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Part 4

Assessing findings, providing conclusions and outlook
16 Conclusions and outlook

16.1 Structure

The first part of this concluding chapter continues to assess the results of the negotiation and transposition analyses with due respect to the role of discretion. In doing so, the key questions of this study are further discussed and answered. This includes, in the second part, a shift of focus towards the relationship between discretion and legitimacy. The remainder of this chapter addresses the relevance of the dissertation’s findings for the study of discretion within the context of processes at the EU and national level with regard to directives, and puts forward a few suggestions for future lines of research.

16.2 Discretion and nothing else matters?

The aim of the dissertation was to shed light on the role of discretion in EU decision-making and the national transposition of EU directives, and to find out how discretion affects these processes. One of the conclusions of this study is that discretion does indeed matter. The empirical findings draw a picture of the different roles that discretion plays in the negotiation and transposition contexts addressed in the case studies. Furthermore, the case study findings made it possible to draw conclusions about the particular circumstances under which discretion facilitates processes at both the EU and national level regarding directives, but also revealed those conditions that lead to impeding effects of discretion on national transposition. To complete the discussion of the empirical results some outstanding issues and additional aspects need to be addressed.

16.2.1 Circumstances and effects (negotiations)

First, the negotiation analyses brought to light that discretion either facilitated EU decision-making or that it had no effect on the progress of negotiations. Facilitating effects occurred in connection with political sensitivity and / or incompatibility between the directive under negotiation and Member States’ legal systems. Cases in point include the negotiations on the two migration directives as well as the Pyrotechnic Articles Directive. In fact, the empirical results from these cases confirm the argument of the previously mentioned consensus-building perspective on the delegation of discretionary decision-making competences to Member States (Dimitrova and Steunenberg, 2000; Thomson et al. 2007; Thomson, 2011). It proceeds from
the assumption that disagreements between Member States in the Council of
Ministers are settled by building discretion into decision outcomes such as
directives. What’s more, the case of the Pyrotechnic Articles Directive
matches the observation that little discretion being made available to Mem-
ber States for implementation can already have such an effect. Little discre-
tion can suffice in bringing about consensus as long as Member States have
the idea that discretion helps to implement EU rules by largely preserving
their domestic legal systems (Thomson, 2011: 260; 262).

16.2.2 Circumstances and effects (transposition)

Second, and with regard to transposition in the Netherlands, it was shown
that discretion facilitated or impeded this process. From the analyses it fol-
lows that discretion has facilitating or impeding effects by interacting with
other factors. In other words, discretion unfolds its effects not alone. It has
a bearing on transposition by affecting other factors that are assumed to
impact transposition. This was shown in the case of the Blue Card Direc-
tive, where discretion strengthened the positive effects of high compatibility
between EU directives and relevant Dutch legislation. It was also brought
into view with regard to the Return Directive where discretion, by interact-
ing with these factors, increased the impeding effect of both legal incom-
patibility and transposition actors. But the retarding effect of discretion and
national transposition actors did not have a big impact in further slowing
down transposition.

Third, the fact that discretion is an intervening factor in transposition
furthermore shows that it is not a sufficient condition for proper or defi-
cient transposition to occur. Other factors must be present in conjunction
with which discretion unfolds its effects. Given the fact that transposition is
found to be affected by a multitude of factors this may not be too surprising
but it is nevertheless worth noting. Furthermore, discretion has a noticeable
effect on transposition if larger amounts of it are available to incorporate EU
rules into national law. The transposition of the two migration directives are
clear illustrations of this result.

Fourth, where only little discretion is available for transposing a direc-
tive discretion has less impact on transposition. The transposition of the
Pyrotechnic Articles Directive indicates that discretion facilitated fitting the
Directive into the Dutch Fireworks Decree in the presence of good compat-
ibility. Nevertheless, due to policy misfit and the complexity of the Direc-
tive’s technical requirements, the positive effects of legal compatibility were
outweighed and proper transposition was therefore not achieved.

16.2.3 Effects and role (negotiation and transposition)

The fifth point relates to the effects and role of discretion in transposition as
well as, again, to its link with the compatibility (or goodness-of-fit, misfit)
argument. Interestingly, as follows from the case studies, the link between
compatibility is of relevance in both the negotiation and transposition pro-
cesses.

First, as becomes evident from most of the negotiation processes, Mem-
ber State preferences were shaped by considerations about the compatibility
between EU and national law – and hence related to the costs assumed to
be incurred by implementation. Member States sought to keep these costs
low by uploading own legal arrangements or seeking additional discre-
tion. Incorporating more discretion into directive proposals which guaran-
teed that EU requirements could be converted into national law as Member
States saw fit, led to the latter’s final agreement on directive proposals. Sec-
ond, compatibility between EU and national law played a role in transposi-
tion. Together with discretion it either facilitated or impeded proper trans-
position, as mentioned above with respect to the two migration directives
analysed. While the compatibility or goodness-of-fit argument has deliv-
ered mixed results as to its relevance in explaining transposition outcomes,
the results of the present analyses show in any case that it mattered, with
respect to both the negotiation and transposition processes.

A last finding is worth mentioning. The transposition analyses show
that legal implementation of EU directives in the Netherlands is based on
the strategy to implement a directive by taking over the legislative text in a
national legal measure. This strategy follows from the discretionary choice
of transposition forms and methods and is referred to as the ‘copy-out’ tech-
nique. By applying it, implementing actors stay as close as possible to the
directive text and avoid the incorporation of any national extras\textsuperscript{1} with the
aim of ensuring timely and legally correct transposition. At the same time,
national transposition is focused on using already existing legislation as
much as possible,\textsuperscript{2} which brings into play the aspect of preserving national
legislation and again the role of discretion. After all, the transposition of
the migration directives shows that discretion is used to retain existing national
legislation. In fact, preserving own legislation is an approach which is not
unique to the Netherlands. It is also applied by other Member States that
take their national legal systems as a point of departure for transposition
(Steunenberg and Voermans, 2006). But such an approach does not seem
to guarantee compliance with EU law and it illustrates again the different
effects that discretion can have. While preserving own national rules and
practices by using discretion contributed to proper transposition regarding
the Blue Card Directive, it resulted in deficient transposition and non-
compliance as exemplified by the transposition of the Return Directive –
not only in the Netherlands but apparently also in other Member States
(Zwaan, 2011; 2013). This example shows that while the empirical analysis
is country-specific, it indicates trends also found in other Member States.

