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**Author:** Hartmann, J.M.
**Title:** A blessing in disguise?! Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives
**Issue Date:** 2016-09-27
### Annex 1:
List of directives subjected to content analysis

<table>
<thead>
<tr>
<th>Directive*</th>
<th>Policy content**</th>
<th>Subject matter***</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 Ambient Air Quality Directive (2008/50/EC)</td>
<td>Environment, consumers and health protection / Pollution and nuisances / Monitoring of atmospheric pollution</td>
<td>Environment</td>
</tr>
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</table>

* In italics: directives and policy areas analysed in the case studies  
** Indicated by the directory code in the legal database EUR-Lex  
*** Indicated in EUR-Lex
Annex 2:
List of interview partners

Maykel Bouma – Migration Policy Department, Ministry of Security and Justice
Edwin Brijder – Legislation and Legal Affairs Department, Ministry of Security and Justice

Jeroen Raukema – Legislation and Legal Affairs Department, Ministry of Security and Justice
Jan Verboom – Migration Policy Department, Ministry of Security and Justice

Annemarieke Grinwis – Directorate-General for Spatial Development and Water Affairs, Ministry of Infrastructure and the Environment
Hans Spiegeler – Directorate-General for the Environment & International Affairs Department, Ministry of Infrastructure and the Environment
Maarten van het Bolscher – Directorate-General for the Environment & International Affairs, Ministry of Infrastructure and the Environment

Michel Janssens – Climate, Air and Noise Department, Ministry of Infrastructure and the Environment

Rob Duba – Safety and Risks Department, Ministry of Infrastructure and the Environment
Maik Schmahl – Directorate-General Enterprise, European Commission

Bert Jan Clement – Legislation and Legal Affairs Department Ministry of Health, Welfare and Sports
Melanie van Vugt – Nutrition, Health Protection and Prevention Department, Ministry of Health, Welfare and Sports

Discretion in European directives
Ludwig Krämer – Head of Unit on Environmental Governance, European Commission (2001-2004); Professor of European and German environmental law, University of Bremen
Josien Stoop – Legislative lawyer and senior advisor on EU law, Directorate for Administrative and Legal Affairs, Ministry of Infrastructure and the Environment
Tineke Strik – Assistant Professor Migration Law, Centre for Migration Law, Radboud University Nijmegen; Member European Affairs Committee, Dutch Senate
Patrick van den Berghe – Jurisconsult / Legal Counsel to the Minister on European Law, Ministry of Economic Affairs
Thomas van Rijn – Director Business Law, Legal Service, European Commission
Jonathan Verschuuren – Professor of European and International Public Law, Tilburg Law School
1. Introduction

The codebook was drawn up for the purpose of analysing European directives, and in particular for assessing their individual margins of discretion. The objectives and structure of the codebook are outlined in a first step. This is followed, in a second step, by a presentation of the coding scheme: main categories, sub-categories, indicators and examples, all of which are used to identify and describe discretion in directives.

1.2 Objectives

The codebook, first of all, has a pragmatic aim. Discretion margins are one of the criteria determining the selection of directives for the case studies of negotiation and transposition processes. Since directives do not come with a fact sheet listing their properties, including the margin of discretion they grant to Member States, they have to be further analysed to find out more about the discretionary leeway they offer for implementation. The codebook, however, is not applied to achieve exact measurement results. Rather its objective is to make it possible to indicate a tendency regarding the directive’s scope of discretion: does the directive which is analysed confer rather more or less discretion upon Member States? Furthermore, the detailed approach to discretion pursues aims which are considered important for the study of discretion in the present context. It is used to show – without claiming to be exhaustive – how diverse the forms are that discretion takes in directives and which specify the ‘range of options or alternatives’ Member States have in implementing them. The codebook therefore serves to provide for a better understanding of legislative discretion. At the same time, by capturing the various discretion manifestations, the aim is to illustrate the EU’s normative treaty commitment to respect deeply entrenched rules and practices in its Member States – a point which was highlighted as one of the motives underlying the use of discretion, and which sheds additional light on the conducive role that discretion can play in the (legal) implementation of directives. All in all, this codebook should be understood as a preliminary attempt to describe discretion in directives more comprehensively and as an instrument to indicate a tendency towards larger or smaller margins of discretion of directives.
1.3 Structure

The codebook lays down the coding rules in a so-called coding scheme also referred to as ‘coding frame’. Formal aspects are addressed first, including the definition of a directive provision which takes different forms hinging on the structure of the given (sub-)article. The second part introduces the types of provisions, standard and relevant provisions, as well as the main categories of permissive and obligatory language. The main categories are reflected in directives by discretionary and non-discretionary provisions, in other words, sub-categories which are further divided into several permission and obligation types. These sub-categories are usually indicated by may- and shall-clauses. All of these elements constitute the coding scheme. To keep explanations of definitions in a concise and accessible form, they are preceded by ‘information texts’ which provide brief descriptions of the key terms repeatedly used in defining discretion manifestations. To further facilitate the understanding of definitions, examples are derived from the directives examined in preparing the coding scheme. On the basis of this exploratory study, it was, however, not possible to offer examples for all definitions.

II. Formal aspects

The definitions provided throughout the codebook take a directive sub-article (or sub-division) as a point of departure. Sub-article is another word for directive provision (see Joint Practical Guide, 2013: 35). A sub-article coincides with a provision in the following example: ‘Member States may adopt a separate administrative or judicial decision or act ordering the removal.’

