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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
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

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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 regu-
lation 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 ear-
erlier. Changes within economic, social and technical circumstances, includ-
ing the rising public awareness of the negative implications of waste, were
amongst the reasons for previous amendment and codification of the Direc-
tive 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 implementa-
tion of EU waste legislation in the Member States. Deficient implementa-
tion 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, implementa-
tion 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 con-
sumer affairs (Lenschow, 2010: 319). Bad implementation records seemed to
oddly contrast with the EU’s commitment to promote environmental pro-
tection and improvement.

3 BIO Intelligence Service (2011) Implementing EU waste legislation for green growth,

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 kinds 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. 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 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 treaties9 (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

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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-
management 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). 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). 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.

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 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. Next to updating and revising already existing legislation – in line with the Commission’s better regulation programme 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.

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-
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.\(^\text{17}\) 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).\(^\text{18}\) 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\(^\text{19}\) (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.

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\(^\text{17}\) As repeatedly stated in the Directive’s preamble and mentioned in Article 11(2) of the revised Waste Framework Directive.


\(^\text{19}\) 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

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>21 Dec 05</td>
<td>Adoption by Commission proposal</td>
</tr>
<tr>
<td>05 July 05</td>
<td>Committee of Regions opinion</td>
</tr>
<tr>
<td>13 Feb 07</td>
<td>European Parliament opinion on 1st reading</td>
</tr>
<tr>
<td>20 Dec 07</td>
<td>Adoption of common position by Council</td>
</tr>
<tr>
<td>17 Jun 08</td>
<td>European Parliament opinion on 2nd reading</td>
</tr>
<tr>
<td>20 Oct 08</td>
<td>Approval by the Council of the European Parliament amendments at 2nd reading</td>
</tr>
<tr>
<td>19 Nov 08</td>
<td>Formal adoption by Council and European Parliament</td>
</tr>
</tbody>
</table>

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. 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

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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, 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).

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. 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, the United 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-

\[22\text{ See Article 1 of the final Directive.}\]
\[23\text{ See Articles 7(4) and 17.}\]
\[24\text{ The corresponding question reads as follows: ‘Will the development of guidelines and common standards at EU level leave the appropriate flexibility for Member States to implement measures at national level?’ Cf. Council of the European Union, 2006a, p. 5.}\]
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

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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). 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. 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. 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 recyc-


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.
clinging 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). 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. 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

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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.

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). 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). 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. 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-

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. Economic instruments are, additionally, promoted with regard to the separate collection and treatment of waste oils, provided that national conditions allow for their application.

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. 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]
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

Part 3  Empirical aspects – negotiation and transposition analyses

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.


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

<table>
<thead>
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<th>Transposition deadline:</th>
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<tbody>
<tr>
<td>Publication transposition legislation:</td>
<td>23 Nov 10</td>
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<tr>
<td></td>
<td>21 Dec 10</td>
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<td>10 Feb 11</td>
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<td>04 March 11</td>
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<td></td>
<td>04 March 11</td>
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<tr>
<td>Sort transposition measure (and number):</td>
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<tr>
<td></td>
<td>Order in council (2), ministerial decision (2)</td>
</tr>
<tr>
<td>In charge:</td>
<td>Ministry of the Environment</td>
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<tr>
<td>Legal Framework:</td>
<td>Dutch Environmental Management Act 1993</td>
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</table>

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 pur-view 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. This was also confirmed in the interviews.

The transposition of the Directive required the involvement of other domestic actors. The Dutch Council of State recommended reviewing the draft measure on a few points, including editorial issues and some content-related aspects (Parliamentary Papers II 2009/2010, 32392 nr. 4). 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, 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.

Member States were allowed to depart from EU waste management procedures.\(^{44}\) This should make the continuation of national practices possible (\textit{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 (\textit{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 (\textit{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

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\(^{44}\) 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 (\textit{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. 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

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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’. 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 which may also further specify the rules on this subject.

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, 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.

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. 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.

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. 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. 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. 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].

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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.


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 kader- richtlijn 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). 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. 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]. 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 provisions 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 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.\(^6^4\) 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.