\textsuperscript{1} This is reflected in the ministries’ adherence to instructions for drafting legislation, no. 331.
\textsuperscript{2} This is done in accordance with no. 333 of the instructions for drafting legislation.
16.3 Discretion under scrutiny

The positive effects of discretion attest to its potential to facilitate processes of EU law-making and national (legal) implementation – a potential which, as argued in the dissertation, is inherent in discretion. And yet, the case studies, in particular those centring on the migration directives, have also brought to light views that express dissatisfaction and criticism of discretion.

In the area of consumer protection and environmental law this aspect is reflected indirectly. Here it seems that harmonisation by directives has not been entirely successful in producing the intended results. As noted before with regard to consumer protection law, the European Commission pursues plans to advance more vigorously the harmonisation of national consumer laws. To this end it has started to introduce full harmonisation instruments such as the 2011 Consumer Rights Directive,3 seen by some scholars as difficult to reconcile with the principle of shared competences and subsidiarity (Antoniolli, 2006; Reich, 2012a, 2012b; Weatherill, 2013). As regards EU environmental law, some believe that the Commission is ‘disadvantaged’ by directives and therefore advocate the use of directly applicable EU regulations (e.g. Jordan, 1999). Although recognising that flexibility makes it possible for Member States to take into account national peculiarities, directives are considered to contribute to the problem of implementation deficits across Member States due to the flexible arrangements they imply – i.e. due to discretion (Jordan, 1999: 78; Steunenberg et al., 2012).

These kinds of debates show the tension between supranational and national dimensions in the EU integration process reflected in debates about the distribution of decision-making competences. In the area of migration, this debate has led to more overt criticism of discretion which is considered by some as the ultimate expression of Member State attempts to retain national legal orders and practices at all costs. Discretion is explicitly addressed in debates about EU harmonisation of national migration law – and viewed critically as shown in the case studies regarding the migration directives. But also in respect of migration directives more generally, discretion is seen with scepticism and is mentioned in one breath with problems of legitimacy and lacking high standards of EU migration law (Formisano and Carrera, 2005: 15).

Turning back to the cases of the Blue Card Directive and Return Directive, here the availability of considerable discretion was found to have challenged if not undermined the objectives of the initial Commission proposals (Baldaccini, 2009; 2010; Eisele, 2013). The proposal for the Blue Card Directive initially implied high standards concerning the equal treatment of EU Blue Card holders with nationals of the host Member State, including appropriate rights for their family members. Through more discretion that was eventually built into the Directive, it was, nevertheless, possible for Member States to minimise these standards during the negotiations (Eisele, 2013). Likewise, with regard to the Return Directive, it has been strongly doubted whether its discretionary provisions allowing for exceptions and differences in national practice will ensure equal and fair treatment of irregular migrants subjected to return procedures as actually being sought by the Directive (Baldaccini, 2009; 2010).

What can be said in response to this critique? To begin with, these critical voices on discretion cannot be simply rejected out of hand. Recent studies on the implementation of the Return Directive show, for instance, that discretion may indeed be used for restrictive migration policies at the national levels (Zwaan, 2011; 2013). And yet, it is doubted here if these negative perceptions do justice to the concept of legislative discretion as presented in this study. Again, my central argument is that the basic idea underlying the use of discretion is a positive one from the viewpoint of implementation. Discretion as a directive’s core feature provides alongside the efficiency benefits previously addressed, the relevant flexibility for Member States to fit EU rules into their traditionally grown legal systems. For those in charge of transposition, discretion makes it possible to take into account national peculiarities – the idea underlying its use being established by the EU treaties: the preservation of national legal identities. It seems to me, however, that this potential of discretion is not recognised in the academic debate on EU migration law. Here, discretion is equated with, or at least treated as, a *pars pro toto* for national sovereignty. As noted by Guild: ‘Inherent in the concept of state sovereignty is the right to exercise discretion in immigration policies’ (1999: 64). This is not to say that discretion is not an expression of Member States’ own decision-making power. But as illustrated by the previous examples, scholars seem to use this interpretation to argue against discretion. As a consequence, it is not understood as a tool facilitating decision-making and the implementation of directives. On the contrary, it is first and foremost conceived as an instrument which allows Member States to take recourse to national rules and practices, and to preserve them at any price at the risk of undermining EU law.

Without intending to ignore the potentially negative effects that may result from the transposition of discretionary directives, I believe that there is another valuable aspect that needs to be mentioned. In my view, it is too short-sighted to conclude that discretion jeopardises harmonisation. Instead, I suggest another interpretation of discretion: seeing it as a tool that initially makes it possible to achieve harmonisation in areas that are politically very
sensitive – apparently relatively ‘young’ EU areas where the previously strong influence of Member States is still detectable. In these areas discretion reflected, for instance, by minimum harmonisation requirements, enables the EU to get ‘a foot in the door’ while, at the same time, the possibility still remains to open this door more fully to progressively adapt minimum requirements to become full harmonisation measures at a later moment. In other words, discretion opens up chances for ‘phased harmonisation’.

16.4 Uses of discretion

The latter observation relates to the use of discretion at the EU level. But how was discretion put to use in the national transposition of EU directives? The case study analyses benefitted in this regard from a closer look at the explanatory memoranda to the transposition measures and interviews with Dutch civil servants in charge of transposing the directives analysed. What is the picture that emerges from the case study findings?

16.4.1 Mixed picture

Starting with a cursory overview, the transposition analyses regarding the Blue Card Directive and Pyrotechnic Articles Directive show that discretion was used to slot EU requirements smoothly into already existing Dutch legislation, leaving the latter largely intact. In the former case, the use of discretion contributed to compliance with EU law whereas in the latter case positive effects of discretion did not suffice to achieve the same outcome. With regard to the Toy Safety Directive, it could not be concluded that discretion served to preserve national legal structures. But also here, discretion reflected in the choice of forms and methods of (legal) implementation was shown to have a useful function. As established earlier, it did not have a decisive role to play but it seems to have had a supporting function. And in any case, it did not impede transposition. Discretion took this latter role in the transposition of the Return Directive which was only incorporated into Dutch law with considerable delay. What all of these examples have in common is that they illustrate how discretion was used by implementing actors to shape transposition and the resulting effects.

16.4.2 Facilitating effect

Taking a closer look at the transposition cases, with regard to both Blue Card Directive and Pyrotechnic Articles Directive discretion was used by the national authorities in charge in certain ways that made it unfold its potential to facilitate transposition. Basically, what did not fit was made to fit. This could also include the decision of transposition actors not to make use of discretionary directive provisions. As illustrated by the transposition of the Blue Card Directive, (discretionary) EU requirements that did not
match with those of the Dutch Knowledge Migrant Regulation and were supposed to have undesired effects were not transposed. At the same time, discretion was used to transpose directive requirements that were in line with national legislation.