Taking a closer look at the syntax of a sub-article, however, shows that they can be more complex and comprise more than one provision:

Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. || They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

To clearly indicate the ending of one provision, and the beginning of the next, a symbol of two vertical bars (||) is used. With a view to the coding of directives it is important to properly define provision(s) within a sub-article. It guarantees that all provisions, and therefore also all permissions or obligations within a sub-article are captured. Each provision is described by one code identifying the discretion instance it contains – in line with the ‘one-to-one’ rule (the aforementioned criterion of strict differentiation). In other words, the code indicates whether the provision is discretionary (permis-

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1 Cf. Article 8(3) of the EU's Return Directive.
2 Cf. Article 8(4).
sion) or non-discretionary (obligation). Another code is ascribed, identifying the addressee of the provision.

As just noted, directive provisions have different structures. This is not necessarily due to their content but may result from the arbitrary nature of the structure and wording of directives. To make it more concrete, the following examples show that obligations for Member States are laid down in one paragraph whereas, in another case, they are enumerated in sub-points:

Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement.3

But

Manufacturers of pyrotechnic articles shall:

(a) submit the pyrotechnic article to a notified body as referred to in Article 10 which shall perform a conformity assessment in accordance with Article 9; and

(b) affix a CE marking to, and label the pyrotechnic article in accordance with Article 11, and Article 12 or 13.4

### Information text

<table>
<thead>
<tr>
<th>Coding Unit:</th>
<th>sentences and clauses.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Verb group:</td>
<td>auxiliary (usually may or shall) + main verb, e.g. ‘shall ensure’ (the mode of conduct of a legal norm).</td>
</tr>
<tr>
<td>Main clause:</td>
<td>a group of words that contains a verb and makes sense on its own.</td>
</tr>
<tr>
<td>Simple sentence:</td>
<td>If a sentence contains a subject, clause (including main verb) it is considered as a ‘simple sentence’.</td>
</tr>
<tr>
<td>Complex sentence:</td>
<td>If a sentence is composed of several parts and contains next to a main clause a subordinate clause which depends on the main clause for its meaning, it is considered as a ‘complex sentence’.</td>
</tr>
<tr>
<td>Subordinate clause:</td>
<td>is only meaningful in combination with a main clause.</td>
</tr>
<tr>
<td>Compound sentence:</td>
<td>If a sentence is composed of two main clauses which are linked by a conjunction such as ‘and’, ‘but’, or ‘so’, it is considered as a ‘compound sentence’.</td>
</tr>
</tbody>
</table>

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3 See Article 11(4) of the Return Directive.
4 See Article 4(4) of the Pyrotechnic Articles Directives.
A. Simple sentences

The following applies:

1. If a directive article is a sub-article which is composed of a simple sentence it is considered as one single provision.

   Member States shall ensure that the national framework in place requires arrangements for education and training to be made by all parties for their staff having responsibilities relating to the nuclear safety of nuclear installations in order to maintain and to further develop expertise and skills in nuclear safety.
   Article 6(2) of Directive 2009/71/EURATOM

2. If a sub-article is composed of more than one sentence, each simple sentence is considered as one single provision.

   Member States shall ensure that information in relation to the regulation of nuclear safety is made available to the workers and the general public. This obligation includes ensuring that the competent regulatory authority informs the public in the fields of its competence. Information shall be made available to the public in accordance with national legislation and international obligations, provided that this does not jeopardise other interests such as, inter alia, security, recognised in national legislation or international obligations.
   Article 8 of Directive 2009/71/EURATOM

3. If a sub-article is composed of a simple sentence and simple sentences which are enumerated in sub-points, the simple sentence and each enumeration are considered as provisions in their own right.

   For the purposes of this paragraph, the following provisions shall apply:

   (a) for the calculation of the denominator, that is the total amount of energy consumed in transport for the purposes of the first subparagraph, only petrol, diesel, biofuels consumed in road and rail transport, and electricity shall be taken into account;

   (b) for the calculation of the numerator, that is the amount of energy from renewable sources consumed in transport for the purposes of the first subparagraph, all types of energy from renewable sources consumed in all forms of transport shall be taken into account;

   (c) for the calculation of the contribution from electricity produced from renewable sources and consumed in all types of electric vehicles for the purpose of points (a) and (b), Member States may choose to use either the average share of electricity from renewable energy sources in the Community or the share of electricity from renewable energy sources in their own country as measured two years before the year in question.
   Article 3(4) of Directive 2009/28/EC

Note that all provisions contain a main clause. The last main clause, however, contains a different verb group.
4. If a sub-article is composed of a simple sentence and enumerated nouns, the simple sentence and each enumerated noun are considered together as provisions in their own right.

1. Pyrotechnic articles shall not be sold or otherwise made available to consumers below the following age limits:

   (a) **Fireworks**
   - Category 1: 12 years.
   - Category 2: 16 years.
   - Category 3: 18 years.

   (b) **Other pyrotechnic articles and theatrical pyrotechnic articles**
   - Category T1 and P1: 18 years
   
   Article 7 of Directive 2007/23/EC

   Note that enumerations (a) and (b), on their own, cannot be considered as a provision. Only together with the preceding main clause including the legal norm, they constitute a provision in its own right.

5. If a sub-article is composed of a complete simple sentence and followed by enumerated nouns which are completed by enumerations listed in sub-points, both the enumerated nouns and sub-points are considered, together with the main clause of the complete sentence, as one single provision.

Member States sharing a marine region or subregion shall cooperate to ensure that, within each marine region or subregion, the measures required to achieve the objectives of this Directive, in particular the different elements of the marine strategies referred to in points (a) and (b), are coherent and coordinated across the marine region or subregion concerned, in accordance with the following plan of action for which Member States concerned endeavour to follow a common approach:

(a) preparation:
   (i) an initial assessment, to be completed by 15 July 2012 of the current environmental status of the waters concerned and the environmental impact of human activities thereon, in accordance with Article 8;
   (ii) a determination, to be established by 15 July 2012 of good environmental status for the waters concerned, in accordance with Article 9(1);
   (iii) establishment, by 15 July 2012, of a series of environmental targets and associated indicators, in accordance with Article 10(1);
   (iv) establishment and implementation, by 15 July 2014 except where otherwise specified in the relevant Community legislation, of a monitoring programme for ongoing assessment and regular updating of targets, in accordance with Article 11(1);
(b) programme of measures:

(i) development, by 2015 at the latest, of a programme of measures designed to achieve or maintain good environmental status, in accordance with Article 13(1), (2) and (3);

(ii) entry into operation of the programme provided for in point (i), by 2016 at the latest, in accordance with Article 13(10).

