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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
12 Toy Safety Directive

12.1 Introduction

In 2003, as part of the simplification and better regulation process, the European Commission announced the revision of particular pieces of its regulation on products (European Commission, 2003). This revision exercise included the Toy Safety Directive1 which had been adopted by the end of the 1980s in the context of the achievement of the internal market. The discussion in this chapter maps the content and history (purpose and background) of the succeeding Directive which revises EU rules on the safety of toys. The evolution of EU consumer law has previously been addressed in greater detail2 and for this reason only some fundamental points are reiterated. More attention is paid to the sub-domain of toy safety legislation. Next, this chapter traces the EU negotiations relating to the Directive with specific regard to the Dutch position on the Directive proposal. Finally, the transposition of the Directive in the Netherlands is addressed. Reconstructing the EU negotiations and national transposition of the Directive aims at illuminating the role of discretion in both these processes.

12.2 The directive

The first EU Directive regarding the safety of toys was adopted by the Council in the late 1980s.3 By that time, the Directive was the first piece of sector-specific legislation regarding toys. It also represented one of the first measures applying the new approach legislative technique to harmonisation and standardisation which has since 1985 characterised the EU’s way of drafting directives proposed in application of Article 95 TEU (ex. 100A TEC).4 As mentioned earlier, directives entailing the ‘new approach’ establish essential safety requirements for products while leaving the technical specifications of these requirements concerning technical standards to standardisation bodies mandated by the European Commission. Also the 2009 Toy Safety Directive implies the new approach. Like its predecessor

2 See chapter 10, case study on the Pyrotechnic Articles Directive.
it furthermore acts on the principle that toys may only be placed on the market if they comply with the essential safety requirements to ensure that the use of these toys is not jeopardising the health and safety of those getting in contact with them. From the Commission’s consultation of experts and the impact assessment conducted in the preparation of the Directive proposal, revising the 1988 Directive had emerged as the preferred option, as opposed to merely repealing the Directive or improving its application by means of soft law such as for instance Commission guidelines or recommendations (European Commission, 2008, p. 3). The revised Directive, albeit being in formal terms a new basic act, is based on the same idea than the first Toy Safety Directive: it aims to realise both the market integration and safety of toys. Additionally, it is intended to revise and especially clarify but not extend or substantially change already established EU rules. Two decades after the first Directive proposal had been launched, the Commission considered it high time to update EU toy safety legislation, following the wishes of both the experts and the wider public (European Commission, 2007a). This eventually led to the adoption of the revised Directive in 2009 which repealed and replaced the 1988 Directive. The latter had only been modified once, by an amendment confined to the CE marking of toys.\(^5\) Either Directives are based on Article 95 TEC (now 114 TFEU), covering the internal market provisions, and reflect the strong connection between consumer protection and market integration.\(^6\) As put in the words of Garde, ‘[t]he proper functioning of the internal market requires that goods in free circulation are safe’ (Garde, 2012: 182). Likewise, the 2009 Directive pursues a two-fold aim: improving the internal market for toys and the safety of health of consumers, above all children, as the most sensitive amongst them. To this end the Directive lays down ‘rules on the safety of toys and on their free movement in the Community’.\(^7\) In revising virtually all safety aspects, it however differs from earlier legislation. It was intended to update and complete the essential safety requirements, including rules on electrical properties and requirements on suffocation and choking hazards. Furthermore, it determines additional hazards leading to requirements for noise, for laser, for activity toys, for speed limit, and for chemicals (Garde, 2012: 183). Hence, the preparation, formulation and negotiations regarding the Commission proposal eventually brought about a Directive which represents a more elaborated, comprehensive and lengthier piece of legislation than the previous one.


\(^6\) In a nutshell, EU measures for the approximation of national law are adopted with the objective to contribute to the establishment and functioning of the internal market thereby ensuring that legislative proposals provide for a high level of protection of health, safety, the environment and consumers. See especially Article 95(1) and 95(3) TEC.

\(^7\) See Article 1 of the Toy Safety Directive.
Toys are products that are designed for use in play by children under 14 years. The Directive establishes obligations for Member States as well as economic operators. Its provisions are divided into nine chapters. The most relevant provisions are set out here in brief and listed in the overview below (table 14). To begin with, the safety of toys shall be guaranteed by all relevant economic operators: manufacturers shall ensure that toy products meet all applicable safety requirements; importers shall only place on the market compliant toys and distributors and retailers shall act with due regard to the essential safety requirements (chapter 2). Toys which meet these requirements are entitled to an ‘EC’ declaration of conformity, must bear the CE marking and may be sold throughout the EU. Compliance with harmonised standards provides a presumption of conformity. For the safe use of toy products, general warnings shall be displayed on toys or their packaging (chapter 3).

Table 14: Key elements of the Toy Safety Directive

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Obligations of economic operators (Art. 4-9)</td>
</tr>
<tr>
<td></td>
<td>Ensuring compliance with the essential safety requirements</td>
</tr>
<tr>
<td>3</td>
<td>Conformity of toys (Art. 10-17)</td>
</tr>
<tr>
<td></td>
<td>Presumption of conformity</td>
</tr>
<tr>
<td></td>
<td>General warnings for safe use</td>
</tr>
<tr>
<td>4</td>
<td>Conformity assessment (Art. 18-21)</td>
</tr>
<tr>
<td></td>
<td>Conformity assessment: self-verification or EC-type examination</td>
</tr>
<tr>
<td>5</td>
<td>Notification of conformity assessment bodies (Art. 22-38)</td>
</tr>
<tr>
<td></td>
<td>Conformity assessment procedures by notified bodies &amp; national notifying authorities</td>
</tr>
<tr>
<td>6</td>
<td>Obligations &amp; powers of Member States (Art. 39-45)</td>
</tr>
<tr>
<td></td>
<td>Market surveillance by national competent authorities</td>
</tr>
<tr>
<td>7</td>
<td>Committee Procedures (Art. 46-47)</td>
</tr>
<tr>
<td></td>
<td>Updates and use of chemicals and other substances in toys by Commission committees</td>
</tr>
<tr>
<td>8</td>
<td>Specific administrative provisions (Art. 48-51)</td>
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<tr>
<td></td>
<td>The Commission shall provide a summary of the national reports on the Directive’s application</td>
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<td>Member States shall provide for rules on penalties of economic operators</td>
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8 See Article 2(2) of the Directive.
Conformity assessments shall be carried out to establish the product’s compliance with the applicable safety provisions. This can be done by means of self-verification or third-party verification (EC-type examination). Self-verification is used in cases where harmonised standards cover all pertinent safety aspects of a toy. In such instances, the manufacturer must apply the existing harmonised standards and ensure that the toy is in conformity therewith. EC-type examination shall be carried out in case of lacking harmonised standards or where the manufacturer believes that the nature, design, construction or purpose of the toy necessitates third party verification (chapter 4). Notified bodies have the obligation to carry out the conformity assessments; Member States have to guarantee that they work independently. National notifying authorities, on the other hand, are obliged to carry out the assessment, notification and monitoring of the notified bodies / conformity assessment bodies (chapter 5). The so-called ‘national competent authorities’ have to perform market surveillance including the evaluation of toys assumed to present a health and safety risk. Market surveillance authorities shall take appropriate provisional measures to remove non-compliant toy products from the market (chapter 6). The Commission is obliged to review these measures. It may update and decide upon the use of chemicals and other substances in toys by means of the committee procedure. Member States shall provide for rules on penalties of economic operators that do not comply with the Directive requirements (chapter 7).

Not only the content but also formal aspects indicate the increased complexity of the Directive compared to its predecessor: the revised Directive comprises 37 pages, 48 recitals, 57 Articles, and an Annex of five parts which contrasts with the 13 pages, 21 recitals, 16 Articles and shorter Annex of the previous Toy Safety Directive. Like the latter, the revised Directive grants very little discretion. While it is not devoid of discretionary provisions, in fact very few of them are directly addressed at the Member States. Discretion is only conferred upon Member States where they decide upon the language of warnings and safety instructions to be used by the manufacturer within their territories. Discretion is furthermore granted with regard to the designation of the national authority assessing and monitoring the conformity assessment bodies (notifying authorities) and finally Member States have discretion in shaping rules on penalties to be imposed on economic operators for infringements of safety rules. Several other discretionary provisions are directed at economic operators and the Commission. Finally, a few discretionary provisions are addressed at national authorities acting on behalf of the Member States (notifying authorities, market surveillance authorities). It is noteworthy that in these latter cases, may-clauses seem to indicate discretion but, in fact, they are interpreted as imposing obliga-

9 Cf. Articles 11(3), 23(2), and 51.
10 See for instance Article 5 (manufacturer) and Article 46 (Commission).
11 See for example Articles 31 and 41.
tions on Member States. This was established in the interviews with the Dutch civil servants involved in the dossier of the Toy Safety Directive.\(^\text{12}\) To give an example, the permission addressed at market surveillance authorities to request a notified body to provide information relating to any EC-type examination certificate which that body has issued or withdrawn,\(^\text{13}\) is understood as obliging Member States to ensure that market surveillance authorities may make that request. This case, in fact, illustrates the difference between legislative discretion granted by the Directive text and the actual discretion margin identified by national civil servants during the transposition process, previously referred to as administrative discretion (see chapter 2).

