faciliteert het bereiken van een compromis in de Minister-

raad. De empirische analyses maken daarbij duidelijk dat beleidsvrijheid vooral een oplossing is voor meningsverschillen tussen de lidstaten, niet alleen wanneer hun posities van elkaar verwijderd zijn maar ook indien de verscheidenheid van hun wettelijke stelsels het overhevelen van eigen nationale beleid, wet- en regelgeving naar het EU-niveau (door zogenaamd 'uploaden') geen grote kans heeft (Blue Card Richtlijn, Terugkeerrichtlijn, Pyrorichtlijn). Een ander belangrijk en wellicht vernieuwend inzicht is dat, zoals blijkt uit de onderhandelingen over de Pyrorichtlijn, beleidsvrijheid conflictoplossend kan werken, ook wanneer het niet in grote hoeveelheden voorkomt maar wel wordt toegekend ten opzichte van een voor de lidstaten cruciaal aspect (hier: om veiligheidsredenen).

Uit de analyse van de omzettingsprocessen blijkt dat beleidsvrijheid verschillende rollen inneemt: naast een faciliterende (Blue Card Richtlijn) en ondersteunende rol (Pyrorichtlijn, Speelgoedrichtlijn), heeft het echter ook een belemmerende (Terugkeerrichtlijn) of juist geen relevante rol (Kaderrichtlijn Afvalstoffen, Richtlijn inzake fase II-benzinedampterugwinning). Welke rol beleidsvrijheid speelt is met name afhankelijk van de omzettingscontext. Opgemerkt dient te worden dat de empirische bevindingen niet voor alle verwachtingen sluitend bewijsmateriaal leveren. Wat betreft de verwachting van een faciliterend effect van beleidsvrijheid op de omzetting (*discretion-in-national-law expectation*) zijn er weliswaar bevindingen die deze verwachting ondersteunen. Maar dat is niet alles. Gedurende de omzetting komt beleidsvrijheid, zoals eerder aangestipt, naar voren als een interveniërende factor die in samenspel met andere factoren een faciliterende of belemmerende werking heeft. Terwijl de case studie analyses het belang van de interactie van beleidsvrijheid met de factor van wettelijke compatibiliteit (met name in het geval van de Blue Card Richtlijn) en het aantal omzettingsactoren (Terugkeerrichtlijn) bevestigen, wijzen de empirische resultaten niet op een interactie van (weinig) beleidsvrijheid en voorafgaande onenigheid die tot gebrekkige omzetting van een richtlijn bepaling zou kunnen leiden. Daarnaast levert geen van de case studies bewijs voor een gezamenlijk (belemmerend) effect van beleidsvrijheid en administratieve capaciteit. Maar het gebrek aan empirisch bewijs gaat wel gepaard met enkele inzichten. Bijvoorbeeld, naar voren komt dat de vertraging van de omzetting van een richtlijn niet te maken heeft met beleidsvrijheid (en andere factoren) maar vooral met externe factoren, zoals veranderingen van politieke omstandigheden in het geval van de Kaderrichtlijn Afvalstoffen en de Terugkeerrichtlijnis, of meer triviale redenen (menselijke fouten) zoals blijkt uit de analyse van de Speelgoedrichtlijn. Daarnaast wordt ook de relevantie van een factor zoals compatibiliteit (ook bekend als *goodness-of-fit argument*) duidelijk aangetoond, een gegeven waarover in het implementatieonderzoek de meningen nogal verschillen. Feit is dat hier wordt aangetoond dat deze factor zowel in de onderhandelingen als ook bij de omzetting van richtlijnen relevant is en gebruikt kan worden om meer helderheid te verkrijgen in de rol van beleidsvrijheid in deze processen.