Article 5(2) of Directive 2008/56/EC

Note that, as mentioned in the previous example, the enumerations (a) and (b) can only be regarded as provisions in their own right when they are considered as supplementing part of the preceding simple sentence.

6. If a sub-article is composed of one incomplete simple sentence which is completed by more than one enumeration, each match of incomplete simple sentence and enumeration is considered as one single provision. If an enumeration includes another simple sentence, this simple sentence is considered as another provision in its own right.

The national framework shall establish responsibilities for:

(a) the adoption of national nuclear safety requirements. || The determination on how they are adopted and through which instrument they are applied rests with the competence of the Member States; ||

(b) the provision of a system of licensing and prohibition of operation of nuclear installations without a license; ||

(c) the provision of a system of nuclear safety supervision; ||

(d) enforcement actions, including suspension of operation and modification or revocation of a license.

Article 4(1) of Directive 2009/71/EURATOM

7. If a sub-article is composed of an incomplete sentence and followed by simple sentences which are enumerated in sub-points, it is considered as comprising two provisions in their own right.

Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities:

(a) Member States shall ensure that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of electricity produced from renewable energy sources; ||

(b) Member States shall also provide for either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources.

Article 16(2) of Directive 2009/28/EC

Note that the incomplete sentence and first enumeration are considered together as one single provision, followed by another single provision (main clause).
B. Complex sentences

The following applies:

8. If a sub-article is composed of a complex sentence it is considered as one single provision.

Where the market surveillance authorities of one Member State have taken action pursuant to Article 20 of Regulation (EC) No 765/2008, or where they have sufficient reason to believe that a toy covered by this Directive presents a risk to the health or safety of persons, they shall carry out an evaluation in relation to the toy concerned covering all the requirements laid down in this Directive.

Article 42 of Directive 2009/48/EC

9. If a sub-article is composed of a complex sentence which contains verb groups with different auxiliaries, it is considered as one single provision.

Where, in the course of that evaluation, the market surveillance authorities find that the toy does not comply with the requirements laid down in this Directive, they shall without delay require the relevant economic operator to take appropriate corrective action to bring the toy into compliance with those requirements, to withdraw the toy from the market, or to recall it within a reasonable period, commensurate with the nature of the risk, as they may prescribe.

Article 42(1) of Directive 2009/48/EC

10. If a sub-article is composed of a complex sentence and the subordinated clauses are enumerated as exceptions, it is considered as one single provision.

Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Article 7(1) of Directive 2008/52/EC

C. Compound sentences

The following applies:

11. If a sub-article is composed of a compound sentence, it is considered as comprising two provisions.
Appendices

Member States shall lay down rules on penalties for economic operators, which may include criminal sanctions for serious infringements, applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. Article 51 of Directive 2009/48/EC.

12. If a sub-article is composed of a compound sentence and the main clauses are enumerated, it is considered as comprising two provisions.

Manufacturers of pyrotechnic articles shall:

(a) submit the pyrotechnic article to a notified body as referred to in Article 10 which shall perform a conformity assessment in accordance with Article 9; and

(b) affix a CE marking to, and label the pyrotechnic article in accordance with Article 11, and Article 12 or 13.


Note that the preceding shall-clause is also part of the second provision and that both provisions contain a different verb group (‘shall submit’, ‘shall affix’).

III. Content-related aspects

This part introduces the types of provisions that are distinguished in the analysis and coding of directives. First, a distinction is made between standard provisions and relevant provisions. Standard provisions are provisions that, as a rule, are part of every directive: these are the initial and final provisions but also provisions concerning standard procedures (e.g. comitology procedures) or relating to the applicability of specific directive requirements. The other group of provisions are those which are relevant to Member States, grant or reduce their discretion and are therefore considered when discretion is measured. They are further divided into sub-categories that describe the permissive and obligatory language categories, and hence those provisions granting discretion by larger or smaller degrees (discretionary and non-discretionary provisions). Additionally, a third category is established for those provisions that cannot be assigned to either of the two main categories but represent a combination of both and are therefore classified as ‘hybrid provisions’. The various sub-categories of both permissive and obligatory language categories, i.e. the different discretion manifestations, are illustrated and, where applicable, the legal concepts they pertain to are identified. Regarding the degree of detail, the sub-categories capture up to three different aspects which are considered to make part of a discretion manifestation: First, permissions and obligations are coded without further conditions being attached to them (e.g. ‘Member States may or shall do something’) and are therefore referred to as simple permissions and ‘simple obligations’. Permissions and obligations can, however, be subjected to further conditions. In this case they are coded as permissions or obligations that apply under certain conditions (e.g. ‘Member States may
or shall do something if...'). Finally, a third aspect that a discretion manifestation can include is taken into account. It is referred to as ‘reference to the national legal order’. It indicates that a directive requirement takes as a reference point Member States’ legal situation:

If the EU Blue Card issued by the first Member State expires during the procedure, Member States may issue, if required by national law, national temporary residence permits, or equivalent authorisations, allowing the applicant to continue to stay legally on its territory until a decision on the application has been taken by the competent authorities.