The Toy Safety Directive represents only one but an illustrative example of the EU’s product safety legislation which is a core part of EU consumer (protection) law.

12.2.1 The area of EU consumer protection law

As pointed out earlier, soft law measures in the form of Commission papers and Council Resolutions paved the way for the development of EU rules on consumer protection and product safety before any significant treaty changes such as the Single European Act (1987) or the Maastricht Treaty (1993) came into the picture. These soft law measures strengthened the position of the EU as an actor in the realm of consumer law-making. Hence, prior to the anchoring of an explicit legislative competence regarding consumer protection in EU primary legislation, the role of the EU in this field had not been a marginal one. By means of soft law, later key concepts of consumer law such as the ‘consumer’, ‘consumer rights’ and ‘consumer protection’ were elaborated. Furthermore, by means of soft law, the foundation for more concrete EU action was established which, in the absence of any explicit legal basis, was mostly justified in connection with the operation of the internal market and the argument that negative repercussions for consumers from economic expansion should be avoided. In reality, repercussions for both consumers and internal market projects were considered to be the result of the diversity of the various national legislations and the issue of toy safety was not an exception to this. In fact, the 1988 Toy Safety Directive was adopted to overcome the twofold problem of national safety systems: first of all, these systems entailed market barriers to the free movement of toy products. Second, the different safety regimes reduced the effi-

\(^{12}\) In the coding exercise, by contrast, these provisions were identified as permissions granted to the Member States (for national authorities are considered as acting on their behalf).

\(^{13}\) See Article 41(1) of the Directive.
ciency of consumer protection against unsafe toys and revealed the general lack of toy safety throughout the EU (RPA, 2004).  

Meanwhile, EU consumer protection law has grown out of its infancy and continues to develop. Only recently, the European Commission has announced new objectives and strategies for ‘A European Consumer Agenda – Boosting confidence and growth’. It floats the Commission’s idea of enhancing consumer participation and trust in the market by adapting its policies and proposals to economic developments and novelties such as the ‘digital single market’ as well as the increase in online trading (European Commission, 2012). In addition to that, it calls for the better application of EU consumer protection legislation in the Member States to make consumer rights fully come into play (European Commission, 2012).

Regarding the development of EU consumer protection law, the instance of the Toy Safety Directive is a case in point. The 1988 Directive should bring about improvements concerning the marketing of toys manufactured in or imported into the EU, aiming to minimise the risk of toy-related dangers and achieving long-term health benefits. But its standards had meanwhile become outdated against the backdrop of technical developments and further market expansion. The proposed revision leading to the adoption of the Toy Safety Directive in 2009 was a direct response to this, showing the particular importance that the EU attached to this issue. Apparently, the need was felt on the part of the EU, to act given the fact that toys repeatedly headed the list of notifications of dangerous goods submitted through the EU’s RAPEX system (Garde, 2012: 182; Weatherill, 2013: 274-75). Still in 2013, toys were the second most notified product category surpassed only by clothing (RAPEX, 2013).

The revision of the Toy Safety Directive pursued another objective: it should be brought in proper alignment with other legislation related to the safety of products (European Commission, 2008). This, again, draws attention to the development of the wider framework of EU safety legislation.

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15 See also Cf. Weatherill, 2013, p. 254.

16 RAPEX is the rapid alert system for non-food dangerous products set up to promote rapid exchange of information between Member States and the European Commission about measures taken for the prevention or restriction of the marketing or use of products that are supposed to jeopardise consumers’ health and safety.


18 Regarding chemicals in toys, compliance was for instance sought with the EU’s general chemicals legislation, including Regulation EC No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency.
A case in point is the General Product Safety Regulation,\textsuperscript{19} adopted by the European Parliament and the Council in 2001. It is based on a similar operating principle than the revised Toy Safety Directive. The General Product Safety Regulation introduces general safety requirements that apply to all consumer products which are placed on the EU market. It prohibits all those products from being marketed which entail a risk for the health and safety of EU consumers, either caused by dangerous substances or unsafe construction. Another example of EU product safety legislation is the new legislative framework for the marketing of products and corresponding instruments, its fundamentals being established by means of a legislative package. This new legislative framework particularly aims to improve the working of the internal market for products. Amongst others, this shall be achieved by advancing already existing systems of market surveillance and conformity assessments within the EU.

The previous measures aim to further harmonise relevant national laws and the revision of the Toy Safety Directive should also be seen in this light. As was mentioned above, enhanced legislative harmonisation represents the third route adopted by the Commission to further integration in the area of consumer law, alongside the application of soft law and the justification of consumer protection measures in the light of internal market. Higher levels of legislative harmonisation are reflected by both the old and revised Toy Safety Directives, since they include total harmonisation requirements. Moreover, and with respect to the revised Toy Safety Directive, by introducing additional common definitions and minimum requirements for enforcement activities this Directive entails a still larger degree of legislative harmonisation than its predecessor. In fact, the modification of the initial Toy Safety Directive reflects the trend of positive integration through stronger market regulation. This is expressed by the shift from minimum harmonisation to full harmonisation of EU toy safety measures which was prompted by the Commission’s wish to achieve better national implementation records and quality of EU toy safety legislation implemented and applied within the Member States (European Commission, 2008, p. 2).

12.2.2 Purpose and background to the directive

The revision of the 1988 Toy Safety Directive was already announced by the European Commission in its Consumer Policy Strategy covering the period of 2002 to 2006 (European Commission, 2002). In reviewing EU toy safety regulation, the Commission sought input from experts and the wider public and consultation rounds were carried out in 2003 and 2007, respectively.

An Expert Group on Toys\textsuperscript{20} safety was set up in which national authorities and stakeholders from industry, consumer- and standardisation organisations were asked to exchange views about the functioning of the Directive within Member States. The outcomes of the consultation process confirmed the Commission’s view that the Directive needed some modification (European Commission, 2008, pp. 3-4).

The subsequent legislative proposal was drawn up along the lines of the Commission’s policy for better regulation and simplification being targeted at EU legislation in several regulatory areas. In a nutshell, EU legislation should be codified, modernised and recast (European Commission, 2003, p. 25). By launching the better regulation and simplification programme, the Commission intended to facilitate the understanding and use of EU legislation for European businesses and citizens in areas closely related to the internal market, including the safety of toys (European Commission, 2008). A number of shortcomings had emerged during the application of EU toy safety legislation. First of all, technical progress had brought into view potential safety gaps owing to outdated EU safety rules concerning the use of toys triggering increased concern amongst consumers. Hence, the identified need to update and complete the safety requirements, in particular in areas such as noise and chemicals in toys (European Commission, 2008). Commission preparations for a legislative proposal were paralleled by external events which seemed to underline the urgency of the envisaged revision. In 2007 toy products manufactured in China were identified as posing a risk to human health and the safety of children in particular. Toxic chemical substances in dangerous quantities such as excessive lead levels as well as too loose pieces of metals getting detached from toys, entering the respiratory tract and causing suffocation had been identified as the biggest risks (Garde, 2012: 186). These events prompted the Commission to urge the Chinese authorities to improve the safety of consumer products, toys in particular. Moreover, it pressed for better domestic enforcement of toy safety legislation in the Member States (European Commission, 2007b). In its view, coherent and effective enforcement and market surveillance had only been insufficiently realised by Member States, making the introduction of common EU minimum requirements all the more necessary (European Commission, 2008, p. 7). Differences in the national implementation of EU safety rules were also found problematic and seen as posing obstacles to the internal market, causing high administrative costs and legal uncertainty. In addition, diverging application of EU safety rules was considered to put the proper health and safety protection of consumers at risk. Next to these acute deficiencies relating to the implementation of toy safety legislation, the Toy Safety Directive was found to lack clarity regarding, for instance, the responsibilities of each economic operator in the entire toy production

\textsuperscript{20} The Expert Group has been operating since 2003 and officially being registered since 2006. It has been working under the direction of the European Commission’s Enterprise and Industry Directorate-General.
chain (production, supply, and distribution) (Coumans, 2010: 35; Garde, 2012: 183). In fact, critique came from an arguably unexpected side: some linguists had used the Directive as a prime example to draw attention to what they considered to be a more general problem of EU legislation: the insufficient clarity of EU directives caused by their poor linguistic quality (Cutts, 2001; Cutts and Wagner, 2002).