Met de vooraf genoemde theoretische, methodologisch en empirische inzichten tracht het proefschriftonderzoek een belangrijke bijdrage te leveren aan het onderzoek naar beleidsvrijheid. Hiertoe hoort ook de poging met behulp van de kwalitatieve case studie analyses de 'black box' te openen en daarmee niet alleen te volstaan met de vaststelling of beleidsvrijheid al dan niet een effect heeft op de omzetting van richtlijnen maar te achterhalen hoe de discretionaire bevoegdheden die door de EU wetgever zijn verleend aan de lidstaten door de Nederlandse autoriteiten gedurende de omzetting worden uitgeoefend. Geconcludeerd kan worden, zoals de analyses van de Blue Card Richtlijn, Pyrorichtlijn en Speelgoedrichtlijn laten zien dat, wanneer ervan gebruik wordt gemaakt, beleidsvrijheid het proces van de inpassing van Europese richtlijnen kan bevorderen, dusdanig dat het nationale wetgevingskader hierdoor nauwelijks wordt aangetast.

Tot slot beantwoordt dit onderzoek niet alleen vragen, maar roept het ook vragen op. Dit biedt mogelijkheden voor toekomstig onderzoek naar beleidsvrijheid en hieraan gerelateerde aspecten. Zo rijst bijvoorbeeld de vraag naar de rol van beleidsvrijheid bij niet alleen de omzetting maar ook de praktische toepassing en naleving van EU richtlijnen. Met andere woorden welke rol heeft beleidsvrijheid in de fases aansluitend op de formele implementatie? En, voor het verkrijgen van een meer systematisch beeld van de effecten van beleidsvrijheid op de fases van omzetting (en daaropvolgende fases), zou onderzoek naar meer cases (richtlijnen) uitkomst bieden. Met behulp van een *mixed method* onderzoeksdesign (combinatie van grootschalig en kleinschalig onderzoek) kan zowel op een diepgaande manier naar het gebruik van beleidsvrijheid bij de omzetting worden gekeken als ook – met behulp van statistische analyse(s) – een grotere groep richtlijnen worden onderzocht om, zo mogelijk, patronen te identificeren ten opzichte van de effecten van beleidsvrijheid op de nationale implementatie van richtlijnen.

Beleidsvrijheid en legitimiteit

De primaire focus van het proefschriftonderzoek is de rol van beleidsvrijheid bij de onderhandelingen en omzetting van richtlijnen. Een tweede aandachtspunt van het proefschrift is de link tussen beleidsvrijheid en legitimiteit. De voordelen die beleidsvrijheid kan hebben voor de onderhandelingen en omzetting betreffende richtlijnen zijn boven water gebracht. Aangezien in het rechtswetenschappelijk debat met name de nadelen van beleidsvrijheid worden belicht en aangezien ook politicologen op de mogelijke problemen wijzen die gepaard gaan met de delegatie van discretionaire bevoegdheden naar het nationale bestuur, komt beleidsvrijheid zoals in het proefschrift wordt aangetoond, in beeld als a *blessing in disguise*. Die conclusie wordt ook getrokken met het oog op de werking die beleidsvrijheid kan hebben op de legitimiteit van richtlijnen in het nationale recht. Ook hier, zo blijkt uit de bespreking van dit onderwerp, kan beleidsvrijheid bevorderende werking hebben. Het onderzoek naar de link tussen beleidsvrijheid en legitimiteit maakt echter geen deel uit van de empirische analyse naar

de rol van beleidsvrijheid in EU onderhandelings- en nationale omzettingsprocessen. Dat neemt echter niet weg dat de case studies worden gebruikt om bepaalde aspecten in de bespreking over de relatie tussen legitimiteit en beleidsvrijheid te illustreren. De aanpak van een complex concept zoals legitimiteit is bescheiden: het doel is niet om de legitimiteit van de omzettingsprocessen te beoordelen die in de case studies worden besproken maar om stil te staan, meer in het algemeen, bij de legitimiteit van EU richtlijnen in het nationale recht. Er wordt dus gereflecteerd op de legimiteit van het omzettingsproces en het bereikte resultaat alsmede de link tussen beleidsvrijheid en legitimiteit hierbij.