*Article 18(5) of the EU’s Blue Card Directive*

<table>
<thead>
<tr>
<th>Information text</th>
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</thead>
<tbody>
<tr>
<td>Addressees of a provision are immediate addressees:</td>
</tr>
<tr>
<td>a) Member States or national authority acting on their behalf</td>
</tr>
<tr>
<td>b) European Commission, Council of Ministers (CoM) or European Parliament (EP)</td>
</tr>
<tr>
<td>c) Member States and European Commission</td>
</tr>
<tr>
<td>d) European Commission and / or EU-level institutions other than CoM or EP (e.g. European Central Bank, European Standards Organisations like CEN, CENELEC etc.)</td>
</tr>
<tr>
<td>Addressees of a provision are intermediate addressees (not liable for infringements of directives):</td>
</tr>
<tr>
<td>e) third parties (e.g. economic operators, third-country nationals)</td>
</tr>
<tr>
<td>Discretionary discretion manifestation (permission): indicated by variants of may-clauses, or other expressions, in a few cases shall-clauses.</td>
</tr>
<tr>
<td>Non-discretionary discretion manifestation (obligation): indicated by variants of shall-clauses, or other expressions.</td>
</tr>
<tr>
<td>Hybrid discretion manifestation (combination of permission and obligation): indicated by may-clause and shall-clause.</td>
</tr>
</tbody>
</table>

I. **Standard provision**

The following applies:

13. If a sub-article contains an addressee and makes part of the initial or final provisions including rules that are part of every directive it is considered as a standard provision.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 July 2010 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

*Article 26(1) of Directive 2008/56/EC*
14. If a sub-article concerns standard procedures (e.g. comitology procedures) or the applicability of specific parts of the directive, it is also considered as a standard provision.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.
Article 29(2) of Directive 2008/50/EC

This paragraph is applicable from 19 December 2011.
Article 15(6) of Directive 2009/50/EC

Note that the first example is a provision that relates to rules on the committee procedure which involves the European Commission as well as the Member States. Therefore this provision is coded as a standard provision addressing both. The second provision is understood as being addressed to Member States.

II. Relevant provision

The following applies:

15. If a sub-article contains an addressee and an indicator of a discretionary, non-discretionary or hybrid discretion manifestation, it is considered as a relevant provision.

a) Member States may decide not to apply this Directive to third-country nationals (...).
Article 2(2) of Directive 2008/115/EC

The EU Blue Card shall be issued by the competent authorities of the Member State.
Article 7(3) of Directive 2009/50/EC

b) The Commission shall publish in the Official Journal of the European Union the references of such harmonised standards.
Article 8(2) of Directive 2007/23/EC

c) Where a Member State or the Commission considers that the harmonised standards referred to in paragraph 2 of this Article do not fully satisfy the essential safety requirements set out in Annex I, the Commission or the Member State concerned shall refer the matter to the Standing Committee set up by Directive 98/34/EC, giving its reasons.
Article 8(4) of Directive 2007/23/EC

d) Where the national measure is considered to be justified and the non-compliance of the toy is attributed to shortcomings in the harmonised standards referred to in Article 42(5)(b), the Commission [...] shall bring the matter before the Committee set up by Article 5 of Directive 98/34/EC. That Committee shall consult the relevant European standardisation body or bodies and deliver its opinion without delay.
Article 43(3) of Directive 2009/48/EC

e) Manufacturers shall ensure that pyrotechnic articles placed on the market comply with the essential safety requirements set out in Annex I.
Article 4(1) of Directive 2007/23/EC
Note that sometimes the addressee is not mentioned in a provision. In such a case the addressee can usually be derived from the context of the whole article.

<table>
<thead>
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<tbody>
<tr>
<td>Certain conditions:</td>
<td>Conditions under which a permission or obligation applies, indicated by grammatical structures, e.g. ‘where’, ‘if’, ‘only’, ‘unless’, ‘may only’, ‘may only… provided that’.</td>
</tr>
<tr>
<td>Conditions referring to the national legal order:</td>
<td>Certain conditions under which a permission or obligation applies, including a so-called ‘reference to the national legal order’.</td>
</tr>
<tr>
<td>Reference to the national legal order:</td>
<td>mentioned in a discretionary or non-discretionary provision together as part of the permission or obligation and indicated by expressions like e.g. ‘in conformity with national law’, ‘in accordance with national law’, ‘if required by national law’, and ‘defined by national law’.</td>
</tr>
</tbody>
</table>

II.1  Discretionary provision (permission)

The following applies:

16. If a relevant provision contains an indicator of a discretionary discretion manifestation, it is considered as a discretionary provision (permission).

Member States may increase the age limits under paragraph 1 where justified on grounds of public order, security or safety. Member States may also lower the age limits for persons vocationally trained or undergoing such training.

Article 7(2) of Directive 2007/23/EC

II.1.1  Sub-categories

PERMISSION TO DO SOMETHING (SIMPLE PERMISSION)

17. If a discretionary provision allows Member States to do something, it is considered as permission to do something (simple permission).

Member States may require the applicant to provide his address in the territory of the Member State concerned.

Article 5(2) of Directive 2009/50/EC

The determination on how they are adopted and through which instrument they are applied rests with the competence of the Member States.

Article 4(1) of Directive 2009/71/EURATOM
PERMISSION TO DO SOMETHING WITH REFERENCE TO THE NATIONAL LEGAL ORDER

18. If a discretionary provision allows Member States to do something and contains a reference to the national legal order it is considered as permission to do something with reference to the national legal order.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

Article 12(1) of Directive 2009/50/EC

PERMISSION UNDER CERTAIN CONDITIONS

19. If a discretionary provision allows Member States to do something and contains certain conditions under which the permission applies, it is considered as permission to do something under certain conditions.