Deficiencies of toy safety legislation and its improper application by Member States thus formed the background for the formulation of a number of concrete goals presented by the Commission in its proposal for a revised Toy Safety Directive. Put in a nutshell, revising the previous Toy Safety Directive should be targeted, in particular, at the essential safety requirements on certain hazards pertaining to chemicals in toys. It should clarify the Directive’s scope (completing the product list by toys not yet covered), definitions and concepts (such as ‘toys’, ‘economic operators’, responsibilities of manufacturers and importers, market surveillance obligations of Member States and others) and improve its practical implementation and enforcement by means of common minimum standards to facilitate the application of EU rules (by economic operators and national authorities). Finally, the revision of the Directive should serve to achieve greater consistency with other consumer-related legislation. In short, the revised Toy Safety Directive should improve the enforcement and efficiency of the Directive (European Commission, 2008). The Commission’s plan according to which all these objectives should have been reached by the year 2004 could not be realised.21 The preparation of a corresponding legislative proposal took longer than expected and was only concluded in 2008. One year later, on 18 June 2009, the revised Toy Safety Directive was adopted at first reading and under the co-decision procedure. The Austrian and German delegations abstained from voting.

12.3 Negotiations

Even if the Directive was adopted later than the Commission had wished for, it seems that its proposal did not lead to protracted negotiations. After all, negotiations were concluded within less than one year and a half. The proposal was negotiated as an A-item throughout the entire period22 and agreement on it reached at lower levels of the Council (within the working party on technical harmonisation and the Permanent Representatives Com-

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21 Finalising the codification, modernisation and recast of Council Directive 88/378/EEC on the safety of toys had been scheduled for 2004 as mentioned in the Commission’s communication about its simplification programme just mentioned.

22 As earlier explained, ‘A-items’ are directive dossiers which are not controversial and usually treated at lower levels of the Council, at working party level or in Coreper, in contrast to B-items that are politically sensitive and require discussion by the Ministers in the Council.
mittee (Coreper)), suggesting the absence of debates on politically sensitive issues. Whereas the first Toy Safety Directive was adopted by the Council acting alone, the revised draft Directive was negotiated under the co-decision procedure (Article 251 TEC) putting the European Parliament into the position of co-legislator and thus on an equal footing with the Council. Against the background of large imports of unsafe products from China, the European Parliament had already stressed the importance of stricter requirements for industrial products such as toys prior to the submission of the Commission proposal (European Parliament, 2007).

The proposal for the revised Toy Safety Directive was further examined and amendments proposed by the European Parliament’s Committee on Internal Market in collaboration with the Consumer Protection Committee on the Environment, Public Health and Food Safety. As a result, a legislative resolution and common position of the European Parliament on the Commission proposal was adopted by mid-December 2008 (see table 15). The European Parliament recognised the need for modernising outdated EU rules on toy safety and agreed with the Commission’s aims to modernise and clarify the safety requirements and enforcement regime. At the same time, it urged to bring the Commission proposal still more in line with the aforementioned new legislative framework on the marketing of goods. To this end it forwarded 79 amendments which it considered to be ‘technical adjustments’, pertaining to both the substantial and procedural aspects of the proposal as well as the key elements of the new approach technique it implied. More concrete, the European Parliament submitted amendments concerning the Directive’s definitions, the obligations for market players and conformity assessment bodies, the presumption of conformity rules on the CE marking, the notification procedures, and the envisaged procedure for formal objection to harmonised standards (European Parliament, 2008, pp. 79-80).

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<th>Date</th>
<th>Event Description</th>
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<tr>
<td>25 Jan 08</td>
<td>Adoption by Commission proposal</td>
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<tr>
<td>18 Jun 08</td>
<td>Committee of Regions opinion</td>
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<tr>
<td>17 Sep 08</td>
<td>European Economic and Social Committee opinion</td>
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<tr>
<td>18 Dec 08</td>
<td>European Parliament opinion on 1st reading</td>
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<tr>
<td>11 May 08</td>
<td>Approval by the Council of the European Parliament position at 1st reading</td>
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<tr>
<td>18 Jun 08</td>
<td>Formal adoption by Council and European Parliament</td>
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What may have contributed to the relatively swift negotiations was that the draft Directive built on already existing rules. Hence, it did not imply a fundamental change to EU safety legislation but aimed to improve it. In addi-
tion to that, the Directive proposal seemed to entail a number of advantages for the Member States, not only in economic terms but especially as regards the safety of toys. To this end, the proposal introduced a few novelties (Garde, 2012: 184). To begin with, and as set out in the recitals and Annex to the draft Directive, substances classified as carcinogenic, mutagenic or toxic for reproduction (CMR) were made subject to limitations, even bans – provided that amounts of these substances, considered to be dangerous for consumers, were included in components of toys accessible to children. Moreover, stricter rules in the form of labelling requirements and prohibitions were foreseen in the proposed Directive with respect to allergenic substances and certain fragrances. Finally, the revised Directive sought to remove the risk of choking by tightening up rules concerning toys put in the mouth and by extending them to the use of children above 36 months.

In a letter to the House of Representatives of the Dutch Parliament, the Dutch Government supported the Commission’s initiative, being joined by other Member States (Parliamentary Papers II 2008/09, 21501-30, no. 196, p. 15). In its detailed assessment of the legislative proposal the Dutch Government recognised the benefits of the proposed Directive, pointing itself to the twin advantage for both industry and citizens (Parliamentary Papers II 2007/08, 22112, no. 623, p. 12-13). To start with, it agreed with the aim to ensure a common level of consumer protection on EU territory (Parliamentary Papers II 2007/08, 22112, no. 623, p. 14). Apparently, the Dutch Government was aware of the need for more (EU) action to tackle the problem of unsafe toys circulating on the European market. The occurrence of safety issues was certainly not to its surprise. Already prior to the 2007 incident with Chinese toys, Dutch enforcement authorities had noted an increase of toy-related accidents from 119 (in 1999) to 3,681 (in 2000) and 5,428 (in 2001) (RAP, 2004, p. 28). Furthermore, alongside improvements of the safety of toys, the Dutch Government expected higher quality and safety standards to strengthen the market position of the European toy industry, thus including its own (Parliamentary Papers II 2007/08, 22112, no. 623, pp. 13-14). The Government therefore endorsed the envisaged minimum harmonisation entailed by the Directive’s enforcement requirements (Parliamentary Papers II 2007/08, 22112, no. 623, p. 15).

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23 See the proposed recitals (16), (32), and Annex II on particular safety requirements regarding chemical properties.


25 As pointed out in recital (18) of the proposal.

26 These figures come from a 2004 report on the impact of the revision of EU toy safety legislation issued by the European Commission. It addresses, amongst others, toy-related accidents in Member States, including, alongside the Netherlands, also Belgium, Denmark, Sweden, and the United Kingdom.
The potential benefits of the Commission proposal, did, however, not blind the Government to the production costs and administrative burdens that stricter and additional safety requirements would incur, especially for small and medium-sized enterprises (SMEs) (Garde, 2012: 185-186), representing virtually the totality of toy companies within the European Union (RAP, 2004, p. 12). Corresponding concerns were indeed voiced by representatives from the Dutch toy industry during a consultation meeting in June 2008 which was organised by the Ministry of Health, Welfare and Sport. The Government urged to seek the input from relevant national stakeholders regarding the Commission initiative (Parliamentary Papers II 2007/08, 22112, no. 623, p. 13; 18). To this end, the Ministry made use of the so-called Regular Consult Food and Non-Food Law, a discussion panel for the exchange of views on new legislation between the stakeholders and the Ministry, including proposals for EU law. The panel consisted of members of business and consumer organisations, as well as representatives of the Netherlands Food and Consumer Product Safety Authority – in charge of supervising and enforcing toy safety rules. Issues raised in this context concerned the costs expected to arise from the implementation of the Directive and, in order to ensure the better practical application of EU safety rules, the clarification of the relationship of the revised Directive with other consumer-related legislation. From the stakeholder feedback it becomes obvious that the proposal met with agreement (Ministry of Health, Welfare and Sport, 2008).

The positive domestic reaction to the proposal and the positive implications it seemed to imply for the Netherlands and other Member States, do not remove the fact that it also raised discussions revealing the different views of Member States on certain aspects of the Directive during the 2008 negotiations under the Slovenian and French presidencies. On closer examination, it seems that the Dutch delegation did not have many objections to the content of the Directive, in contrast, for instance, to the delegation of Germany. This seems to imply that the Dutch delegation took a more reserved role in the negotiations on the Directive. Its comments, which very rarely included own suggestions but rather aimed to support other delegations, were mostly confined to the technical aspects of the Annex to the Directive and hardly addressed its substantive provisions.

27 In Dutch referred to as ‘Regulier Overleg Warenwet’, ROW (Regular Consult Food and Non-Food Law). ROW is a discussion panel for examining, together with stakeholders, EU legislative proposals related to food and non-food matters. Also otherwise proposed legislation within the ambit of the Dutch Commodities Act is discussed in its framework.