Te dien einde wordt in een eerste stap uiteengezet hoe het concept van legitimiteit in het proefschrift wordt opgevat. Heel in het algemeen wordt politieke legitimiteit aangezien als een soort containerbegrip voor diverse aspecten die te maken hebben met de uitoefening van beslissingsbevoegdheid en de reactie hierop van degenen die worden geraakt door de genomen besluiten. In die zin behandelt legitimiteit substantiële en procedurele aspecten. Legitimiteit wordt bijvoorbeeld geassocieerd met begrippen zoals rechtvaardigheid, verantwoording, erkenning en ondersteuning van politieke beslissingen. In de rechtswetenschappen wordt de uitoefening van politieke macht en de wetten waarop deze gebaseerd is als legitiem beschouwd – en als een plicht voor de burger om deze na te leven – wanneer wetten en machtsuitoefening terdege rekening houden met onder ander de beginselen van de rechtsstaat (legaliteit, rechtszekerheid) alsmede het beginsel van de machtenscheiding. Bovendien moeten de grondrechten worden geëerbiedigd en de mogelijkheid van rechterlijke toetsing van wetten en hun bestuurlijke uitvoering bestaan. In het politiekwetenschappelijk debat wordt legitimiteit kwalitatief benaderd, dat wil zeggen dat het wordt beschreven in termen van elementen, vectoren en dimensies en ook in dit proefschrift is voor deze benadering gekozen. In lijn hiermee wordt benadrukt dat politieke legitimiteit substantiële en procedurele aspecten kent en dat het wordt opgevat als een multidimensionaal concept.

Multidimensioneel concept

De veelzijdigheid van het concept wordt bijvoorbeeld benadrukt door Beetham and Lord (1998) die nagaan wat het concept van legitimiteit, met name in de context van de EU, inhoudt. Volgens deze auteurs is legitimiteit gebaseerd op legaliteit, normatieve rechtvaardigheid en legitimatie. Kort samengevat moet de uitvoering van politieke macht op (democratisch) vastgestelde regels berusten en deze moeten te rechtvaardigen zijn in termen van wat burgers beschouwen als een rechtmatige bron van autoriteit, de daarbij passende doelen alsmede de manier van bestuurlijke uitvoering van bevoegdheden ter bereiking van die doelen. Legitimatie houdt tenslotte in dat het beslissingsbevoegde gezag aanvaard wordt door middel van de uitdrukkelijke toestemming en bevestiging van degenen die ondergeschikt zijn aan de politieke macht en de wetten waarop deze gebaseerd is. Daarnaast introduceren Beetham en Lord drie dimensies van legitimiteit: democratie,

identificatie en performance. Democratie slaat op de structurele aspecten van de uitvoering van beslissingsbevoegdheid (bv. vertegenwoordiging van de bevolking bij besluitvormingsprocessen of het beginsel van machtenscheiding). Identificatie heeft met de publieke aanvaarding van politieke autoriteit te maken maar gaat ook over onderwerpen zoals Europese identiteit en burgerschap. Tenslotte heeft performance betrekking op de vraag of in een politiek systeem beslissingsbevoegdheden zo worden uitgevoerd dat ze de plannen en doelen van dit systeem ten goede komen (en hiermee de burgers die het hebben erkend). Met andere woorden is de vraag of de effectiviteit van de politieke maatregelen wordt gerealiseerd.

Nog belangrijker voor de context van dit proefschrift is echter de driedimensionale benadering van legitimiteit door Scharpf (1999) en Schmidt (2012). Volgens hen kan legitimiteit worden beschreven en beoordeeld in termen van input, throughput en output legitimiteit. Output legitimiteit kan gerelateerd worden aan de notie van performance van Beetham en Lord. Het gaat hierbij om de effectiviteit van wetgeving: hoe goed wordt een gemeenschappelijk (op Unie niveau) vastgesteld probleem opgelost door de aangenomen EU wetgeving? Hoe zeer richt zich deze wetgeving op het belang en de behoeftes van de burgers van de Unie (samengevat in de door Abraham Lincoln bekende slagzin: 'government *for* the people')? Input legitimiteit gaat over de vraag in welke mate de aangenomen wetgeving het belang van het publiek weerspiegelt (Scharpf, 1999) en betreft dus het aspect van publieke betrokkenheid bij besluitvormingsprocessen ('government *by* the people'). Input legitimiteit is nauw verbonden met procedurele aspecten van deze processen waarop throughput legitimiteit gebaseerd is ('government *with* the people'). Lord en Magnette (2004) laten bovendien zien dat de input en output dimensies van legitimiteit gebruikt kunnen worden om beginselen nader te beschrijven die EU besluitvorming en hieruit resulterende wetgeving legitimeren. Het voordeel van deze benadering is dat voor specifieke gevallen kan worden toegelicht wat de legitimiteit van EU besluitvorming precies inhoudt. Deze beginselen noemen ze ook 'vectors' ('vectoren') waarmee ze bedoelen de indirecte (door democratisch gelegitimeerde lidstaten), parlementaire (door betrokkenheid van het Europese Parlement), technocratische (door de input van deskundigen) en procedurele (door bv. de naleving van beginselen van subsidiariteit en proportionaliteit) legitimiteit van besluitvormingsprocessen.