These latter examples show that discretion eased fitting the Directive into the national legal framework, exhibiting discretion’s ‘facilitating-fit-function’. It also had a bearing on the transposition of the provisions defining and categorising pyrotechnic articles and EU enforcement requirements of the Pyrotechnic Articles Directive which were not in line with the national approach. Discretion, however, implied by the choice of implementation forms and methods as well as the directive text, made it possible to incorporate EU definitions and categories on pyrotechnic articles. This could be done by largely preserving national concepts already firmly established in own legislation (the categories of consumer fireworks and professional fireworks) as well as national practice aiming to keep certain pyrotechnic articles available under the Directive’s framework away from consumers. Using discretion also made it possible to continue with the application of national rules and practices with regard to aspects of enforcement.

### 16.4.3 Impeding effect

The way discretion was used led in one case, alongside other factors, to non-compliance as illustrated by the transposition of the Return Directive. Also here, transposition was geared towards preserving the national legal framework. This point notwithstanding, in the presence of low compatibility of EU and national legislation, the overall approach by the Ministry of Security and Justice and the way discretionary provisions were transposed, rather emphasised than mitigated the differences between EU and national law. This was apparent in the transposition of the provisions on voluntary departure and detention which resulted in stricter outcomes than implied by the Directive. As a result, the use of discretion undermined instead of supported the main tenor and objective of the Directive as laid down in Article 1: ‘to promote voluntary instead of forced returns and to establish common standards and procedures for returning illegally residing third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.’

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4 This concerns Articles 2(g) of the Blue Card Directive and the requirement of applicant’s level of professional experience and Article 8(2) making admission for the purpose of highly qualified employment conditional on the outcome of an examination of the Member States’ labour markets.

5 Discretion granted by Article 6 on volumes of admission was used to ensure the exclusion of the third undesired category of workers resulting into Article 3.32 of the Foreigners Decree.

6 Article 6(2) limitation to free movement clause.

7 This becomes evident from the use of Article 6(2) regarding the storage of fireworks.
Finally, how discretion was used is a relevant aspect with regard to the transposition of the Toy Safety Directive. The case study findings led to the conclusion that it had no decisive role in transposition. But in fact it did have a positive influence on transposition – albeit in a different way as compared to the Blue Card Directive and Pyrotechnic Articles Directive. In the area of product safety regulations where national rules are already into close alignment with EU law, discretion did not carry any relevance by allowing for the incorporation of EU requirements by preserving previously established legislation. In fact, the discretionary choice of forms and methods rather reflects that transposition is already directed towards the fact that legislation is made in Brussels. First of all, the traditional transposition approach of the Ministry in charge (Ministry of Health, Welfare and Sport), towards EU law in general implies the use of delegated legislation, and administrative acts such as government decrees. Not only does this point to the possibility of relatively swift transposition in the absence of strong parliamentary involvement. It also points to the fact that, as was exemplified by the Toy Safety Directive, hardly any discretion is available that would require parliamentary debate on decisions to be taken regarding the interpretation and application of the directive’s requirement which, in turn, underlines the high harmonisation level national law has already been subjected to. To put the point differently, the application of certain transposition techniques makes it evident that discretion for shaping transposition in a national fashion (using as much as possible elements from own legislation) has ceased to be relevant in the considerations of implementing actors. With respect to the Toy Safety Directive in particular, this is shown by the fact that the first Toy Safety Directive was transposed by the copying technique which implies a transposition measure equivalent to the wording of the directive and indicates the marginal role of national legal terms and concepts in transposing the Directive. Meanwhile, this technique has been replaced by the technique of direct and dynamic referencing as exemplified by the transposition analysis of the revised Toy Safety Directive. The use of this technique underlines even more that national legislation is no longer taken as a starting point in transposing directives. This was also confirmed by the senior civil servant of the Ministry of Health, Welfare and Sport who pointed out that directives in areas such as EU product safety regulation, as well as EU pharmaceutical legislation and animal testing, are highly detailed leading to considerable changes in national legislation which nowadays largely refers to EU rules introduced in the Member States by means of directives.

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8 Parliamentary Papers II 2007/08, 31498, no. 1-2, pp. 50-51.
9 By means of this technique a transposition measure is created which is equivalent to the wording of the directive.
While additional discretion – flexible arrangements implied by the directive text – is lacking and does not play a pertinent role in preserving national law, in my view it may still have relevance for national transposition. The transposition of the Toy Safety Directive illustrates that discretion in the form of implementation forms and methods allowed for the relatively smooth transposition of the directive – as already noted, the delay was negligible. By using direct referencing in transposing the Directive, the likelihood of misinterpretation and misapplication was largely reduced, and by means of direct referencing the future swift and efficient amendment to toy safety rules was guaranteed. National stakeholders were also involved by means of an established procedure and largely approved of the transposition measure. Against the transposition background just described and taking into consideration that, as previously noted, the Ministry of Health, Welfare and Sport is known to have one of the best compliance records with regard to EU directives, it is at least conceivable that discretion has been beneficial for the transposition of EU directives. It does not seem unreasonable to assume that the way discretion has been used – in choosing transposition forms and methods – may have served the Ministry over time to establish a routine way of dealing with transposition in the area of product safety.

Up to this point, the empirical results have been assessed with the aim of answering the dissertation’s questions concerning the role and effects of discretion, the circumstances under which it comes into play, and how it is used within the context of transposition. All that is missing now is elaborating on the link between discretion and legitimacy. And in particular how does discretion link up with the three dimensions of input, throughput and output legitimacy?

16.5 Discretion and legitimacy

To someone like Weber (1864-1920), a lawyer and one of the founding fathers of sociology, it may not have been obvious why discretion should be of relevance for modern legal systems and have certain implications for their legitimacies. In the academic world Weber is well known for his concept of legitimacy which has influenced contemporary debates about the rightful exercise of power but also triggered criticism (a case in point is Beetham, 1991). In Weber’s view, it is primarily the rationality of the rule of law that makes people, in modern legal societies, accept and obey power exercised
over them. Legal systems based on the rationality of the rule of law as an overarching principle have administrations that are rule-governed and work in a scientific and objective way. Hence, administrative actors exercise power rationally i.e., according to legal, rational principles (Galligan, 1990: 64-68). This prevalence of rules and principles precludes that any difficulties arise from having to choose among possible courses of action in the application of law. Hence the conclusion that there would be no problem of administrative discretion since the concern of the bureaucratic institutions would be to find the most rational and efficient means for implementing legislative policies as explained by Galligan who elaborates on the implications of Weber’s theory for the concept of discretion (Galligan, 1990: 68; see also Feldman, 1992). And yet, later scholars of public administration have recognised that discretion is an inevitable part of administrative action (Feldman, 1992: 164).