28 In Dutch referred to as Nederlandse Voedsel en Waren Autoriteit.

29 See Ministry of Health, Welfare and Sport, ‘Report of the stakeholder (ROW) meeting’, 2 June 2008; provided to me by the Ministry civil servants.
12.3.1 Definitions

The proposed definitions of the key terms used in the Directive caused further debates and revealed different views held by the Member States. Whereas the old Directive hardly offered any clarifications of key terms and concepts, except for the term ‘(functional) toys’, the Commission proposed the inclusion of fifteen new definitions under Article 2. These definitions were, however, substantially amended and more definitions added during the negotiations (Council of the European Union, 2008a, pp. 15-21) not only on the initiative of the Member States but also at the request of the European Parliament (European Parliament, 2008, pp. 14-18). Obviously, the technical changes and the increased diversity of products required not only an update of the product safety requirements but also revealed the need expressed by the Member States (and Members of Parliament) to introduce and clarify new terminology. It was therefore suggested in the Council to include additional definitions of relevant terms into the draft Directive: ‘CE-marking’ – according to the proposal of France, Hungary, Portugal and Romania, ‘conformity assessment procedure’ and ‘market surveillance’ at the request of Hungary. Furthermore, suggestions were made for the definition of the term ‘manufacturer’ by the United Kingdom and Portugal. Germany, again, preferred to further specify the sort of toys, suggesting that definitions for ‘oral contact toys’ and ‘dermal contact toys’ should be included. Eventually, these suggestions were not followed but other distinctions between toys introduced instead.

What about the Dutch preferences regarding the definitions provided by Article 2? Except for one suggestion being forwarded, no further requests for amendments were made by the Dutch delegation. The exception to this relates to the concept of toys. Article 2(1) in combination with the product list provided by Annex I to the draft Directive excluded several products from the scope of the Directive, not considering them as ‘toys’. Falling under these exclusions were ‘decorative objects for festivities and celebrations’ which implied that balloons were not conceived of as toys. Under Dutch law, by contrast, ‘balloons’ are counted as toys. In addition, Dutch law provides for certain safety rules relating to the use of certain chemi-
Empirical aspects – negotiation and transposition analyses

cal substances in balloons. For the sake of ensuring that own legislation and therefore safety standards could be preserved, the Dutch delegation requested to include balloons into the scope of the Directive (Parliamentary Papers II 2007/08, 22112, no. 623, p. 17). The final product list was, however, not adjusted to the wishes of the Dutch delegation. On the other hand, the product list does also not explicitly exclude 'balloons' from the Directive's scope. What's more, it seems that the Dutch request was not completely ignored. This follows from the fact that safety rules were strengthened by the introduction of a prohibition into Annex II addressing the particular safety requirements for chemical properties of toys. It forbids the use of harmful amounts of nitrosamines and nitrosable substances which previously used to be applied in products such as rubber toy balloons.

12.3.2 Essential safety requirements

The preamble of the draft directive underlined the need to update EU safety requirements for toys by taking due account of the technical developments having emerged since the adoption of the first Directive in 1988. The revision of the essential safety requirements fell within the exclusive competence of the Commission and boiled down to a more detailed treatment of the requirements which were not only addressed in the Annex, as had previously been the case, but also in Article 9 of the proposed revision.

33 Based on Article 3 of the Commodities Act, conferring particular powers of rule-making to the Minister, the latter had issued a policy rule concerning standards for the safety of balloons (Beleidsregel inzake normen ten aanzien van veiligheid van ballonnen, Government Gazette, 2006, 62).

As stated by the Minister when updating this measure, this policy was intended to warn against the use of balloons containing hazardous quantities of cancer-causing substances, in particular nitrosamines or nitrosatable substances. See Government Gazette, 2010, 5934.

34 Given the earlier request issued by the Netherlands and Germany, the Commission referred the issue to the European scientific committee which delivered an opinion in December 2007. See Scientific Committee on Consumer Products (SCCP) (2007), Opinion on the presence and release of nitrosamines and nitrosatable compounds from rubber balloons, SCCP/1132/07, Brussels: European Commission.

35 Hazards are caused from placing toy products in the mouth. Hence, it is the migration limit of these nitrosamines and nitrosable substances that is further specified to indicate potential harmful effects. The relevant rule laid down in the Annex to the revised Directive is in line with the opinion of the European scientific committee (see previous footnote) as pointed out by the Minister of Health, Welfare and Sport. Dutch policy rules were brought in line with the migration limits of the revised EU Directive. Cf. Government Gazette, 2010, 5934.

36 See recital (3).

37 In fact, according to the legislative technique of the new approach, the technical specifications of products meeting the essential requirements in harmonised standards are determined by European standardisation bodies, the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC) mandated by the European Commission. See recital 2, Articles 45, and 46 of the Directive proposal.
Most importantly, the safety requirements should ensure that toys did not ‘jeopardize the safety or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind behaviour of children.’

Member States were to guarantee that only those toys would be placed on the market that complied with the essential safety requirements during the period of their use. In this regard, the envisaged elaboration of the requirements listed in the Annex 2 of the draft directive triggered debate, especially on the chemical properties of toys (Council of the European Union, 2008b, pp. 72-81). A major issue was the question of how to deal with fragrances in toys (Council of the European Union, 2008b). Member States were divided as to the questions of how to distinguish between natural and artificial fragrances, whether or not fragrances should be banned from the inclusion in toys, and if banning of fragrances should be exhaustive or only apply to particular fragrances (Council of the European Union, 2008b, pp. 72-80). The Dutch delegation advocated adopting a stricter approach to fragrances in toys. Like Austria and France, it favoured the introduction of a ban not only on artificial fragrances – as envisaged by the proposal – but also on natural substances seen as causing allergy (Council of the European Union, 2008b, p. 77). Furthermore, enhancing the essential safety requirements for toys should not only be confined to fragrances. It should, additionally, take into account other allergy-causing substances such as colouring agents, preservatives, stabilizers (Parliamentary Papers II 2007/08, 22112, no. 623, p. 17). Finally, the Dutch delegation wished to amend the Directive’s preamble by adding an explanation concerning the criteria used for setting migration limits of chemical elements in toys. This request was probably prompted by the wish to provide for more transparency and clarity of EU legislation (Council of the European Union, 2008b, p. 81). The final Directive provides for such an explanation, demonstrating that the Dutch request was apparently taken into account.

Raising the safety standards of toys was at the heart of the European Parliament’s resolution and chemical properties therefore also a key matter looked into during the European Parliament’s discussions on the proposal. This is expressed by a number of the forwarded amendments. For instance, migration limits for chemicals from toys which are expected to be frequently put in the mouth were among the concerns addressed by the European Parliament. In this regard, the European Parliament supported a strict application of these limits in line with EU rules on materials and arti-

38 Cf. Article 9(2).
39 See Article 9(1) and 9(3) of the proposal.
40 Recital (22) of its preamble states that ‘[l]imit values for arsenic, cadmium, chromium VI, lead, mercury and organic tin, which are particularly toxic, and which should therefore not be intentionally used in those parts of toys that are accessible to children, should be set at levels that are half of those considered safe according to the criteria of the relevant Scientific Committee, in order to ensure that only traces that are compatible with good manufacturing practice will be present.’
cles intended to come into contact with food. This request was met. Furthermore, in line with the wishes of the European Parliament, the final draft Directive puts more emphasis on the need to update and adopt new essential safety requirements in the face of risks posed by certain chemical substances (CMR compounds, allergens and metals). With a view to CMR substances, the European Parliament welcomed the measures envisaged by the draft directive but proposed to tighten them up, especially regarding the conditions for the exceptional authorisation of their use. These conditions should be equally strict for all categories of CMR substances identified and the use of these substances only granted upon evaluation by the relevant Scientific Committee mandated by the Commission (European Parliament, 2008, pp. 66-67; 81). In addition to that, and in line with requests by some Member States, including the Netherlands, the European Parliament favoured a stricter approach to allergenic substances, supporting the banning of them (European Parliament, 2008, pp. 70-72; 81). Its suggestion to exclude more allergenic fragrances from the use in toys than included in the initial Commission proposal was taken up, as reflected by the final Annex to the Directive.