De vraag die vervolgens behandeld wordt, is hoe beleidsvrijheid aansluit op de input, throughput en output legitimiteit van wetgeving en hoe bovendien de net genoemde legitimerende beginselen in het gehele plaatje passen. Het centrale argument waarop vooral in het laatste deel van het proefschrift wordt ingegaan, is dat beleidsvrijheid ten goede kan komen aan de legitimiteit van Europese richtlijnen omdat beleidsvrijheid bij de omzetting in het nationale wetgevingskader kan worden gebruikt om de input, throughput en output legitimiteit van die richtlijnen te verhogen. Rekening houdend met de gehele levenscyclus van een richtlijn en dus hetaan de omzetting voorafgaande EU besluitvormingsproces, wordt de

stelling gepresenteerd en besproken dat sommige Europese richtlijnen die moeten worden omgezet een gebrek hebben aan (bepaalde beginselen van) legitimiteit.

Beleidsvrijheid en output legitimiteit
In de analyse van die stelling wordt ten eerste de samenhang uitgewerkt tussen de beleidsvrijheid die door EU richtlijnen aan lidstaten wordt toegekend en de output legitimiteit van deze richtlijnen in de nationale rechtsorde. Met behulp van beleidsvrijheid zijn lidstaten in staat aan de verplichtingen van een richtlijn te voldoen op een wijze die de lidstaten het meest gepast lijkt. Met andere woorden, kunnen de lidstaten de meest geschikte vormen en middelen kiezen en zodoende de richtlijn laten omzetten door actoren met kennis van de omzettingspraktijk en de omzetting op een manier laten uitvoeren die naar hun mening het beste past bij hun nationale, wettelijke context. Alles samengenomen vergroot dit de kans dat door de flexibiliteit die een richtlijn beschikbaar stelt de Europese regels op een doelmatige manier in de nationale rechtsorde worden geïncorporeerd. Dat draagt ertoe bij dat de richtlijn haar probleemoplossende werking volledig kan ontplooien. Hierdoor wordt ook de kans groter op duurzame effectiviteit want een goede omzetting kan een garant zijn voor de probleemoplossende werking van een richtlijn in de verdere uitvoeringsfases.

Beleidsvrijheid en input, throughput legitimiteit
Betrokkenheid bij en deelname aan besluitvormingsprocessen zijn nauw verbonden met zowel input als throughput legitimiteit. Met oog op de omzetting van richtlijnen en hieraan gerelateerde regelgevingsprocessen, kan beleidsvrijheid een waardevol instrument zijn. De discretionaire ruimte kan bijvoorbeeld worden gebruikt om vorm te geven aan een dialoog tussen het bestuur (dat een richtlijn omzet) en de belanghebbenden waardoor de kwaliteit (juistheid) van de omzettingswetgeving kan worden bevorderd. Beleidsvrijheid kan worden benut om een dergelijk dialoog tussen de overheid (bestuur) enerzijds en belanghebbenden en breder publiek anderzijds zo vorm te geven dat er ingegaan kan worden op de betekenis en de gevolgen van specifieke EU wetgeving en de toepassing ervan voor nationale wetssystemen. In de functie van een nationale 'communicatieve discours' (Schmidt, 2004) waarin EU wetgeving door de overheid aan het publiek wordt toegelicht en op vragen en behoeftes van burgers wordt ingaan, kan beleidsvrijheid bijdragen aan het legitimeren van EU wet- en regelgeving in het nationale recht. Op die manier kan onder burgers begrip worden gekweekt en, met name onder belanghebbenden, steun worden gegenereerd voor de feitelijke toepassing en naleving van een EU richtlijn. De bevorderende rol die beleidsvrijheid voor de input en throughput legitimiteit kan spelen, lijkt vooral in het licht van het rechtswetenschappelijk onderzoek naar 'procedurele rechtvaardigheid' (Tyler, 1988; 1990) van belang. Hieruit blijkt dat burgers zelfs voor hen ongunstige beslissingen aanvaarden en naleven aangezien ze deze als 'rechtvaardig totstand-