In the present study this latter view is shared. In addition, it has acted on the assumption that discretion matters for the functioning of modern legal systems, including their administrations which are broadly involved in the application of law. What’s more, it sought to show that discretion can play a useful role in law-making and (legal) implementation processes. By looking into the role of discretion in EU decision-making and the national transposition of EU directives, its aim was to highlight the facilitating effects discretion may unfold in these processes and to show that it can contribute to their successful conclusion. But there is more to say to it. Taking this approach one step further, it is believed that discretion can contribute to the legitimacy of EU directives in national law. The central argument is that the legitimacy of EU directives may benefit from discretion in so far as discretion can be used in transposition processes to enhance the input, throughput and output legitimacy of these directives.

As explained in the introduction to this study, legitimacy can be described in terms of input (government by the people), throughput (government with the people), and output (government for the people). These three legitimacy dimensions can serve to assess legitimacy on a more abstract level, linking them to different principles of legitimacy which describe the content of the concept more directly. One way to conceive of legitimacy in the EU is to link it to principles of indirect, parliamentary, technocratic and procedural legitimacy which have elements of both input and output legitimacy. The principles function as vectors that alongside the output and input dimensions have served to pinpoint legitimacy issues.

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11 Alongside the rationality of the rule of law, acceptance and obedience may be motivated by peoples’ belief in a charismatic leader or custom and tradition. While charisma and tradition are two sources of legitimacy in especially pre-modern societies, the rationality of the rule of law is the prevalent pattern in modern legal societies. See Galligan, 1990, pp. 64-65. Galligan bases his observations on his reading of, amongst others, Weber’s, M. Economy and Society edited by G. Roth and C. Wittick (1978) California UP: Berkeley: University of California Press.

12 The dimension of throughput legitimacy was only studied in more detail at a later stage. It largely corresponds with procedural principles of legitimacy.
regarding different aspects of the European Union, its institutions, processes and legislation (Lord and Magnette, 2004; Georgiev, 2013; Stack, 2014).

But the aim here is not to strictly stick to the vector model. For present purposes it shall rather be used to stimulate reflections about legitimacy that are of immediate relevance for the context at hand. Without necessarily combining them, both legitimacy principles (vectors) and input, throughout and output dimensions are considered useful in identifying and describing the main issues at stake with regard to the legitimacy of EU directives. To this end, the focus of the discussion alternates between EU decision-making and national transposition. Reference is made to transposition in the Netherlands by using the case studies for the sake of illustration.

16.5.1 Discretion and output legitimacy

The case studies show several features of the Dutch transposition context that were previously pointed out. To start with, they illustrate the fact that the transposition of EU directives is largely an administrative process in the Netherlands which also applies to transposition in other Member States (Steunenberg and Voermans, 2006). Except for the Waste Framework Directive and Return Directive, in all other cases (Blue Card, Pyrotechnic Articles, Toy Safety, and Stage II Petrol Vapour Recovery) transposition was carried out without a prominent role for the Dutch Parliament. From the viewpoint of democratic legitimacy, this should not be a reason for concern where directives imply technical requirements or adjustments to previously transposed EU rules – and, in any case, where they do not have more fundamental implications for Member State citizens. It is true that in Member States such as the Netherlands, the principle of primacy of the legislature serves as a key guideline in the implementation of (EU) law. But this does not necessarily imply that the national parliament is directly involved in the making of each transposition measure.13 Where national law so provides, implementing actors are encouraged to apply delegation mechanisms to achieve timely transposition. This is in line with the above-mentioned approach to make use of already existing legislative instruments with the aim of achieving compliance with EU directives. It is well known by now that these consideration and choices can be made due to the presence and availability of discretion.

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13 For instance, where elements of a directive are subject to delegation, it is not directly involved in transposition. See ‘Instructions for the drafting of legislation’, no. 22. In exceptional cases, the Dutch Parliament can, however, get involved by means of affirmative resolution (‘voorhangprocedure’). See ‘Instructions’, no. 35. Generally, there also is the possibility for Parliament to scrutinise orders in council before they enter into force by means of a notification procedure (‘nahangprocedure’). This may, however, be time-consuming and therefore result in fewer applications of this specific kind of notification procedure.
Part 4  Assessing findings, providing conclusions and outlook

While compliance with EU law was not reached in all transposition cases analysed, discretion was shown to have facilitated or at least supported legal implementation in three of them. Even though the process was eventually delayed, it facilitated to some extent the transposition of the Pyrotechnic Articles Directives. Most obviously, discretion facilitated and contributed to timely and legally correct transposition in the case of the Blue Card Directive. Finally, discretion had a supportive function, enabling transposition actors to integrate EU rules into the existing legal framework with ease, with regard to the Toy Safety Directive. Very importantly, the transposition of the latter two Directives on legal migration and toy safety respectively, make clear that discretion contributed to compliance with EU law and therefore to the legitimacy of these Directives in national law. This concerns the output dimension of legitimacy in particular: if national transposition meets both conditions of timeliness and legal correctness, a directive can be expected to be fully effective at the domestic level. It is assumed then to be able to unfold its problem-solving capacity at subsequent implementation stages i.e. during the directive’s practical application and enforcement. In a nutshell, the transposition examples from the case studies show that discretion facilitated good transposition performance, which being a sound basis for implementation, makes it more likely that long-term effectiveness of the directive within national law will be achieved. Discretion can, thus, contribute to the output legitimacy of directives in national law.

Where directives touch upon more fundamental issues that affect citizens and more discretion is available for their transposition, it seems reasonable, however, to wonder whether this does not require greater involvement from parliament or other national stakeholders in discussions about how to transpose a directive into national law. This could limit or preclude any ‘democratic leakage’ (Vandamme and Prechal, 2007: 45; Vandamme, 2008: 278). In line with these considerations, the view is taken here that by using discretion for the broader involvement of national actors, the input and throughput legitimacy of EU directives can be enhanced. In the absence of strong and direct influence by national actors on decision-making on directives at the EU level, this is deemed an aspect worth considering further.