The body concerned may perform the activities of a notified body only where no objections are raised by the Commission or the other Member States within two weeks of a notification where an accreditation certificate is used or within two months of a notification where accreditation is not used.

Article 31(5) of Directive 2009/48/EC

PERMISSION UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

20. If a discretionary provision allows Member States to do something and contains certain conditions under which the permission applies and a reference to the national legal order, it is considered as permission to do something under certain conditions referring to the national legal order.

Member States may retain restrictions on access to employment, provided such employment activities entail occasional involvement in the exercise of public authority and the responsibility for safeguarding the general interest of the State and, in accordance with existing national or Community law, these activities are reserved to nationals.

Article 12(3) of Directive 2009/50/EC

PERMISSION TO GO BEYOND WHAT IS PRESCRIBED

21. If a discretionary provision allows Member States to take more far-reaching measures than established by the directive, it is considered as permission to go beyond what is prescribed.

Member States may introduce stricter protective measures than those provided for under the Directive.

Article 14 of Directive 2009/147/EC

Note that this discretionary provision gives expression to the legal concept of minimum harmonisation which implies a higher discretion margin for Member States for the purpose of implementation. It is usually expressed by the sentence (or variant of it): ‘Member States may introduce (or take) stricter (or more favourable) measures.’
PERMISSION TO GO BEYOND WHAT IS PRESCRIBED WITH REFERENCE TO THE NATIONAL LEGAL ORDER

22. If a discretionary provision allows Member States to take more far-reaching measures than established by the directive and contains a reference to the national legal order, it is considered as permission to go beyond what is prescribed with reference to the national legal order.

Note that, as pointed out earlier, not all definitions are illustrated by an example.

PERMISSION TO GO BEYOND WHAT IS PRESCRIBED UNDER CERTAIN CONDITIONS

23. If a discretionary provision allows Member States to take more far-reaching measures than established by the directive and contains certain conditions under which the permission applies, it is considered as permission to go beyond what is prescribed under certain conditions.

This Directive shall be without prejudice to the right of Member States to adopt or maintain provisions that are more favourable to third-country nationals to whom it applies in relation with Articles 6 and 13, provided that such provisions are compatible with this Directive.

Article 15 of Directive 2009/52/EC

PERMISSION TO GO BEYOND WHAT IS PRESCRIBED UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

24. If a discretionary provision allows Member States to take more far-reaching measures than established by the directive as well as a reference to the national legal order, it is considered as permission to go beyond what is prescribed under certain conditions referring to the national legal order.

PERMISSION TO CHOOSE BETWEEN RULES

25. If a discretionary provision allows Member States to choose between application and non-application of directive standards, criteria or other options, it is considered as permission to choose between rules.

The Member State may require the person concerned to report his / her presence within its territory within a reasonable and non-discriminatory period of time.

Article 5(5) of Directive 2004/38/EC

End-of-waste specific criteria should be considered, among others, at least for aggregates, paper, glass, metal, tyres and textiles.

Article 6(2) of Directive 2008/98/EC

The permission to choose between rules can be expressed by a shall-clause:

The requirements of paragraphs 1 and 2 shall be fulfilled in accordance with the following options:
(a) by setting technical specifications for energy and environmental performance in the documentation for the purchase of road transport vehicles on each of the impacts considered, as well as any additional environmental impacts; or

(b) by including energy and environmental impacts in the purchasing decision, whereby:

- in cases where a procurement procedure is applied, this shall be done by using these impacts as award criteria, and
- in cases where these impacts are monetised for inclusion in the purchasing decision, the methodology set out in Article 6 shall be used.

Article 5(3) of Directive 2009/33/EC

Note that the first example gives expression to the legal concept of optional harmonisation. The Member States can decide whether or not they would like to implement certain rules which are established by the directive. Moreover, optimal harmonisation can also refer to the fact that Member States or economic operators may choose between the application of national standards or harmonised EU standards. Optional harmonisation implies that discretion is granted by larger degrees to Member States or producers of goods. They can decide whether or not they apply EU rules.

PERMISSION TO CHOOSE BETWEEN RULES WITH REFERENCE TO THE NATIONAL LEGAL ORDER

26. If a discretionary provision allows Member States to choose between application and non-application of directive standards or criteria, or among options more generally, and refers to the national legal order, it is considered as permission to choose between rules referring to the national legal order.

PERMISSION TO CHOOSE BETWEEN RULES UNDER CERTAIN CONDITIONS

27. If a discretionary provision allows Member States to choose between application and non-application of directive standards or criteria, or among options more generally, and contains certain conditions under which the permission applies, it is considered as permission to choose between rules under certain conditions.

Member States may decide not to undertake the preliminary flood risk assessment referred to in Article 4 for those river basins, sub-basins or coastal areas where they have either:

(a) already undertaken a risk assessment to conclude, before 22 December 2010, that a potential significant flood risk exists or might be considered likely to occur leading to the identification of the area among those referred to in Article 5(1)

or

(b) decided, before 22 December 2010, to prepare flood hazard maps and flood risk maps and to establish flood risk management plans in accordance with the relevant provisions of this Directive.

Article 13(1) of Directive 2007/60/EC
PERMISSION TO CHOOSE BETWEEN RULES UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

28. If a discretionary provision allows Member States to choose between application and non-application of directive standards or criteria, or among options more generally, contains certain conditions under which the permission applies and a reference to the national legal order, it is considered as permission to choose between rules under certain conditions referring to the national legal order.

Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or
(b) delays in obtaining the necessary documentation from third countries.

Article 15(6) of Directive 2008/115/EC

PERMISSION TO DEVIATE FROM EU RULES

29. If a discretionary provision allows Member States to do something different from a directive requirement, it is considered as permission to deviate from EU rules.

Until 15 March 2009, each Member State may postpone application of this Directive to the retention of communications data relating to Internet Access, Internet telephony and Internet e-mail.