gekomen' beschouwen. Procedurele rechtvaardigheid wordt onder andere gerealiseerd doordat besluitvormingsprocessen aan bepaalde criteria voldoen die onder ander te maken hebben met een toereikende vertegenwoording van belanghebbenden en onpartijdigheid van het beslissingsbevoegde gezag. In het proefschrift wordt het idee geuit dat beleidsvrijheid kan worden benut om zo vorm te geven aan een bestuurlijk regelgevingsproces in het kader van de omzetting van richtlijnen dat aan deze criteria kan worden voldaan. Figuur 2 vat de bespreking van de link tussen beleidsvrijheid en de drie legitimiteitdimensies in een overzicht samen:

Figuur 2: Legitimiteit en beleidsvrijheid bij de omzetting van EU richtlijnen

Legitimiteit	Beleidsvrijheid
Output legitimiteit: besluitvorming voor burgers	Draagt bij tot de effectiviteit en het probleemoplossend vermogen van EU richtlijnen in de lidstaten
Input en output legitimiteit: besluitvorming *door* burgers en rechtvaardige procedures *met* burgers	Draagt bij tot de aanvaarding en ondersteuning van de formele en praktische implementatie van EU richtlijnen in de lidstaten

In het proefschrift wordt vervolgens ingegaan op de aanname dat het EU wetgevingsproces soms legitimiteit aan richtlijnen verleent die een tekort laat zien aan bepaalde maar belangrijke wetgeving-legitimerende beginselen die boven werden genoemd (met name procedurele legitimiteit).

Legitimiteit van EU besluitvorming

Het blijkt dus dat beleidsvrijheid bij de omzetting gebruikt kan worden om naast de output legitimiteit zowel de input als throughput legitimiteit van richtlijnen in het nationale recht te verhogen. Kennelijk kan dat nodig zijn waar de legitimiteit van de EU besluitvorming omtrent richtlijnen gebrekkigheden lijkt te vertonen. Deze gebrekkigheden komen echter in eerste instantie niet onmiddelijk voort uit het feit dat de omzetting, zoals in Nederland maar ook in andere lidstaten, grotendeels door het bestuur wordt uitgevoerd. De redenering is dat voor een beter begrip van gebrekkige (maar niet per se ontoereikende) legitimiteit van richtlijnen naar het EU wetgevingsproces moet worden gekeken. Aangaande de beleidsdomeinen die in de case studies worden behandeld, wordt op basis van de relevante literatuur het volgende geconstateerd. Wat betreft het gebied van justitie en binnenlandse zaken, migratie inbegrepen, wordt in de literatuur gewezen op een gebrek aan legitimiteit door een 'cultuur van geheimhouding', onvoldoende transparantie en verantwoording van besluitvorming alsmede te weinig input van het Europees Parlement of belanghebbenden. Het blijkt dus dat de legitimiteit van EU migratiewetgeving toen vooral gebaseerd was op indirecte legitimiteit: de realisering van politieke voorkeuren in de betrokken lidstaten (grensbeveiligingsaangelegenheden en regulering

van het toestroom van migranten). Dit aspect komt duidelijk naar voren in het geval van de Blue Card Richtlijn waar het Europees Parlement door de geldende consultatieprocedure een slechts marginale invloed had op de besluitvorming die vooral in handen lag van de lidstaten.

Met betrekking tot de EU milieuwetgeving en wetgeving betreffende consumentenbescherming is de bevinding dat deze vooral berusten op technocratische legitimiteit en dus de input van deskundigen. Dat komt door de vele technische eisen van de relevante richtlijnen die door deskundigen moeten worden uitgewerkt waardoor uitvoeringsbevoegdheden vaak gedelegeerd worden aan de relevante commissies van de Europese Commissie. In de case studie analyses over de milieu- en consumentenbeschermingsrichtlijnen komt dit aspect gedeeltelijk naar voren. Door de veelal toegepaste codecisie- of medebeslissingsprocedure in de periode voor het verdrag van Lissabon tonen de richtlijnen op het gebied van die beleidsdomeinen, naast technocratische echter ook parlementaire legitimiteit.