16.5.2    Legitimacy at the EU level

The EU adopts law in various fields. For several reasons already touched upon in the introduction to the dissertation, this has given rise to issues of legitimacy. Nevertheless, it would be exaggerated to believe that legitimacy is a pervasive problem. In fact, regarding areas of EU law-making and policies it has been noted that legitimacy needs differ depending on the subject matter at stake (Scharpf, 1997: 21; Lord and Magnette, 2004: 190). Problematic issues have emerged in the area of justice and home affairs. In the pre-Lisbon period, democratic legitimacy in the justice and home affairs area, including the sub-domain of migration, was found to
be largely absent. This was caused by a lack of input from parliament and stakeholders and missing mechanisms to ensure transparency and accountability (Carerra and Formisano, 2005; Lavenex and Wallace, 2005: 464). EU decision-making was therefore perceived to be carried out in a ‘culture of secrecy’ dominated by the involvement of national officials and prevalence of national interests (Kostakopoulou, 2007: 160); like in the case of the Blue Card Directive if only because of the applicable consultation procedure which implies the absence of a more vital role of the European Parliament.\textsuperscript{14}

It appears, thus, that the legitimacy of EU migration law rested for a long time mainly on indirect legitimacy, being justified by its output (Lord and Magnette, 2004, see also Lord and Beetham, 1998; 2001): the realisation of state preferences pertaining initially to border security matters and later to the regulation of influx of migrants.\textsuperscript{15}

In the areas of environment and public health which are also addressed in the case studies, technocratic legitimacy plays an important role in the legitimation of EU decision-making: these directives often include numerous technical requirements which have to be elaborated (Lord and Magnette, 2004: 193). Corresponding tasks are then delegated to expert committees attached to the European Commission. This was partly illustrated by EU decision-making on the environmental and consumer protection directives analysed. On a more general level and as noted above, legitimation of EU law and policies is gained from drawing on different legitimacy principles: indirect, parliamentary, technocratic and procedural (Lord and Magnette, 2004: 184-187). Accordingly, legitimacy of EU decision-making processes on directives can be gained from co-decisions by Member States’ governments and the European Parliament on EU directive proposals (indirect and parliamentary legitimacy). In addition, legitimacy is created by involving experts and other stakeholders from different parts of society (e.g. civil society, business groupings and academics) already during the preparation of directives in which due consideration is also paid to procedural aspects, including the principles of subsidiarity and proportionality (technocratic and procedural legitimacy).

16.5.3 Discretion, input and throughput legitimacy

From the above it becomes obvious that several sources contribute to the legitimacy of directives at the EU level. While legitimacy is hence not lacking, it is argued that it should be enhanced when it comes to the transposition of directives at the national level; and this for good reasons. Discretion can be used to this end.

\textsuperscript{14} But in contrast to the Return Directive; in this case EU decision-making had already been brought out a bit of the shadow of secrecy given the applicability of the co-decision procedure.

\textsuperscript{15} This has become evident from mapping out the historical development of the area as part of the relevant case studies.
In line with the basic principle of democracy, democratic processes and political decisions to be taken should be installed at the same level within a political system (Thomassen and Schmitt, 2004: 377). In other words, these decisions should be made as close as possible to its members, reflecting a strong connection between decision-maker and those affected by the former’s decisions. Naturally, EU decision-making does not sufficiently live up to this principle for it takes place remotely from national citizens with national parliaments being involved only to limited extent.16 Turning to the national implementation stage, the fact remains that here decision-making is mainly shaped by state administrations and not parliaments. Seen in this light, it seems to be useful to consider options for the participation of national-level actors beyond parliamentary involvement. The argument is that the availability of discretion in transposition should be understood as an opportunity to bring national-level actors back in. Granted, when it comes to implementing a directive, its requirements can no longer be changed. As rightly argued in the Dutch policy debate on greater public involvement in implementation processes, once EU directives have to be implemented at the national level, their potential deficiencies can no longer be repaired (Prechal and Vandamme, 2007).17 This, however, does not make broader involvement of national actors in subsequent decision-making on how to transpose a directive less relevant.

This brings the discussion back to the argument that where more discretion is available, democratic leakage should be avoided by greater involvement on the part of those affected by the EU directive’s requirements in decisive legislative discussions. The availability of more discretion should as Vandamme notes, justify ‘a full-fledged democratic transposition procedure’ instead of ‘swift transposition’ (2008: 279). He considers discretion in transposition as ‘democracy discretion’ which supports the argument made here that discretion, if used, can enhance the overall democratic legitimacy of EU directives in national law (Vandamme, 2008). Viewed from this perspective, discretion functions not only as a factor which facilitates a legal

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16 This describes especially the situation of the pre-Lisbon period. With the Lisbon Treaty (2009) the situation may change since it aims to strengthen the role of national parliaments in EU decision-making, providing them with a number of control mechanisms to review the application of subsidiarity in legislative proposals forwarded by the Commission. See for instance Arribas, V. and D. Bourdin (2012) ‘What does the Lisbon Treaty change regarding subsidiarity within the EU institutional framework’, European Institute of Public Administration 2, pp. 13-17. As rightly observed in the academic debate realising the better involvement of national parliaments is, however, also a responsibility of the Member States. See Steunenberg and Voermans, 2006 as well as Steunenberg (2008) ‘De hartkwaal van de Nederlandse politiek: mythes over de invloed van Europa’, Regel-Maat 5, pp. 169-179.

17 Translated from Dutch by myself; the original citation reads as follows: ‘Anders gezegd: mogelijke defecten en onvolkomenheden in het EU-wetgevingsproces kunnen niet meer worden ‘gerepareerd’ op het nationale niveau. Dergelijke reparatie is enkel mogelijk door grotere beïnvloeding van het Europese wetgevingsproces zelf.’ See Vandamme and Prechal, 2007, p. 44.
match and, in so doing, enhances the output legitimacy of EU directives in national law – as was argued above. Discretion can also strengthen the input and throughput dimensions of the legitimacy of directives, meaning that it can contribute to fostering wider acceptance of EU requirements built into them by national stakeholders and other citizens and therefore among those who have to apply and obey these directives.