12.3.3 Warnings

The proposed provisions on warnings also called for a broader debate (Council of the European Union, 2008b, pp. 28-29; 86-89). In contrast to previous legislation the issue was given more weight in the proposed text for the revised Directive. Next to the Annex, the proposal also addressed this issue in Article 10. In line with the Commission’s aim to minimise hazards resulting from the use of toys, new and more stringent requirements were introduced in the Article and further substantiated in Annex 5 to the Directive, including categories of general and specific warnings relating to particular sorts of toys. Member States were given discretion in obliging manufacturers to present warnings and safety instructions in their own official language(s) when placing toy products on their market. Most importantly,

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42 Cf. recitals (23), (24), Article 46(2), and Annex II, chemical properties under point 7.
43 To recall from above, CMR stands for ‘carcinogenic, mutagenic or toxic to reproduction’.
44 See the European Parliament’s amendment no. 5 concerning recital (16) of the Directive proposal. European Parliament, 2008, p. 8. This amendment was taken over in the final agreement. See recital (21) of the revised Directive.
45 Depending on their expected risk potential three categories of CMR substances were identified. Cf. European Commission, 2008, p. 4.
46 Cf. Annex II regarding particular safety requirements, point 11, under ‘chemical properties’.
48 See Article 10(3).
as stipulated by the proposal, warnings should specify user limitations (e.g. minimum and maximum ages for users) and manufacturers should mark these limitations on the toy in a clearly legible and accurate way. Regarding this latter aspect, Sweden supported by the Netherlands, Germany, Finland, Malta and Romania pointed to the need of defining the minimum size of the letters in the wording of warnings. The European Parliament made corresponding amendments as reflected in its common position on the proposal (European Parliament, 2008, p. 106). Other Member States, like Malta, criticised the proposed requirements as inefficient for not drawing users’ attention to residual risks inherent in toys. Next to the obligation of indicating age limits provided for by the proposal, Poland preferred the inclusion of the maximum weight which a toy can stand. France and Hungary wished to see warning requirements included for magnetic toys. Germany, by contrast, rejected the latter proposal (Council of the European Union, 2008b, p. 89). France forwarded a proposal for another warning requirement concerning balloons stipulating that a pump should be used to inflate balloons in order to preclude harmful exposure to cancer-causing chemical substances such as nitrosamines included in rubber balloons. Interestingly, it based its proposal on similar legislation in the Netherlands and Germany providing for corresponding rules. Even though the French request for amendment was not followed to the letter, the final Directive imposes a ban on products containing the substances referred to in its request, provided that certain conditions are met.

The Dutch delegation had a specific request regarding EU rules on particular warnings specified in the Annex to the draft directive. The Commission proposal introduced certain warning requirements regarding the use of toys by children less than three years of age, excluding from this requirement, those toys that ‘on account of their function, dimensions, characteris-

49 It seems that this request was somewhat taken into account. In contrast to the Commission proposal which remained silent on this issue, recital (29) of the revised Directive refers to residual hazards in toys: ‘Where a hazard cannot be sufficiently minimised by design or safeguards, the residual risk [italics added] could be addressed by product-related information directed at the supervisors, taking into account their capacity to cope with the residual risk.’

50 This refers to the aforementioned policy rule, see footnote 33. The 2006 policy rule also provided for the requirement to place, in all cases, warnings on the packaging of balloons, including the recommendation addressed at consumers to avoid contact with the mouth, and instead, to use a pump for inflating balloons. For the 2010 update of the policy rule, resulting from the transposition of the Directive, agreement was reached with domestic industry during another ROW meeting. The updated policy rule was issued by the Ministry of Health, Welfare and Sport to ensure complete conformity with EU rules on nitrosamines and nitrosable substances had to be notified to the European Commission under Directive 98/34/EC (on procedures concerning information on technical standards and regulations). It should be noted that the Ministry did not remove the recommendation from the text of the warnings despite the Commission’s comment that it would not be necessary to have it displayed on all packages containing balloons. See Government Gazette, 2010, 5934.

51 See Annex II and under point 8 of the section on chemical properties of toys.
tics, properties or other cogent grounds, are manifestly unsuitable for children under 36 months’. The Dutch Government, by contrast, preferred an explicit prohibition on the placing of corresponding warning requirements (Parliamentary Papers II 2007/08, 22112, no. 623, p. 17) and put forward a corresponding suggestion for the sake of this (Council of the European Union, 2008a, p. 30). The European Parliament took a similar position on this matter. Being dissatisfied with the rules proposed by the Commission, in particular regarding warnings against toys ‘obviously designed or intended for children of a certain age group’, it pointed out that ‘[a]ll] too often toys that are obviously intended for babies and very young children are marked with a warning that they are unsuitable for children under 36 months. By doing this, the manufacturer is trying to sidestep strict safety rules and to evade any possible liability. This is irresponsible and must be forbidden’ (European Parliament, 2008, p. 81). For that purpose, the Dutch delegation suggested amending Article 10 accordingly (European Parliament, 2008, p. 104). However, in spite of the wishes of the Dutch delegation and the European Parliament, the final Directive does not introduce such a ban, possibly due to Member States’ objection to it, being prompted by fears that it would impose too much of a burden on national enforcement authorities. Finally, another request of the European Parliament was made in the light of the subsidiarity principle. The European Parliament underlined the need to provide warnings and instructions for the use of toys in a language understandable by the consumers (European Parliament, 2008, p. 32; 82; 84). As a result, the final Directive allows Member States to impose such a requirement on manufacturers.52

12.3.4 Obligations for economic operators

EU directives in the area of consumer law and the internal market typically establish obligations for economic operators. Chapter two of the proposal laid down those obligations that should fall under the framework of the new Toy Safety Directive (Articles 3 through 8). Article 8, for instance, obliges economic operators to notify the market surveillance authorities about other economic operators in the toy supply chain. More concrete, they shall indicate from whom they have been supplied with toys and to whom they themselves have supplied toys. Furthermore, the relevant provision stipulated that ‘economic operators should ensure to have in place appropriate systems and procedures which allow for this information to be made available to the market surveillance authorities on request, for a period of 10 years’. This provision was one of the very few which the Dutch delegation sought to amend. Whereas it had initially agreed with the ten-year commitment of availability, it changed course in the later negotiation rounds, advocating together with Hungary, Malta and Italy, a shorter period of five years.

52 See Article 11(3) of the final Directive.
It is possible that the Dutch efforts to change the proposal accordingly were geared towards achieving a more frequent identification and documentation of responsible market players in toy supply in order to uphold own high safety standards. It seems that a common agreement on this issue did not swiftly materialise, leading the Dutch and Irish delegation to suggest that ‘documentation should be available from first placing on the market and then 7 years after a toy has ceased production’ (Council of the European Union, 2008c, p. 30). The final directive includes, however, the original proposal (ten-year availability).

12.4 Analysis

The foregoing descriptive analysis has mapped out the negotiation process on the proposal for a revised Toy Safety Directive seeking to draw particular attention to the position of the Netherlands on the latter. The focus now shifts to the explanatory analysis and the role of discretion in the negotiations.

12.4.1 Discretion and policy area

To start with the first expectation, it implies that the less a policy area is influenced by the EU in institutional and legal terms, the more discretion is granted to Member States. This does not seem to match the case of the Toy Safety Directive. After all and as established earlier, integration of consumer protection law with the EU is well advanced. It shows in the progressive approximation of national legislation to the EU acquis in the field of consumer protection. It is also expressed by an increasingly stronger pull towards full harmonisation exerted by the Commission, not least by means of the new approach which realises the full harmonisation of product standards as well as the new legislative framework on the marketing of products which is largely implemented by EU regulations and hence, rules which are directly applicable in the Member States. All this points to a high density of EU rules in the area of consumer law and the (revised) Toy Safety Directive seems to exemplify this, being a complex and detailed Directive with references embedded in the context of other EU consumer-related legislation. In addition to that, its own history illustrates the strong influence which the EU exerts in the area of product safety legislation. After all, introducing and revising the essential safety requirements falls within the exclusive competence of the EU. As a result, both the first and the revised Toy Safety Directives establish full harmonisation requirements. In addition to that, the revised Directive also introduces common requirements in the realm of enforcement, which traditionally is an area resting in the hands of the Member States. Taking all these points into account, the reverse of the policy area expectation appears to be much closer to the facts of the present case: high EU influence leading to very little discretion left for the Direc-
Part 3  Empirical aspects – negotiation and transposition analyses

tive’s formal implementation. Indeed, and as confirmed by the results of the coding exercise: the Directive grants a small margin of discretion. Having said this, it seems plausible to assume that the role of discretion in the negotiations was marginal. But before jumping to conclusions, the other expectations of the analytical framework are addressed one by one for the sake of providing a consistent and complete analysis.

12.4.2 Discretion and political sensitivity

Where the content of a Directive includes politically sensitive issues, more discretion is incorporated into the Directive (expectation 2). The Directive, however, grants hardly any discretion which already points to the little relevance of this expectation for the present context. Furthermore, the Commission proposal included EU rules that built upon already existing ones and were proposed with the intention to update but not fundamentally change previous legislation. Such modifications are in general associated with less resistance from and controversy among Member States than the introduction of a new subject matter for regulation (Kaeding, 2007; Mastenbroek, 2007: 36-37). Besides the fact that Member States’ attempts to find a common position on the terminology used in the Directive as well as the essential safety requirements (especially the chemical properties of toys) led to some discussion revealing different views, the analysis does not deliver any indicators that preference divergence and / or disagreement, among Member States, for instance, about the level of harmonisation stirred up hot debates stalling the negotiations on the Directive. What’s more, it should be born in mind that the aspects addressed in the negotiations were mostly not about new substantial requirements but rather related to technical requirements. Hence, in political terms, there was very little at stake. At least this can be said with some certainty from the viewpoint of the Netherlands and due to the overall smooth progress of the negotiations it is likely that it also applies in the case of other Member States. Indicators of a relatively unproblematic EU decision-making process are the short length of negotiations and the adoption of a final agreement at first reading, alongside the fact that the dossier was officially not identified in the Council negotiations as being controversial (A-item). All this seems to confirm the view that political sensitivity, controversy and more discretion resulting from the previous two did not carry any relevance in the negotiations on the revised Toy Safety Directive.