Legitimiteit van nationale omzetting

Wanneer de aandacht gericht wordt op het nationale vlak, kan dus met oog op de hier besproken richtlijnen en beleidsdomeinen worden vastgesteld dat naast het bestaan van parlementaire legitimiteit, door de betrokkenheid van het Europees Parlement, met name de indirecte en technocratische beginselen legitimiteit verlenen aan een in nationaal recht om te zetten richtlijn. Hieruit kan worden opgemerkt dat er behoefte kan bestaan om de procedurele legitimiteit van richtlijnen, dus de througput dimensie, te versterken. Bovendien, aangezien het feit dat in Nederland, naast andere EU lidstaten, de omzetting van richtlijnen grotendeels door het bestuur (nationale ministeries) wordt uitgevoerd, lijkt het ook belangrijk om de input van belanghebbenden te waarborgen. Deze input in besluitvormingsprocessen is niet noodzakelijk wanneer de omzetting louter technische details of een niet-essentiële herziening van EU wetgeving betreft. Maar het wordt als belangrijk geacht indien de omzetting van een richtlijn meer fundamentele kwesties inhoudt die, wanneer het nationale parlement niet intensief betrokken is,[2] het raadplegen van de relevante belanghebbenden bij de omzetting door het bestuur essentieel maakt. Dit aspect is in lijn met een basisprincipe van democratie, namelijk dat politieke besluitvorming zo dicht mogelijk bij degenen dient plaats te vinden die hierdoor beïnvloedt worden. In dit verband wordt, in de context van de omzetting van richtlijnen, op het idee gewezen dat betrokkenen des te meer moeten kunnen participeren aan nationale besluitvormingsprocessen betreffende de omzetting van richtlijnen, hoe meer beleidsvrijheid voor lidstaten ter beschikking staat. In lijn hiermee is de gedachte dat de verplichting om een richtlijn tijdig om te zetten weliswaar belangrijk is maar niet ten koste zal gaan van de betrokkenheid van belanghebbenden. Want anders ontstaat er een 'democratische lekkage'

2 Dit zal het slechts zijn indien de omzetting de aanname van een wet in formele zin zal vereisen.

(Vandamme and Prechal, 2007; Vandamme, 2008). In het voorkomen van die lekkage kan een sleutelrol weggelegd zijn dat om die reden beschouwd wordt als 'democracy discretion' (Vandamme, 2008). Tot slot wordt in dit verband in het proefschrift ingegaan op de vraag hoe de participatie van derde partijen (naast het bestuur en het parlement) in bestuurlijke besluitvormingsprocessen tijdens de omzetting – die tot een verhoging van zowel input als throughput legitimiteit kan leiden – kan worden vormen gegeven. Suggesties hieromtrent betreffen vormen van democratisch en op samenwerking gebaseerde governance ('collaborative governance'), met name het zogenaamde 'negotiated rule-making' ('onderhandelend regelgeven'). In dit soort processen kan beleidsvrijheid, zoals reeds eerder is uiteengezet, de voorwaarden scheppen voor een proces dat de input en throughput legitimiteit van besluitvorrming en hierdoor het democratisch gehalte van bestuurlijke besluitvorming verhoogd. In dit verband wordt beleidsvrijheid aan processen van deliberatie en participatie gelinkt (Hunold & Peters, 2004).

Samenvattend kan geconcludeerd worden dat beleidsvrijheid in de context van de omzetting van Europese richtlijnen beschouwd moet worden als een kans om de relevante nationale actoren terug te brengen in een proces dat in de eerste plaats vooral vorm wordt gegeven op het EU-niveau. Tegen die achtergrond komt beleidsvrijheid naar voren als een belangrijk middel om de (vooral bestuurlijke) omzetting van richlijnen op een effectief maar ook democratische manier te laten plaatsvinden.