Tying in well with the idea of ‘democratic discretion’ regarding the transposition of EU directives, other ideas have been presented about discretion in administrative rule-making more in general. In this connection, the use of discretion by administrative actors is considered to strengthen public participation and deliberation and therefore democratic legitimacy of administrative rules and regulations (Hunold and Peters, 2004). According to such views, discretion should be used to shape administrative rule-making along the lines of collaborative forms of governance, especially negotiated rule-making, which are applied in administrative law procedures in the United States and Canada (Hunold and Peters, 2004). Hunold and Peters show how administrative discretion, if put to use, can render administrative rule-making more democratic by making accountability, transparency and other mechanisms deemed relevant from the viewpoint of democratic legitimacy, integral parts of deliberation processes (Hunold and Peters, 2004: 131-149). Put differently, discretion can be used to create these conditions, thereby turning administrative rule-making into a ‘government process by and with the people’, enhancing input and throughput legitimacy as a result. In more concrete terms, involving stakeholders and citizens in processes of administrative rule-making is believed to enhance commitment to and compliance with the decisions taken by all actors involved. For instance, if discretion is used to bring administrative decision-making closer to citizens, accountability is enhanced because administrative actors are obliged to act upon public input. In the case of bureaucratic drift or insufficient consideration of public interests, administrative actors can be held accountable more immediately as a result of closer collaboration between the administration and citizens (Hunold and Peters, 2004: 140). In addition, citizens are assumed to be more willing to comply with administrative rules and regulations at the practical implementation stage based on the consideration that they themselves assisted in translating these measures into national legislation. As a result and as aptly put by Hunold and Peters: ‘Decisions justified with a view to publicly revealed and accepted standards of fairness and equity are believed to enjoy greater legitimacy’ (2004: 141).

In fact, ideas about deliberative democracy and the role of discretion therein meet here with the core idea of the procedural justice approach which acts on the assumption that people accept even unfavourable outcomes as long as they perceive the way these came into being as fair (Tyler, 1990).

To conclude, discretion has been presented here as a tool that, if put to good use, makes it possible to enhance the legitimacy of administrative rulemaking. In the present context, this means that discretion can be used to upgrade EU directives at the national level in terms of output, but especially
input and throughput legitimacy. In doing so, two important outcomes can be achieved with regard to the transposition of EU directives. The first outcome is that input (expertise) and support can be ensured not only from those primarily in charge of transposition – ministerial civil servants – but also from relevant national stakeholders who are more immediately affected by EU directive requirements. This is considered important with a view to ensuring compliance at the actual application and enforcement stages.\textsuperscript{18} The second outcome relates to the idea that available discretionary room can be used by both political and administrative actors in charge of transposition to explain the purpose, content and implication of the directive to be transposed to national citizens who make up ‘organised civil society representing a constituency’s interest’ (Curtin, 2009: 286-287).\textsuperscript{19} This may strengthen the understanding and therefore arguably the acceptance of EU law and policies by the wider public. Against this backdrop, it seems that discretion turns out to be a blessing in disguise. While from the academic debate views have emerged which emphasise that discretion is problematic, if not disadvantageous for legal systems, it has been shown here that inherent in the concept of discretion is the potential to contribute to the proper implementation of EU directives and their legitimacy in national law.

\section*{16.6 Qualifying observations}

It seemed to me that due to the alleged downsides of discretion emphasised in academic debates, discretion’s advantages had somewhat faded into the background. While discretion has certainly not slipped from scholarly attention, this study sought to make a contribution to highlight the positive features inherent in its concept which may not yet have been fully recognised. In so doing, discretion’s potential for processes of law-making and implementation, with specific regard to the transposition of EU directives, was brought to light. Discretion, however, should not be considered merely in terms of a blessing or curse. This is why attention was paid in the dissertation to both the advantages and disadvantages of discretion. The effects of discretion on transposition, whether positive or negative, should not be overestimated. As noted above, national transposition is shaped by many factors and discretion unfolds its effects in interaction with a few of these. Having said this, it is finally considered useful to put some findings about discretion into perspective, especially regarding its role and implications in creating opportunities for stakeholder and citizen participation in transposition.

\begin{itemize}
  \item \textsuperscript{18} Mastenbroek elaborates on the link between deliberation, transposition and compliance. See Mastenbroek, 2007, pp. 81-86.
  \item \textsuperscript{19} Curtin, in fact, uses the term as defined by B. Kohler Koch and C. Quittkat (2009), ‘What is civil society and who represents civil society in the EU? Results of an online survey among civil society experts’, \textit{Policy and Society}, 28(1), pp. 11-22.
\end{itemize}
16.6.1 Discretion and deliberation

First, it is deemed justified to ask how processes of deliberation shaped by the use of discretion may be realised in transposition practice to enhance the democratic legitimacy of a process mainly shaped by administrative action. In order to make administrative rule-making more democratic, Hunold and Peters call for comprehensive public involvement to achieve authentic interest representation as well as continuous interaction between negotiating partners – administrative actors and public – in rule-making (Hunold and Peters, 2004: 140). From the knowledge obtained by analysing the Dutch transposition context, it becomes evident that involving other national actors outside ministries and parliaments is organised in the form of ‘deliberation light’ or, probably more appropriately put, ‘dialogue’, in which ministry civil servants and stakeholders exchange views about the draft transposition measure(s). The involvement of national stakeholders in the transposition of the Toy Safety Directive has exemplified this. From the viewpoint of practicality, the question is if it is possible to intensify communication between the transposing ministries and public along the lines proposed by Hunold and Peters. Given the time limits imposed by the transposition deadline and other possible constraints (e.g. human capacity), it is difficult to see how this can be feasible. Different, more beneficial framework conditions could possibly be created if other fora are established to involve citizens in legislative and administrative decision-making processes. This kind of citizen involvement has been noted to take place in the Netherlands (Bovens, 2005).20 Whether the transposition process could benefit from this development remains speculative. Besides the question of practicability, it should be born in mind that where transposition involves updating technical details or implies no substantial changes for the wider public, citizen involvement is far less relevant.

16.6.2 Discretion, deliberation and delay

In the Netherlands, the involvement of parliament in transposition has been discussed as a possible cause for delay, but was not found to be a decisive reason for it (Clement, 2007; Parliamentary Papers II 2007-2008, 31498, no. 1-2). The same argument, that delay may occur, can be made regarding more participation of actors outside the transposing ministries in transposi-

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20 With specific regard to decision-making in the Netherlands, Bovens makes concrete proposals on how to improve the involvement of citizens in legislative and administrative decision-making processes. Amongst others, he suggests establishing corrective referendums (‘corrective referenda’) and citizen juries (‘burgerjury’s’) that bring together all relevant actors: politicians, experts and citizens. Deliberation then, and as argued by Bovens, does not remain confined to obtaining technically sound results, but also includes those parts of the population affected by EU law. Taking into account principles of ‘representation’, ‘majority’ and ‘transparency’ (‘afspiegeling’-, meerderheids- en transparentiebeginsel’) adds to the democratic legitimacy of these fora. See Bovens, 2005, pp. 124-126.
tion processes. Delay at the transposition stage can increase deficient implementation at subsequent stages and therefore non-compliance with EU law (Mastenbroek, 2003: 391). Third party involvement (next to ministries and parliaments), on the other hand, could foreclose later problems, for example, that deficient transposition will be challenged in court – in line with the idea that greater interference of citizens in administrative rule-making results in enhanced accuracy and appropriateness of administrative action (Carolan, 2009: 131). Besides, whether belated transposition is slightly or strongly problematic or something in between, may hinge on the extent of delay. For instance and with regard to the transposition of transport directives by several Member States, discretion was found to ‘merely’ have contributed to short delays of a few months which make it certainly less difficult to catch up on implementation than longer delays (Kaeding, 2007a). Additionally, in case of short-term delays the European Commission may be less prompted to start an infringement proceeding. Short-term delay of the transposition of the Waste Framework Directive, for instance, did not have any such consequences. Finally, empirical findings of transposition analysis have led to the conclusion that delay in transposition does not automatically lead to problems at the practical application stage (Mastenbroek, 2007: 161; Carroll, 2014).

