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## **A blessing in disguise?! Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives**

Hartmann, J.M.

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## 2 Discretion in the legal sciences

### 2.1 INTRODUCTION

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

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

### 2.2 THE NOTION OF DISCRETION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 2.2.1 Sources and terminology

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

#### 2.2.1.1 Discretion in Dutch law

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

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

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

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

Table 1: Discretion in Dutch administrative law

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

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

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

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

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



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

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

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

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

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

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

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

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

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

#### 2.2.1.2 EU law

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

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

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

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

regulations which hardly leave any discretion as they are entirely binding and directly applicable in the Member States.<sup>19</sup>

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

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

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

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

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

20 The Dutch equivalent is 'implementatievrijheid'.

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

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

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

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

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

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

*Box 1: Defining discretion*

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

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

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

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



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

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

### 2.3 BIRD EYE'S VIEW ON LEGAL DISCOURSE

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

#### 2.3.1 Discretion in context

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

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

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

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

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



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

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

### 2.3.2 From opposite to threat

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

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

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

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

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

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

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

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

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

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

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

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

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

### 2.3.3 Discretion re-visited

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

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

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

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

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

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

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

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

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

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



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

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

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

## 2.4 CONCLUSION

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

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

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