Curriculum Vitae

Josephine Marna-Rose Hartmann was born on 31 March 1982 in Berlin, Germany. She attended the Freiherr-vom-Stein Gymnasium in Berlin Spandau from which she graduated, receiving the higher education entrance certificate (Abitur) in 2001. From 2001 to 2007 she studied Dutch Philology, Modern History and Education at the Freie Universität Berlin for which she received the Magister degree in 2007. Obtaining a direct exchange scholarship, Josephine completed part of her studies at the University of Amsterdam where she took classes in Dutch language and culture. With another scholarship from the German Academic Exchange Service (Deutscher Akademischer Austausch Dienst, DAAD), Josephine returned to Amsterdam, following the interdisciplinary Master program European Studies: Identity and Integration at the University of Amsterdam, passing it with distinction in 2010. In her master thesis Josephine focused on a political and judicial subject matter: 'The Europeanisation of national environmental policies in Germany, Spain and the Czech Republic' analysing, in other words, the EU's impact on environmental policy-making in a few EU Member States. Being aware of the importance to gain practical skills and insights into working fields of her interest, Josephine completed internships at the Dutch Embassy and German Embassy, both in Berlin as well as at the European Cultural Foundation (ECF) in Amsterdam. She also worked as a staff member at the Dutch Embassy in Berlin and later on as a research assistant at the Amsterdam School of Communication Research (ASCoR), University of Amsterdam. Her academic and professional background reflects her interest in the study of cornerstones of European society: language, history, culture, politics and law. Alongside that, she perceives living and working in multicultural environments as having decisively contributed to her educational and social development.

Josephine's PhD research at the University of Leiden, department of Constitutional and Public Law, is part of the interdisciplinary profile area *Political Legitimacy*. Her dissertation has focused on the role of discretion in EU legislative and administrative decision-making as well as the link between discretion and legitimacy regarding EU directives in national law. During her PhD-programme, Josephine participated in a research project of Leiden Law School and the Leiden Institute of Public Administration which was commissioned by the Ministry of Internal Affairs and Kingdom Relations, dealing with the effects of European directives within frontier areas. Josephine was furthermore involved in the department's project on legitimacy and the separation of powers resulting into the volume *The Powers that Be. Rethinking the Separation of Powers. A Leiden Response to Möllers* (2016) as well as in international conferences, organising and presenting in workshops

on issues related to her research ('legitimacy issues of Post-Lisbon secondary EU legislation' and 'EU and domestic politics'). Additionally, Josephine followed postgraduate training at the *ECPR* Winter and Summer Schools in *Research Methods and Techniques* including courses on qualitative and quantitative research designs, expert interviews, Nvivo9 for qualitative data management and analysis, process tracing, content analysis as well as comparative research designs. Josephine was involved as a teacher in the department's bachelor programme *Dutch Constitutional and Administrative law*, teaching the courses 'Introduction to Dutch constitutional law' and 'Principles of the democratic constitutional state'. In addition to that, she co-supervised BA students in the writing of their theses. During her time at Leiden Law School she also obtained the University Teaching Qualification (BKO).

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2015 and 2016:

MI-246 C. Vernooij, *Levenslang en de strafrechter. Een onderzoek naar de invloed van het Nederlandse gratiebeleid op de oplegging van de levenslange gevangenisstraf door de strafrechter* (Jongbloed scriptieprijs 2014), Den Haag: Jongbloed 2015, ISBN 979 70 9001 563 2

MI-247 N. Tezcan, *Legal constraints on EU member states as primary law makers. A Case Study of the Proposed Permanent Safeguard Clause on Free Movement of Persons in the EU Negotiating Framework for Turkey's Accession*, (diss. Leiden), Zutphen: Wöhrmann 2015, ISBN 978 94 6203 828 8

MI-248 S. Thewissen, *Growing apart. The comparative political economy of income inequality and social policy development in affluent countries*, (diss. Leiden), Enschede: Gildeprint 2015, ISBN 978 94 6233 031 3

MI-249 W.H. van Boom, *'Door meten tot weten'. Over rechtswetenschap als kruispunt*, (oratie Leiden), Den Haag: BJu 2015, ISBN 978 94 6290 132 2

MI-250 G.G.B. Boelens, *Het legaat, de wisselwerking tussen civiel en fiscaal recht* (diss. Leiden), 's Hertogenbosch: BoxPress 2015, ISBN 978 94 6295 285 0