12.4.3 Discretion and compatibility

The proposal for the revision of EU toy safety rules built on earlier EU legislation on this subject matter. Hence, Member States were already familiar with the EU toy safety requirements, having them already implemented into their national legal orders. This makes it less likely that compatibility between EU and national rules represented a problematic issue (expectation
3). At least, and confined to the position of the Netherlands on the Directive proposal, no fundamental discrepancies were brought to light as regards the EU and Dutch safety rules on toys. There certainly were a few minor issues that the Dutch delegation sought to change to its own benefit, trying to uphold (own) high safety standards. This was, for instance, reflected by its requests concerning the use of fragrances in toys, its wish to introduce a ban on the placing of specific warning requirements on toys, and its position on the obligation for market players to identify economic operators (more) frequently. But even if the Dutch Government wished to (slightly) change a few technical aspects of the Directive proposal, this does not provide any evidence for legal incompatibility between the EU Directive and national law. What’s more, it seems safe to assume that, if EU and Dutch rules had considerably differed, the Dutch delegation had presumably been more pro-active in forwarding requests and proposing amendments. As confirmed by the interview partners, there was no reason for disapproval with the proposed revision of EU safety rules. Neither did they include fundamentally new issues, nor did they seem to incur high implementation efforts – except for costs to be borne by the toy industry which, on the longer run, were, however, expected to be compensated by market gains owing to the availability of safer and high-quality standard products for the market. As noted by the interviewee of the Ministry of Health, Welfare and Sport involved in the negotiations, a few aspects for improvement were brought up by the Dutch delegation during the negotiations on the proposal. But only to demonstrate that Dutch interests were adequately identified and represented in Brussels. What’s more, as noted by another interviewee, a senior civil servant at the same Ministry, in the light of the fact that, at the Ministry, the overall acceptance with safety rules concerning products ‘made in Brussels’ is high, especially as regards toy safety legislation, seeking more discretion for the national implementation of EU law has become a void issue. This may also explain why the Dutch delegation took a seemingly reserved role in the negotiations, submitting hardly any requests for amendments.

12.4.4 Discretion and European Parliament

Turning from the Dutch delegation, finally, to the European Parliament and its role within the negotiations and its perspective on discretion, the following findings can be presented. For sure, if compared to the negotiations on the first Toy Safety Directive where the European Parliament had no say in the matter given the fact that its role was confined to deliver a (non-binding) opinion on the proposal according to the applicable consultation procedure, it had a stronger position in the case of the negotiations on the revised 2009 Toy Safety Directive. Here it acted as co-legislator in the corresponding decision-making process. In addition, its influence in the formulation of EU legislation seems to have left its traces in the text for the revised Directive. A cursory, comparative look at both – the proposed changes mentioned within the European Parliament’s legislative resolution and the final deci-
sion-making outcome – brings to light that most amendments found their way into the revised Directive by being entirely taken over or slightly adjusted. At the same time, these amendments do not point to any attempts of the European Parliament to reduce the already limited margin of legislative discretion (expectation 4). In fact, the European Parliament suggested the granting of discretion to Member States to ensure compliance with the subsidiarity principle as regards the determination of the language of warnings on toys. Taking an overall view, based on the previous descriptive analysis and the considerations just made, leads to the conclusion that the European Parliament played a relevant role in the legislative process on the Directive, presenting itself therein as a supporter of stricter safety requirements – a role that it had already taken in its 2007 resolution to the Commission prompted by the incident with unsafe toys from China. The analysis, however, does not provide any evidence that the European Parliament used its influential position in the negotiations to alter the already meagre margin of discretion entailed by the Directive proposal. Being a proponent of legislative harmonisation in matters relating to the internal market, there was also no need for the European Parliament to advocate the conferral of more discretion upon Member States.

12.5 Conclusion

The facilitating role of legislative discretion in EU decision-making on directives does not come into play in the present case. In fact, the negotiations on the Toy Safety Directive illustrate well under which circumstances legislative discretion does not seem to hold great significance. First of all, in a political area where particular issues are already largely determined by EU law, seeking discretion has ceased to be among Member States’ preferences. This is especially the case if Commission proposals introduce updates of already established rules instead of novel matters that require more implementation efforts in the Member States and may therefore trigger more debate in the Council. Moreover, if aspects of the Directive under negotiation pertain to technical matters which exclude the likeliness of political sensitivity and resulting controversy among Member States, discretion is not needed to facilitate reconciling divergent national interests. Finally, it seems reasonable to assume that the acceptance of EU rules expressed by the Netherlands and, possibly, other Member States, is higher where EU objectives include establishing common (high) levels of product safety standards. These standards determine the marketing success of products, especially if they are used primarily by children which are, after all, the most sensible group of consumers. Having looked into the negotiation process on the Toy Safety Directive, the transposition of the Directive into Dutch law shall receive specific attention hereafter.
Chapter 12  Toy Safety Directive

12.6 Transposition

While the formal implementation of the revised Toy Safety Directive was due to 20 January 2011, the deadline for the practical application of EU safety rules for toys was set at 20 July 2011.\(^{53}\) Hence, the Directive provided for a transitional period, taking into account that the toy industry needed time to adjust to the new safety rules. Additionally, the deadline for the application of the Directive’s chemical safety requirements (part three of Annex 2) was set at 20 July 2013. By that time the European standardisation bodies were supposed to have finalised developing harmonised standards. Meanwhile, toys complying with the corresponding parts of Directive 88/378/EEC were still allowed to be placed on the market.

The Directive was transposed in the Netherlands by virtue of the 2011 Toys Commodities Act Decree, and hence, without any intensive participation of the Dutch Parliament.\(^{54}\) Likewise, the first Toy Safety Directive had been formally implemented by means of subordinated legislation. But the latter’s transposition had required five transposition measures instead of one.\(^{55}\) Since the adoption of the revised 2009 Toy Safety Directive, the Commission and its Expert Group on Toys have sought to assist Member States in the implementation of the Directive – by means of roadshows and explanatory guidance documents, which are partly drawn up in the Chinese language since many toy products are manufacturer in and imported from China (e.g. European Commission, 2013).\(^{56}\) Assistance pertains in particular to the application of those EU rules that cause uncertainty among economic operators, such as for instance the technical documentation requirements, as noted by Coumans with regard to the Directive’s application by the Dutch toy industry (2010: 35).

In any case, and with regard to the Directive’s formal implementation in the Netherlands, so far it has not prompted any objections from the Commission. This contrasts with, for instance, Germany, which has only recently

\(^{53}\) See Article 54 of the Directive.


\(^{55}\) These measures included new and amending lower-level instruments.

\(^{56}\) In line with the Commission’s overall aim to improve the effectiveness of warnings in preventing accidence, this document provides guidance regarding the Directive’s warning requirements aiming to ensure that the information on instructions and warnings is understandable and accessible to consumers of toys.
received a reasoned opinion for not complying with the chemical requirements of the revised Directive (European Commission, 2014).⁵⁷,⁵⁸

12.6.1 Transposition measure

As in the case of the first Toy Safety Directive, the revised Directive was incorporated into the legal framework of the Dutch Commodities Act (see table 16).⁵⁹ The Dutch Commodities Act has since 1935 provided a legal framework for ensuring that products (food, electronic, games, toys etc.) do not pose risks for the safety of consumers. Meanwhile, the Act has been modified several times. Within this legal framework rule-making by means of secondary legislation is allowed and the regulatory power established to transpose European directives concerning product safety.⁶⁰

<table>
<thead>
<tr>
<th>Table 16: Fact sheet transposition Toy Safety Directive</th>
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<tr>
<td>Transposition deadline: 20 Jan 11</td>
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<tr>
<td>Publication transposition legislation: 17 Feb 11</td>
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<td>Sort transposition measure (and number): Order in council (1)</td>
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<tr>
<td>In charge: Ministry of Health</td>
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<tr>
<td>Legal Framework: Dutch Food and Non-Food Law, 1935 Commodities Act Decree on Toys 1991</td>
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In so doing, the Dutch Commodities Act represents the basis for a number of sectoral decrees including those that serve to transpose EU legislation such as the Commodities Act Decree on Toys adopted in 1991,⁶¹ transposing the first Toy Safety Directive. This Decree covered safety rules for both toys and other goods for kids. The new Toys (Commodities Act) Decree, adopted

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⁵⁷ In May 2014 the General Court of the European Union had already largely confirmed the Commission’s decision by which Germany was requested to change its national legislation concerning limit values for certain metals which were found not to be consistent with the chemical requirements of the revised Directive. Meanwhile the case has been closed. Cf. Case T-198/12 Germany v Commission.