Article 15(3) of Directive 2006/24/EC

Member States may exempt from the requirement laid down in Article 23(1) establishments or undertakings for the following operations:

(a) disposal of their own non-hazardous waste at the place of production; or
(b) recovery of waste.


Note that deviation from EU rules is linked to the legal concepts of derogation and exemption which release Member States from the obligation to apply specific directive requirements or, if justified, exempt them from the application of larger parts or the directive as a whole.

PERMISSION TO DEVIATE FROM EU RULES WITH REFERENCE TO THE NATIONAL LEGAL ORDER

30. If a discretionary provision allows Member States to do something different from a directive requirement and refers to the national legal order, it is considered as permission to deviate from EU rules with reference to the national legal order.
PERMISSION TO DEVIATE FROM EU RULES UNDER CERTAIN CONDITIONS

31. If a discretionary provision allows Member States to do something different from a directive requirement and applies under certain conditions, it is considered as permission to deviate under certain conditions.

Member States may decide not to apply paragraph 1 where the employers are natural persons and the employment is for their private purposes.
Article 4(2) of Directive 2009/52/EC

PERMISSION TO DEVIATE FROM EU RULES UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

32. If a discretionary provision allows Member States to do something different from a directive requirement, applies under certain conditions and refers to the national legal order, it is considered as permission to deviate under certain conditions referring to the national legal order.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defense, public security and for the prevention, investigation, detection and prosecution of criminal offences.
Article 12(1) of Directive 2008/115/EC

PERMISSION TO DELEGATE

33. If a discretionary provision allows Member States to assign implementing tasks to national authorities, expressed by a may-clause or shall-clause, it is considered as permission to delegate.

Member States shall designate a notifying authority that shall be responsible for setting up and carrying out the necessary procedures for the assessment and notification of conformity assessment bodies for the purposes of this Directive, and for the monitoring of notified bodies, including compliance with Article 29.
Article 23(1) of Directive 2009/48/EC

Member States may confer upon the courts, or administrative authorities, powers enabling them, with a view to eliminating the continuing effects of misleading advertising or unlawful comparative advertising, the cessation of which has been ordered by a final decision.
Article 5(4) of Directive 2006/114/EC

Note that the permission to delegate relates to the legal concept of delegation. Indicators can be both shall- and may clauses. While Member States have the duty to implement EU law, they may delegate rule-making powers to public authorities they consider the most suitable in line with the principle of institutional autonomy. The permission to delegate is usually not linked to any other conditions or references to the national legal order.
II.2 Non-discretionary provision (obligation)

The following applies:

34. If a relevant provision contains an indicator of a non-discretionary discretion manifestation, it is considered as non-discretionary provision (obligation).

If the Commission considers that the national measures are not justified, the Member State concerned shall withdraw them.  
*Article 16(1) of Directive 2007/23/EC*

II.2.1 Sub-categories

OBLIGATION TO DO SOMETHING (SIMPLE OBLIGATION)

35. If a non-discretionary provision requires from Member States to do something, it is considered as an obligation to do something (simple obligation).

Member States shall ensure that creditors and, where applicable, credit intermediaries provide adequate explanations to the consumer (...).  
*Article 5(6) of Directive 2008/48/EC*

OBLIGATION TO DO SOMETHING WITH REFERENCE TO THE NATIONAL LEGAL ORDER

36. If a non-discretionary provision requires from Member States to do something and contains a reference to the national legal order, it is considered as an obligation to do something with reference to the national legal order.

Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid (...).  
*Article 13(4) of Directive 2008/115/EC*

OBLIGATION TO DO SOMETHING UNDER CERTAIN CONDITIONS

37. If a non-discretionary provision requires from Member States to do something and contains certain conditions under which the obligation applies, it is considered as an obligation to do something under certain conditions.

Member States shall ensure that, if the parties agree to change the total amount of credit after the conclusion of the credit agreement, the creditor updates the financial information at his disposal concerning the consumer and assesses the consumer’s creditworthiness before any significant increase in the total amount of credit.  
*Article 8(2) of Directive 2008/48/EC*
OBLIGATION TO DO SOMETHING UNDER CERTAIN CONDITIONS REFERRING TO THE NATIONAL LEGAL ORDER

38. If a non-discretionary provision requires from Member States to do something and contains certain conditions under which the obligation applies and refers to the national legal order, it is considered as obligation to do something under certain conditions referring to the national legal order.

Information shall be made available to the public in accordance with national legislation and international obligations, provided that this does not jeopardise other interests such as, inter alia, security, recognised in national legislation or international obligations.

Article 8 Directive 2009/71/EURATOM

OBLIGATION NOT TO DEVIATE FROM THE DIRECTIVE

39. If a non-discretionary provision does not allow Member States to make rules, other than those laid down by the directive, it is considered as an obligation not to deviate from the directive.

For the products defined in Annex I, Member States shall not adopt national provisions not provided for by this Directive.

Article 4 of Directive 2000/36/EC

Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.

Article 22(1) of Directive 2008/48/EC

Note that this obligation gives expression to the legal concept of total harmonisation which precludes any discretion for Member State implementation. A total harmonisation requirement is indicated by a may-clause or shall-clause in combination with the verbs ‘impede, prohibit, restrict’ or by similar expressions. In the absence of any discretion being available to Member State implementation, it does not include any reference to national legal orders.

OBLIGATION NOT TO DEVIATE FROM THE DIRECTIVE UNDER CERTAIN CONDITIONS

40. If a non-discretionary provision does not allow Member State to make rules other than those the directive lays down and contains certain conditions under which the obligation applies, it is considered as an obligation not to deviate from the directive under certain conditions.