16.6.3 Discretion in different legal contexts

In the midst of all this, it should not be overlooked that discretion is no one-size-fits-all solution to deficits of transposition or vulnerable legitimacy of EU law. This would also contradict its own raison d’être which is to enable compromise according to the motto of unity in diversity through which discretion facilitates not only decision-making on directives, but also the incorporation of EU directives into different legal systems. As mentioned further above in the theoretical discussion on discretion: whether or not and how discretion is used in transposition differs among Member States due to their very distinct legal frameworks in which the use of discretion for administrative rule-making may be encouraged or discouraged, depending on the interpretation that is given to the concept of separation of powers.

The latter aspect finally links up with another important issue which concerns generalising the findings of this study. It was noted earlier that case study analysis comes with limitations in this regard. The empirical analysis of this study is based on a single-country design and therefore provides insights into one specific transposition context. As illustrated by the point just made about discretion, context specificity precludes the ability to apply the results of the present analysis to other national transposition contexts, shaped by their own legal-administrative idiosyncrasies. Yet this does

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21 Apart from that, the Commission is known to take action selectively anyway, depending on the saliency it ascribes to the issue at stake and the resources available for enforcement. See Steunenberg, 2010.
not make it less legitimate to highlight discretion’s potential – particularly since in this dissertation this potential is not only demonstrated with regard to national transposition but also regarding EU decision-making processes. In addition, and as shown here, limitations related to generalising case study findings do not reduce the importance that these findings have for assessing the outcomes of previous research.

16.7 Contributions

Regardless of the apparent trade-off between depth and breadth in studying discretion, this dissertation, having opted for the former (in-depth) approach, offers a number of relevant insights and ideas on the subject matters addressed: discretion in administrative rulemaking, EU decision-making and the national transposition of EU directives and legitimacy in the European Union. Hence, it contributes theoretically, methodologically and empirically to the corresponding academic debates and opens up new perspectives for future research.

16.7.1 Theoretical part

From a theoretical point of view, this study contributes to a better understanding of how discretion helps in making decisions at the EU level and the way discretion is used in the national transposition process. By looking into processes at both the EU and national level, it complements other studies that have focused on discretion’s effects on Member State transposition and post-transposition implementation (e.g. Kaeding, 2007; Mastenbroek, 2007; Versluis, 2007; Steunenberg and Toshkov, 2009; Carroll, 2014). The special feature of the dissertation is its multi-perspective approach to discretion by involving different strands of literature not only within one but across disciplines: law and political science which so far have had limited interaction. Literature on discretion in administrative and constitutional law as well as the socio-legal studies, legislative politics in the EU (and United States), implementation of EU directives and finally, legitimacy in the EU were shown to complement each other well in the study of discretion. Weaving together the various insights obtained has proved enriching for examining the place of discretion in modern legal systems. Light could thus be shed on different aspects of discretion, allowing for a more comprehensive understanding of the concept in the context of law-making and implementation. The legal science perspectives proved useful in addressing discretion in the light of the rule of law and separation of powers principles and to explain discretion’s potential effects and implications, negative as well as positive, for democratic legal systems. Insights from studies on legislative decision-making and research on EU law implementation in political science and public administration served, on the other hand, to identify and add other valuable pieces to the research puzzle of discretion in EU decision-making.
and national implementation: reasons for granting discretion as well as the circumstances under which it takes place were revealed, and it was shown how discretion affects the transposition of EU directives into national law. Taking into account relevant EU, national-level and directive characteristics, two sets of expectations were offered to describe and explain more systematically the role of discretion in EU decision-making and national transposition processes. In this connection it is worth mentioning that theoretically as well as later on empirically, discretion was analysed with regard to its link with three EU policy areas (consumer protection, environment and justice and home affairs/migration), yielding comparative insights into the role of discretion in different fields of EU law-making. This may add to the understanding of EU decision-making, integration dynamics and tensions, all of which are well illustrated by the use of directives to harmonise legal differences in the context of a unity in diversity.

Last but not least, the dissertation has sought to reduce the identified research gap regarding the link between discretion and legitimacy in the context of national transposition. By pointing out the potentials of discretion, it made a contribution to the discussion on proper ways of democratic decision-making to enhance the legitimacy of EU law (Voermans, 2001; Interinstitutional agreement 2003; Stie, 2013).

16.7.2 Methodological part

Expanding and developing the knowledge of discretion entailed that the concept of discretion granted by EU directives (defined in the dissertation as legislative discretion) was elaborated on further. By means of literature review, and classification and interpretation of the content of directives in particular, various manifestations of discretion were introduced and explained. An interdisciplinary effort was made to offer a fine-grained, small-scale analysis of discretion in directives. For this purpose, the theory of legal norms and the social science research method of content analysis were combined, leading to a codebook being developed to assess the scope of discretion granted by individual directives. The aim pursued was not to provide exact measurements, but to indicate a tendency of discretion primarily for the purpose of case selection. All in all, this boiled down to a more refined approach to measuring discretion than previously applied (Kaeding, 2007, Thomson, 2007; 2010; Thomson et al., 2007, Steunenberg and Toshkov, 2009). Due attention was paid to the complex structure that directives can have in order to better capture discretion. Hence, the merit of the codebook (and coding scheme) presented in detail in the Appendix to the dissertation is that it presents a way to identify and describe discretion in more detail, also regarding its implications for national law since legal concepts are used.