⁵⁸ More details on Member States’ implementation performances were not available. The relevant Commission report was not yet published by the time this part of the dissertation was written.


⁶⁰ See Article 13 in conjunction with Article 3 of the Commodities Act.

⁶¹ The Decree is also referred to in the following as ‘Toys (Commodities Act) Decree’, or just ‘Toys Decree’. In Dutch it is known as ‘Warenwetbesluit Speelgoed’ and published in the Official Bulletin, 1991, 269.
to transpose the 2009 Toy Safety Directive, repeals its 1991 predecessor.\textsuperscript{62} Albeit including more Articles than the previous Decree (19 vs. 12), the new Decree does not anymore contain provisions pertaining to goods for kids other than toys. This is due to the fact that these rules do not fall within the remit of the revised Toy Safety Directive and were therefore incorporated by the transposing Ministry of Health, Welfare and Sport into another Decree under the framework of the Dutch Commodities Act which relates to the general safety of products.\textsuperscript{63} This transposition approach illustrates the Ministry’s efforts to remain in line with the Directive and to avoid the inclusion of any national extras into the transposition measure, adhering strictly, to the corresponding ministerial instructions for the transposition of EU law into Dutch law.\textsuperscript{64}

Since the Toy Safety Directive is a comprehensive piece of EU legislation, the following sections are used to map out, by means of a few examples, how the Directive was transposed into Dutch law. Such an approach is preferred to a long and detailed description of the transposition measure. It ensures better readability of the analysis and, in addition, brings out the most important aspects, providing an insight into the methods and techniques applied by the Ministry to transpose the Directive into the national legal framework.

\subsection*{12.6.1.1 Terms and scope}

The definitions of the Directive’s key terms and rules concerning its scope were transposed into Article 1 of the Toys Decree. Reference is thereby largely made to the corresponding explanations provided by the Toy Safety Directive.

\subsection*{12.6.1.2 Obligations of economic operators}

The obligations for manufacturers were translated into Article 3 and 4 of the new Toys Decree. In fact, the two Articles merely list the relevant Directive provisions as well as the Annex that manufacturers are supposed to take into account (see Article 3.1 Toys Decree). The same approach, i.e. direct

\textsuperscript{62} The repeal of the previous Decree resulted in the ipso jure termination of a few ministerial decrees and instructions that the Ministry had issued under the previous Toys Decree, including the instructions concerning standards for toys as developed by the Netherlands Standardisation Institute (NEN). These standards would, however, continue to be published in the \textit{Government Gazette} or could be obtained from NEN. Furthermore, since harmonised standards were to be determined by EU standardisation bodies, it was no longer deemed necessary by the Ministry of Health, Welfare and Sport to introduce them within the framework of the Toys Decree. \textit{Cf. Official Bulletin}, 2011, 57.


\textsuperscript{64} This refers to the earlier-mentioned Instructions for drafting legislation, no. 331 in particular.
referencing to the relevant Directive provisions, was applied regarding the obligations for importers and distributors (see Article 5 and 6 Toys Decree).

12.6.1.3 Safety Instructions and warnings
The Directive’s requirements relating to the safety instructions and warnings for the use of toys are transposed by means of Article 7 of the Toys Decree. The Ministry made use of discretion provided by the Directive in establishing that information on the safety of toys and warnings has to be provided in the Dutch language.

12.6.1.4 Presumption of conformity and CE marking
Article 8 of the Decree is almost a literal translation of the Directive’s Article 13, setting out the presumption of conformity with the essential safety requirements (harmonised standards) as laid down in Article 10 and Annex II to the Directive. According to Article 9 of the Decree, toys being placed on the market have to be affixed with a CE mark indicating compliance with EU safety standards. The general principles of the CE marking and rules and conditions for affixing it to toys are laid down in Article 9 of the Decree which establishes that toys being placed on the market have to bear a CE marking in correspondence with Article 16(1) and (2) as well as Article 17 of the Directive.

12.6.1.5 Conformity assessment procedure
Article 12 of the Decree transposes the EU rules concerning the conformity assessment procedure and bodies involved therein. Article 12.2 requires from conformity assessment bodies compliance with the Directive’s Articles 26(2) to 26(11), Article 31(5), and Article 36 (performance and condition requirements as well as information obligations). Article 12.3 of the Dutch Toy Decree literally translates the Directive’s presumption of conformity requirement for national conformity assessment bodies.65

12.6.1.6 Market surveillance
Article 13 of the Decree relates to the Directive’s rules on market surveillance. Officials, in the meaning of Article 25 of the Commodities Act those that are appointed by national ministers to carry out market surveillance tasks,66 together with conformity assessment bodies as well as economic operators shall act in accordance with Articles 41, 42 and 45 of the Directive (laying down the obligations concerning market surveillance).

The description of the transposition measure clearly illustrates that the Ministry of Health, Welfare and Sport closely followed the structure and wording of the Directive while transposing it into the Dutch legal frame-

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65 Cf. Article 27 of the Toy Safety Directive.
66 They are appointed by the Minister of Health, Welfare and Sport, the Minister of Economic Affairs or the Ministry of Agriculture, Nature and Food Quality. Cf. Article 25 of the Act.
work. While incorporating the revised EU safety rules into Dutch law (including those established in the Annexes to the Directive), one-to-one transposition was accompanied by the method of direct referencing. Nearly all Articles of the Decree cite the relevant Directive provision or literally translate the rules contained by them. In fact, to properly understand transposition legislation of the Toy Safety Directive requires reading the former in conjunction with the latter. This corresponds to already established practice as was noted by the Ministry. Owing to the international dimension of the toy sector, economic operators involved in the toys business regularly consult the Directive’s safety rules (Official Bulletin, 2011, 57). While largely staying close to the Directive text when transposing its requirements into Dutch law, additional wording was added to the new Toys Decree, only in a few cases, namely where national peculiarities had to be taken into account, such as for instance with respect to the language requirements concerning safety instructions and warnings. Last but not least, it becomes evident from the Dutch transposition measure that the Ministry applied the method of dynamic referencing, meaning that the transposition measure directly refers to the directive, including its future amendments. The application of this method is reflected by Article 14 of the new Toys Decree: any amendment to the Directive shall apply to the application of precisely this transposition measure.

12.6.2 Reactions to the measure

In August 2010, prior to the publication of the new Toys Decree, another meeting was held between the Ministry of Health, Welfare and Sport and representatives from the toy sector and consumer organisations. This meeting took place under the already-mentioned framework of the Regular Consult Food and Non-Food Law (ROW). The issues discussed pertained to the costs caused by the implementation of the Directive and the removal of the provisions concerning goods for kids from the scope of the Toys Decree resulting from the Directive’s formal implementation into Dutch law. The participants of this meeting opined that the proposal lacked clarity with regard to the question of costs: while it was obvious to all of them that the Directive’s enforcement requirements entailed administrative and financial burdens, the exact amounts of the implementation costs turned out to be hard to predict and remained unclear. The revised EU rules and, in particular the way they were transposed by means of the new Toys Decree, nevertheless met with broad approval by stakeholders (Ministry of Health, Welfare and Sport, 2010). The content of the transposition measure was only

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67 While later on, in the explanatory memorandum to the Decree, attempts were made to calculate costs, the Ministry, however, acknowledged that figures could not be provided with certainty. Official Bulletin, 2011, 57, p. 8.

68 Ministry of Health, Welfare and Sport, ‘Report of the stakeholder (ROW) meeting’, 2 August 2010, provided to me by the Ministry.
slightly amended at the request of the Dutch association of toy suppliers and with regard to Article 10.3 of the Decree: to avoid further administrative burdens for the toy industry sector, it was agreed with the Ministry that the Decree would provide for the possibility to draw up technical documentation and correspondence in English as an alternative to Dutch.69 While one participant expressed the view that having to consult two legal documents might cause inconvenience in the application of EU safety rules, the majority of stakeholders shared the opinion that directly referring to the relevant provisions of the Directive, would help to avoid misinterpretation and misapplication of EU rules (Ministry of Health, Welfare and Sport, 2010). Be it as it may, the discussion did not lead to any fundamental amendments to the Toys Decree.

In the Netherlands, as with any adoption of governmental decrees (as well as parliamentary acts), the draft transposition measure was submitted to the Council of State to obtain its non-binding opinion. While stakeholders agreed with the draft Decree, the Council of State did not approve of the transposition technique the Ministry had applied in formally implementing the Directive (Council of State, 2010).70 The Council of State held the view that the method of direct referencing was flawed in that it did not provide for sufficient legal certainty for economic operators, and consumers, in particular, to whom the Directive was also directed. It therefore advised the Ministry to review the measure and to provide for clear and legible transposition legislation. The Ministry took a different view by rejecting, first, that the Directive was directed at consumers, and second, by arguing, to the contrary, that transposition legislation provided for sufficient clarity. With a view to consumers, it additionally pointed out that they would gain certainty about the safety of products by means of the CE marking affixed to toy products. Based on this argumentation, the Ministry did not follow the opinion of the Council in this particular respect.