OBLIGATION TO AVOID MARKET RESTRICTIONS

41. If a non-discretionary provision requires from Member States to ensure that a product is not prevented from being placed on the market if it complies with a directive requirement, it is considered as an obligation to avoid market restrictions.
Member States shall take all appropriate measures to ensure that equipment is placed on the market and / or put into service only if it complies with the requirements of this Directive when properly installed, maintained and used for its intended purpose.

*Article 3 of Directive 2004/108/EC*

Note that this obligation relates to the legal concept of *mutual recognition*. Even though it does not prescribe European standards, mutual recognition does have harmonising effects regarding the national legal-administrative procedures concerning market access for goods. The concept is indicated by a shall-clause like e.g. ‘shall take appropriate measures’, ‘shall not impede’. The concept does not imply any reference to the national legal order.

**OBLIGATION TO AVOID MARKET RESTRICTIONS UNDER CERTAIN CONDITIONS**

42. If a non-discretionary provision requires from Member States to avoid market restrictions and contains certain conditions under which this obligation applies, it is considered as an *obligation to avoid market restrictions under certain conditions*.

At trade fairs, exhibitions and demonstrations for the marketing of pyrotechnic articles, Member States shall not prevent the showing and use of pyrotechnic articles not in conformity with the provisions of this Directive, provided that a visible sign clearly indicates the name and date of the trade fair, exhibition or demonstration in question and the non-conformity and non-availability for sale of the articles until brought into conformity by the manufacturer, where such manufacturer is established within the Community, or by the importer.

*Article 6(3) of Directive 2007/23/EC*

**OBLIGATION TO SHARE IMPLEMENTING POWERS**

43. If a non-discretionary provision implies that the European Commission shall be assisted by a committee of national representatives in areas where implementing power are conferred upon the Commission, it is considered, from a Member State point of view as an *obligation to share implementing powers*.

Committee procedure – The Commission shall be assisted by a committee.

*Article 47 of Directive 2009/48/EC*

Note that the obligation refers to both the European Commission and the Member States. Even though it implies that Member States can control the Commission in exercising implementing powers, the very fact that these powers have to be shared means that Member States’ discretion is reduced. This obligation precludes any additional conditions or references to national legal orders.
II.3 Hybrid provisions

Alongside discretionary (permissive) and non-discretionary (obligatory) provisions there is the sub-category of hybrid provisions that contain both permission and obligation. Hybrid provisions can be further divided into ‘permission hybrids’ and ‘obligation hybrids’.

The following applies:

44. If a relevant provision contains both discretionary discretion manifestation and non-discretionary discretion manifestation, in other words permissive as well as obligatory language, it is considered as a hybrid provision.

II.3.1 Sub-categories: Permission hybrids

PERMISSION WITH RESTRICTION

45. If a hybrid provision allows Member States to do something but imposes restrictive conditions, it is considered as permission with restriction.

When a market surveillance authority requests the technical documentation or a translation of parts thereof from a manufacturer, it may fix a deadline for receipt of such file or translation, which shall be 30 days (…).

*Article 21(3) of Directive 2009/48/EC*

II.3.2 Sub-categories Obligation hybrids

OBLIGATION WITH LEEWAY UNDER CERTAIN CONDITIONS

46. If a hybrid provision contains an obligation which is further described by a may-clause and contains certain conditions under which it applies, it is considered as an obligation with leeway under certain conditions.

Where, in the course of that evaluation, the market surveillance authorities find that the toy does not comply with the requirements laid down in this Directive, they shall without delay require the relevant economic operator to take appropriate corrective action to bring the toy into compliance with those requirements, to withdraw the toy from the market, or to recall it within a reasonable period, commensurate with the nature of the risk, as they may prescribe.

*Article 42(1) of Directive 2009/48/EC*

OBLIGATION WITH EXCEPTIONS

47. If a hybrid provision contains an obligation and conditions under which the obligation does not apply (exceptions), it is considered as an obligation with exceptions.
Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Article 7(1) of Directive 2008/52/EC

48. If a hybrid provision contains an obligation and conditions under which the obligation does not apply (exceptions) and a reference to the national legal order, it is considered as an obligation with exceptions with reference to the national legal order.

Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

Article 15(6) of Directive 2008/115/EC
### Types of directive provisions at one glance

<table>
<thead>
<tr>
<th>Standard provision</th>
<th>Relevant provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>– Requirement</td>
<td>– Requirement</td>
</tr>
<tr>
<td>– Addressee</td>
<td>– Addressee</td>
</tr>
<tr>
<td>– Rules of general or final provisions, rules concerning standard procedures, applicability of parts of directive</td>
<td>– Discretionary, non-discretionary discretion manifestation (e.g. may-, shall-clauses)</td>
</tr>
</tbody>
</table>

#### Relevant discretionary and relevant non-discretionary provisions

<table>
<thead>
<tr>
<th>Permission (discretionary provision): simple, with certain conditions and/or reference to the national legal order</th>
<th>Obligation (non-discretionary provision): simple, with certain conditions and/or reference to the national legal order</th>
</tr>
</thead>
<tbody>
<tr>
<td>– To do something (simple permission)</td>
<td>– To do something (simple obligation)</td>
</tr>
<tr>
<td>– To go beyond what is prescribed</td>
<td>– Not to deviate from the directive</td>
</tr>
<tr>
<td>– To choose between rules</td>
<td>– To avoid market restrictions</td>
</tr>
<tr>
<td>– To deviate from EU rules</td>
<td>– To share implementing powers</td>
</tr>
<tr>
<td>– To delegate</td>
<td></td>
</tr>
</tbody>
</table>

#### Hybrids with certain conditions and/or reference to the national legal order

<table>
<thead>
<tr>
<th>Permission hybrid: permission with restriction</th>
<th>Obligation hybrids: obligation with leeway, obligation with exception</th>
</tr>
</thead>
</table>
CODES AND VALUES