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22 By focusing on discretion in a directive’s provision instead of directive article; provision being defined not, as usually done, ‘sub-division of an article’ but, instead, as a phrase, and therefore smaller unit.
as indicators of discretion. It should, however, be underlined that measuring discretion as proposed in the dissertation represents an initial, preliminary effort. Hence, the codebook offered here is not considered to be a fully-fledged instrument of measurement. Rather, it is thought of as an attempt to assess discretion which does not pretend to be without flaws. At the same time, this implies the opportunity for future improvement.

16.7.3 Empirical part

Regarding the empirical contributions, the case study findings of the dissertation resonate well with other studies in the sense that they offer confirmation of discretion’s mixed record with respect to its effects on national transposition. Next to the fact that the empirical results bear out both negative and positive effects of discretion, it is worth mentioning that the empirical results were used to explain the core idea of the concept of legislative discretion within the context of EU law-making and national legal implementation. The contribution made in this regard consists of showing that discretion facilitates or at least supports the incorporation of directive requirements by ironing out differences between EU and national law. It was also shown that due to discretion, Member States are able to incorporate requirements of EU law into their national legal orders by leaving these intact to the greatest extent possible evidencing the EU legislature’s ‘ingrained respect’ for Member States’ legal identities. The empirical results pointing to discretion’s facilitating role substantiated the core idea of the concept of legislative discretion within the context of EU law-making and national legal implementation. The contribution made in this regard consists of showing that discretion facilitates or at least supports the incorporation of directive requirements by ironing out differences between EU and national law.

Furthermore confirmed was the view that discretion does not affect transposition individually but by interacting with other factors thereby contributing to both the deficient and proper legal implementation of EU directives (Thomson, 2007; Thomson et al., 2007; Zhelazykova and Torrenvliet, 2011). This relates to factors that have earlier been linked up with discretion and were conceptualised in the dissertation as ‘administrative capacity’ and ‘compatibility’ (Mastenbroek, 2007; Kaeding, 2007; Steunenberg and Toshkov, 2009). Empirically it was shown that by interacting with these factors, discretion strengthens the latter’s effects on transposition. Discretion was also identified as an interacting factor at post-transposition implementation stages which underlines the relevance of discretion beyond transposition (Carroll, 2014). In contrast to the present study, Carroll uses a different, dynamic concept of misfit with the notion of adaptation pres-
sure as one of its core elements. Despite these differences, it is nevertheless interesting to note that he also addresses the link between misfit and discretion in the implementation of EU law. Carroll claims that discretion has a positive effect on implementation in the presence of high adaptation pressure implying higher misfit (or low fit): accordingly, he assumes that discretion decreases the likelihood of implementation difficulty in the presence of high adaptation pressure which was confirmed by the results of his quantitative analysis (Carroll, 2014: 222). In the present study it is also argued that discretion can positively affect transposition by increasing the positive effect of medium or high compatibility between EU and national rules. In the presence of low compatibility, however, and as evidenced by the case of the Return Directive, discretion was found to have contributed to deficient transposition. While the intention here is not to compare the two studies due to the obvious differences in terms of research design, research context and conceptualisation of the misfit factor, it is nevertheless interesting to note that the link between discretion and misfit between EU and national law also comes into play at later implementation stages, and that it might be possible that discretion takes different roles at each of these stages. In any case, it is apparently worth elaborating further on the relationship between the two factors at all stages of implementation. This would allow for an even more comprehensive picture of discretion in the overall implementation process of EU directives.

16.8 Outlook

A research endeavour such as the latter would certainly benefit from the analysis of a larger number of cases for a more consistent picture of the role and effects of discretion. At the same time, looking into uses of discretion at the various implementation stages requires an in-depth approach to the cases analysed. For future research on discretion, it would therefore be useful to combine quantitative and qualitative approaches into a ‘mixed method design’ which has already been applied in the study of national implementation (e.g. Mastenbroek, 2007, Kaeding, 2007; Carroll, 2014) to achieve a good compromise between depth and breadth in the study of discretion within the context of the implementation of EU directives. To this end, researchers with relevant expertise could be involved in an interdisciplinary research project on discretion on a wider scale.

23 In contrast to the one used in the dissertation, derived from Steunenberg and Toshkov (2009), Carroll complements his misfit model with considerations about adaptation pressure. In doing so, he shows how different sorts of requirements implied by EU directives or regulations create different degrees of adaptation pressure over time. See Carroll, 2014, pp. 48-53.
Earlier research has called for paying more attention to the exercise of discretion in the legal implementation of EU law (Carroll, 2014: 228) in order to more fully understand how discretion affects this process. The present dissertation took up this challenge with regard to uses of discretion in national transposition. At the same time, it has proved itself to be in the good company of other studies which, while identifying and addressing key questions in their research puzzles, have discovered further issues of central importance along the way which can, at best be highlighted as potential avenues for future research.

Two such potential avenues have already been raised: further elaboration of the codebook as an instrument for assessing the degree of legislative discretion granted by individual EU directives. In this regard, future approaches to assess or measure discretion could consider how to integrate interpretations based on EU primary legislation and case law into the analysis of discretionary provisions and concepts used in directives. Since this adds to the complexity of an already complex matter – directives frequently lack consistency in terms of structure – this must be done with a view to the practical applicability of the measurement instrument that would emerge as a result. This presents a challenging endeavour for which this dissertation hopes to have given relevant input and impetus.

The second potential research area links up to what was noted when discussing the dissertation’s empirical contributions: to elaborate on the role of discretion in the national implementation of EU directives by systematically analysing how it is used and with what effects at all implementation stages including, besides transposition, the practical application and enforcement of directives. For instance, and to make it more concrete, it was briefly discussed above whether or not delayed transposition, possibly caused by discretion, amongst other factors, negatively affects subsequent implementation stages. Post-transposition implementation analysis has provided empirical evidence showing that such effects did not occur (Carroll, 2014: 223-224). Against this background, it seems particularly interesting to look into how the different stages relate to each other with specific regard to the role of discretion, uses of it by implementing actors and resulting effects on implementation.

Finally, to further broaden the knowledge on discretion in transposition contexts, future research should study discretion using a cross-country comparative design. It could thereby benefit from comparative research that already exists on transposition approaches and legal contexts in various Member States as well as studies on EU decision-making and transposition in different policy areas (e.g. Steunenberg and Voerman, 2006; Müller et al., 2010; Haverland et al., 2011). Even if implementation is carried out at the national level, this dissertation has demonstrated that the interrelatedness of processes at the EU and national level in making and implementing EU law matters when it comes to drawing a more complete picture of the role of discretion in a directive’s life cycle. The various ideas, insights and additional questions raised in this study indicate pathways for future research.
They show in any case that there is no shortage of new challenges when it comes to the study of discretion. This makes continuing research on discretion worthwhile.