The Decree was published in the Dutch Official Bulletin by mid-February 2011 and therefore a few weeks after the transposition deadline.71 Transposition occurred, thus, with a very short delay. Nevertheless, the question may be asked why there was a time lag after all. The government originally proceeded from the assumption that transposition would be timely (Parliamentary Papers II 2010/11, 21109, no. 197, p. 7). This was also confirmed in

69 This was in line with the Directive. According to Article 20(5) of the Directive technical documentation and correspondence ‘shall be drawn up in an official language of the Member State in which the notified body is established or in a language acceptable to that body.’


71 It became effective on 20 July 2011. General practice of ministries in the Netherlands is to let legal acts enter into force only twice annually - usually on 1 January and 1 July (known as common commencement days). This approach is applied to prevent citizens from being confronted with new legislation too frequently.
the interview with the civil servants involved in the transposition process. The interview partners could not identify any specific grounds for why timely transposition was not achieved. They were convinced that transposition was delayed for minor reasons. Explaining such a brief delay may be less intriguing and complex than in case of longer delays. In the words of the interviewees, ‘it might have been a rather trivial reason which caused delay in the transposition of the revised Toy Safety Directive, such as a delayed signature or a misplaced document on a wrong pile that eventually retarded the process.’ This is certainly not far-fetched to think given the fact that processes such as the transposition of European directives by national civil servants are not automated. Hence, human errors can occur and therefore not be ruled out as one of the reasons for deficient transposition. This, however, does not answer the question concerning the role of discretion and other factors in the transposition of the revised Toy Safety Directive. The subsequent explanatory analysis therefore tackles this question.

12.7 Analysis

This section builds upon the previous discussion of the Dutch transposition of the revised Toy Safety Directive. Factors that are assumed to influence transposition are addressed, including discretion, and examined in respect of their relevance in the present transposition case.

12.7.1 Discretion-in-national-law

It seems that, on the basis of the above-made observations, there is much to be said for the point that expectations about the role of discretion in the transposition process seem to carry little relevance in the present context.

As established before, the Toy Safety Directive grants hardly any discretion which already makes redundant to consider whether with more discretion available, the Directive was better (timely and / or legally correct) transposed into national law (expectation 1). The reasons for the meagre levels of discretion shall be briefly recalled: harmonisation of EU toy safety legislation is well-advanced. Safety rules are ‘made in Brussels’ leaving hardly any discretion for transposition. Additionally, harmonisation is preferred by the Member States, and arguably also by business and consumer organisations due to the advantages it entails for all of these groups: common standards and legal clarity, alongside the free circulation of toys as well as high safety and consumer protection throughout the EU. In this context, seeking discretion for own policies, certainly within the Directive’s limits, in order to give transposition a truly ‘national touch’, loses all relevance. Where it is accepted by national actors that Brussels ‘sets the tone’ like in the case of the Dutch transposition (and negotiations) regarding the Toy Safety Directive, considerations relating to the preservation of national peculiarities while incorporating the Directive into national law, have
ceased to be relevant. If little discretion is available after all, as shown by the present transposition case, it is used for pragmatic reasons: providing safety and warning instructions that are easy for the consumer to understand. Taking the foregoing into consideration, the *discretion-in-national-law expectation* does not carry much relevance in the present case. It is, in this context, however, interesting to note that the discretionary choice of transposition forms and methods by the Ministry of Health, Welfare and Sport reflects a certain approach to transposition. Whereas the first Toy Safety Directive was transposed by copying out EU rules, this technique has meanwhile been replaced by direct and dynamic referencing – as evidenced by the transposition of the revised Directive. Thus, it seems that, in the course of time, the Dutch transposition of EU safety rules on products, at least concerning toys, has become a matter of routine and acceptance: EU rules are ‘simply’ taken over in the transposition measure.72

12.7.2 Discretion, administrative capacity and transposition actors

With the certainty that the Directive afforded very little discretion to Member States for transposing its provisions into Dutch law, those expectations evidently become irrelevant that predict certain effects resulting from more discretion being available for transposition. More concrete, it can be ruled out that transposition was facilitated by an interaction effect from more discretion and administrative capacity (expectation 8). Nor did the combination of more discretion, and the number of actors transposing the Directive, lead to a negative interaction effect contributing to deficient transposition (expectation 9). Considering each national-level factor on its own furthermore does not offer much explanatory power with a view to the transposition outcome. To begin with, administrative capacity was not a problematic issue. The analysis of the transposition documents and the information obtained from the interviews do not provide any meaningful indicators of lacking knowledge or administrative coordination problems in transposition. The Ministry of Health, Welfare and Sport acted alone in transposing the Directive, and on the basis of the analysis no serious disagreements or conflict between the political units involved in the negotiations and the legal units transposing the Directive, could be established. Having one Ministry in charge of transposition, also excludes controversy as a cause for delay, resulting from divergent views among the transposition authorities on how to incorporate the Directive into national law.

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72 In this regard it is interesting to note that with the most recent amendment to the Dutch Commodities Act a legal basis was introduced (Article 13c) which establishes that for all EU directives transposed within the framework of the Dutch Commodities Act, dynamic referencing shall apply. See *Official Bulletin*, 2015, 235. This was mentioned to me by one of the interviewees.
Discretion and compatibility between EU and national rules are not only considered to be relevant factors that are linked with each other in EU negotiations on directives. They can also be connected in the national transposition of directives according to the compatibility interaction expectation (E7). It is expected that compatibility between the EU directive and national rules raises the likelihood of proper transposition, and that this effect becomes more positive with increasing degrees of discretion available for transposition. In the present case, the Toy Safety Directive and relevant Dutch legislation were, indeed, largely compatible. The analyses of both the negotiation and the transposition processes do not provide for any pertinent indicators of lacking compatibility between EU and Dutch rules. It is possible that the situation was different with respect to the first EU Toy Safety Directive adopted in 1988 which required five transposition measures to be incorporated into national law. The revised Directive, by contrast, was transposed by means of one Decree, its rules being incorporated relatively easily into already firmly established national legislation: the Dutch Commodities Act. Assessing the compatibility between EU safety rules and Dutch legal arrangements on the basis of the four-fold classification of misfit, provided by Steunenberg and Toshkov (2009), allows concluding that the legal misfit between the Directive and national law was small. It is therefore likely that low incompatibility, and therefore a rather good compatibility between EU and national rules, contributed to a relatively smooth transposition of the Directive. What about the role of discretion which is the second factor, alongside compatibility, addressed by the expectation? The Directive text leaves no doubt that the Toy Safety Directive is not a discretionary piece of EU legislation. This being said, it becomes evident that a facilitating joint effect resulting from compatibility and discretion can be excluded as having affected the transposition of the Directive. And yet, it cannot be said that discretion is completely irrelevant in the present case. The simple fact that it is inherent in directives, due to the choice of implementation forms and methods offered by them to transposition actors, is a relevant point. The descriptive analysis shows that the methods and techniques chosen in transposing the Directive, have contributed to the fact that the Directive was smoothly incorporated into national legislation – even in the absence of high levels of discretion. As pointed out in the explanatory memorandum to the Toys Safety Decree, and as confirmed by the interviewees, the method of direct referencing made it relatively unproblematic to transpose EU rules while at the same time misinterpretation (and later misapplication) could be avoided. In addition to that, using this technique, and especially the method of dynamic referencing, ensures the swift adjustment of safety rules whenever future amendments of the Directive are required.

Finally, another expectation that carries little relevance in the present case refers to both the negotiation and transposition stages, and implies that disagreement between the EU directive and national rules raises the likeli-
hood of deficient transposition, an effect which becomes more pronounced if the degree of discretion decreases (expectation 6). First of all, and as noted when analysing the EU decision-making process, the content of the Directive was largely in line with the Dutch preferences. It is true that Dutch requests were not always accommodated such as in respect of the introduction of a ban regarding the placing of particular warnings on toys, to mention one example. On the other hand, the Dutch Government was, on the whole, satisfied with the proposal, as was also confirmed in the interviews conducted.

12.8 Conclusion

The relevance of discretion in the case of the Toy Safety Directive is very limited but, on the other hand, also not entirely negligible. Discretion was not necessary for ironing out disparities between EU and national rules, neither at the negotiation nor transposition stage. It can, however, not be denied that discretion through the choice of implementation forms and methods, comes to bear in the present case. It made it possible for the Ministry of Health, Welfare and Sport to use a well-proven approach to transposition, involving certain techniques and methods as well as the consultation of national stakeholders. Stakeholder involvement in transposition may enhance national compliance at later implementation stages: when the Directive has to be practically applied and enforced, entailing that stakeholders take an active role in the implementation of the Directive. In a nutshell, transposition could be shaped in a way that, in the eyes of the actors concerned, would ensure the proper formal implementation of the Directive into national law. Discretion was not a deciding but a supporting factor in this process, ensuring that the Directive requirements could be incorporated into the Dutch legal system without much difficulty.