Variable (V) 1 = Addressee

Code = 1-5

Immediate addressees
1. Member State or other national authorities
2. European Commission, and / or the EU Council of Ministers (CoM) or the European Parliament (EP)
3. Member State and the European Commission
4. European Commission and / or EU-level institutions other than CoM or EP such as the European Standards Organisation (CEN, CENELEC etc.), the European Central Bank or others

Intermediate addressees
5. Third parties such as economic operators, citizens or others

V 2 = Permissive / discretionary (relevant) provision

Code = 6-10

6. Permission to do something
   61. Permission to do something and reference to the national legal order
   62. Permission to do sth. and certain condition
      621. Permission to do sth. and certain condition with reference to the national legal order

7. Permission to go beyond what is prescribed
   71. Permission to go beyond what is prescribed and reference to the national legal order
   72. Permission to go beyond what is prescribed and certain condition
      721. Permission to do more than is prescribed and certain condition with reference to the national legal order

8. Permission to choose between rules
   81. Permission to choose between rules and reference to the national legal order
   82. Permission to choose between rules and certain condition
      821. Permission to choose between standards and certain condition with reference to the national legal order

9. Permission to deviate from EU rules
   91. Permission to deviate from EU rules and reference to the national legal order
   92. Permission to deviate from EU rules and certain condition
      921. Permission to deviate and certain condition with reference to the national legal order
10  Permission to delegate

V3 = Obligatory/non-discretionary (relevant) provision

Code = 11-14

11  Obligation to do something
   111  Obligation to do something and reference to the national legal order
   112  Obligation to do sth. and certain condition
       1121  Obligation to do sth. and certain condition with reference to
              the national legal order

12  Obligation not to deviate from the directive
   121  Obligation not to deviate from the directive and reference to the na-
        tional legal order
   122  Obligation not to deviate from the directive and certain condition
       1221  Obligation not to deviate from the directive and certain condi-
             tion with reference to the national legal order

13  Obligation to avoid market restrictions
   132  Obligation to avoid market restrictions and certain condition
       1321  Obligation to avoid market restrictions and certain condition
              with reference to the national legal order

14  Obligation to share implementing powers

V4 = Hybrid provision

Code = 15-17

15  Permission hybrids: Permission with restriction

16  Obligation hybrids: Obligation with leeway under certain conditions

17  Obligation with exceptions
   171  Obligation with exceptions with reference to the national legal order

V5 = Standard provision

Code = 18
As noted earlier, the codebook is primarily used for case selection purposes. The analysis of individual directives, and the role and relevance of discretion in particular cases, follows at later stages in this study. Having coded the directives under consideration here (3 consumer protection directives, 10 environmental directives and 4 migration directives), a few outcomes are striking, however, and therefore worth mentioning. These outcomes relate to one focal point which was mentioned in the theoretical discussion and concerns the empirical analysis of EU decision-making processes regarding directives: the link between a directive’s margin of discretion and the policy area and subject matter addressed by the directive. In a nutshell, where the EU has not (yet) gained a strong foothold in legal and institutional terms, more discretion is available for Member States to transpose a directive into national law as they see fit. The coding results seem to point into the same direction when considering the distribution of discretion manifestations in the three areas addressed: consumer protection, environmental and migration law.

Distribution of permissions

- All directives analysed by means of content analysis include more obligatory requirements than permissive ones. At the same time, however, nearly all directives also include permissions. It is interesting to note that migration directives show much greater variety regarding the sorts of permissions identified in the codebook than directives from the areas of consumer protection and environmental law. Most directives of the latter two EU areas lack two particular sorts of permissions: the permission to go beyond what is prescribed – usually reflected in minimum harmonisation requirements and the permission to choose between rules (national standards or harmonised EU standards) as expressed by the concept of optional harmonisation.

References to the national legal order

- Furthermore, consumer protection and environmental directives hardly include any discretion manifestations with reference to the national legal order (neither in case of permissions nor obligations). References to the national legal order are, on the other hand, prevalent in discretion manifestations of migration directives.

Obligation hybrids

- Migration directives also include obligation hybrids: EU requirements that in spite of their obligatory nature leave a bit of discretionary room. These hybrid provisions are less frequent in environmental directives and absent from the consumer protection directives analysed.
Policy-specific features
- The obligation to avoid market restrictions shows in consumer protection directives but not in directives of the other two areas. Both consumer protection directives and nearly all environmental directives include the obligation to share implementing powers, which, however, is absent from all migration directives.

All in all, this cursory look at the coding outcomes shows that the distribution of discretionary and non-discretionary discretion manifestations can be used to illustrate and, at least, speculate about the scope of the EU’s influence in a policy area, and thus also about the overall relevance of discretion in that very area. To make it more concrete: the absence of specific sorts of permissions (reflecting minimum harmonisation, optional harmonisation) and references to the national legal order as well as the presence of delegation of implementing powers to the European Commission in the field of consumer protection and environmental law suggests strong EU leverage and therefore points to a minor role of discretion. To render speculations into findings, however, an empirical analysis is required. For this purpose, the dissertation includes a (comparative) case study approach which examines in-depth a set of European directives from the three areas addressed, with the aim of shedding light on the role and relevance of discretion in EU negotiations and national transposition processes regarding directives.


European Migration Network (2007) Conditions of Entry and Residence of Third Country Highly-Skilled Workers in the EU, Small-Scale Study III, Brussels: EMN.


Appendices


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Appendices


References


References


Appendices


References


European Commission

Blue Card Directive

Pyrotechnic Articles Directive

Waste Framework Directive

1 The documents are listed according to the order of appearance in the case study chapters and therefore not always listed in chronological order.
Appendices


Toys Safety Directive


Return Directive


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