MI-251 S.C. Huis, *Islamic Courts and Women's Divorce Rights in Indonesia. The Cases of Cianjur and Bulukumba*, (diss. Leiden), Zutphen: Wöhrmann 2015, ISBN 978 94 6203 865 3

MI-252 A.E.M. Leijten, *Core Rights and the Protection of Socio-Economic Interests by the European Court of Human Rights*, (diss. Leiden), Zutphen: Wöhrmann 2015, ISBN 978 94 6203 864 6

MI-253 O.A. Haazen, *Between a Right and a Wrong. Ordinary Cases, Civil Procedure, and Democracy*, (oratie Leiden), Amsterdam: Amsterdam University Press 2015, ISBN 978 90 8555 099 0

MI-254 A. Marrone, *The Governance of Complementary Global Regimes and the Pursuit of Human Security. The inter-action between the United Nations and the International Criminal Court*, (diss. Leiden), Zutphen: Wöhrmann 2015

MI-255 Marieke Dubelaar, Rick van Leusden, Jeroen ten Voorde, Sigrid van Wingerden, *Alleen voor de vorm? Frequentie, organisatie en praktijk van pro-formazittingen*, Den Haag: Boom Juridische uitgevers 2015, ISBN 978 94 6290 156 8

MI-256 Y. Li, *Inter-creditor Equity in Sovereign Debt Restructuring. Towards the Establishment of a Multilateral Legal Framework* (diss. Leiden), Amsterdam: Amsterdam University Press 2015, ISBN 978 90 8555 103 4

MI-257 M.A.K. Klaassen, *The right to family unification. Between migration control and human rights* (diss. Leiden), Zutphen: Wöhrmann 2015, ISBN 978 94 6203 945 2

MI-258 J.C.W. Gooren, *Een overheid op drift* (diss. Leiden), Zutphen: Wöhrmann 2015, ISBN 978 94 6203 973 5

MI-259 S. Tjandra, *Labour Law and Development in Indonesia* (diss. Leiden), Zutphen: Wöhrmann 2016, ISBN 978 94 6203 981 0

MI-260 R.H.C. van Kleef, *Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports organisations and civil law* (diss. Leiden), Den Haag: Eleven International Publishing (BJu) 2016, ISBN 978 94 6236 670 1

MI-261 C.G. Breedveld-de Voogd, A.G. Castermans, M.W. Knigge, T. van der Linden & H.A. ten Oever (red.), *Core Concepts in the Dutch Civil Code. Continuously in Motion*, BWKJ nr. 30, Deventer: Kluwer 2016, ISBN 978 90 1313 725 5

MI-262 P.W. den Hollander, *De relativiteit van wettelijke normen*, (diss. Leiden)

MI-263 W. Wels, *Dead body management in armed conflict: paradoxes in trying to do justice to the dead*, (Jongbloed scriptieprijs 2015), Den Haag: Jongbloed 2015, ISBN 979 70 9003 825 9

MI-264 Fredericks, E.A., *Contractual Capacity in Private International Law*, (diss. Leiden), Zutphen: Wöhrmann 2016

MI-265 J.H. Crijns, B.J.G. Leeuw & H.T. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, Research Report, Den Haag: Eleven International Publishing (BJu) 2016, ISBN 978 94 6236 687 9

MI-266 B.E.E.M. Cooreman, *Addressing global environmental concerns through trade measures: Extraterritoriality under WTO law from a comparative perspective*, (diss. Leiden), Zutphen: Wöhrmann 2016

MI-267 J.E. van de Bunt, *Het rampenfonds*, (diss. Leiden), Meppel: PrintSupport4U, 2016.

MI-268 J.G.H. Altena, *Het legaliteitsbeginsel en de doorwerking van Europees recht in het Nederlandse materiële strafrecht*, (diss. Leiden), Deventer: Kluwer 2016, ISBN 978 90 1313 885 6

MI-269 D. van der Blom, *De verhouding van staat en religie in een veranderende Nederlandse samenleving*, (diss. Leiden), Zutphen: Wöhrmann 2016, ISBN 978 94 6328 032 7

For the complete list of titles (in Dutch), see: www.law.leidenuniv.nl/onderzoek/publiceren