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8.1 INTRODUCTION

The theory of this study needs to be connected with the empirical analysis. The empirical analysis seeks to assess the expectations concerning the role of discretion in the negotiation and transposition of European directives and includes the case studies presented later in the book. The first steps in connecting the theoretical and empirical parts of this book were taken by operationalising discretion which resulted in the introduction of content analysis and the codebook instrument. The second major element of the methodological approach adopted in this study is the case study method which shall be addressed in the subsequent sections. In this context several questions arise. How is the analytical framework applied to the empirical examples, how are these examples or cases selected, and in what way was the empirical research carried out, which methods and techniques were used to this end, what kind of data was applied, and how was this data generated? In short, in this chapter relevant questions of case study research methodology are addressed.

8.2 CASE SELECTION STRATEGY

The first topic to be dealt with is the case selection process. The selection of cases for the empirical analysis was carried out in a step-wise manner, by means of a preliminary selection of directives, followed by the application of content analysis as well as the use of a specific case selection strategy. The case selection strategy applied required taking into consideration additional factors that next to discretion are expected to affect national transposition.

8.2.1 Directives for content analysis

A preliminary selection of directives was carried out to define the directive population of this study. The directive population refers, in other words, to a large group of directives that represent the main focus of the study. These directives share certain common characteristics on the basis of which they were chosen. In the present context these characteristics pertain to directive and EU-level features. Thus, the selection was made with an eye to the sort of directive, the adoption period and policy area. Consequently, the research population is a group of directives which represent new legislative acts (instead of amendments of already existing directives), were adopted in the period 1 January 2007 to 1 December 2009 and address the EU policy area of

consumer protection, environment, and justice and home affairs (see table 5). The corresponding directives were obtained by making the relevant queries, using the European Union's legal database EUR-Lex which provides free access to EU law.

Table 5: Selecting directives for content analysis

Policy Area	Adoption period	Sort of act
Consumer protection Environment Migration	1 January 2007 until 31 December 2009	New legislative acts

The distribution of directives by policy area yielded the following results: twenty-five environmental directives, nine consumer protection directives and five directives concerning migration. The prominent representation of environmental directives does not come as a surprise. In the area of environment the EU has been highly active for decades, and this has resulted in a vast amount of legislative output. The small number of directives in the field of justice and home affairs, on the other hand, reflects the power relationship between the EU and its Member States, which was for a long time in favour of the latter and EU decision-making competence therefore limited. In relation to these two policy areas, consumer protection seems to take a middle position. In any case, it is known as an area where the EU has a rather wide competence. The entire group of directives initially also comprised modifying or amending directives next to new directives. This was in line with the original idea to add to the analysis a further dimension in explaining transposition and therefore to have more variation concerning the sort of legal act. Modifying directives change already existing ones and are assumed to be faster transposed than new directives since they imply only little change to national law (Kaeding, 2006; 2007b; Mastenbroek, 2007). New directives, by contrast, entail new topics of legislation, and for this reason they are considered more likely to cause disagreement between domestic actors, resulting in delayed transposition (Haverland and Romeijn, 2007). The idea to include modifying directives was eventually dropped for reasons of feasibility related, in particular, to the application of the codebook to measure discretion margins of individual directives. It turned out that the codebook would be more suitably applied to the analysis of new directives which do not need to be analysed in conjunction with previous acts. Be it as it may, removing the modifications among the directives reduced the total

number of directives as did the exclusion of codifications and recasts.¹ As for these specific types of modifications, the corresponding directives did not require transposition into national legislation and were therefore disregarded. This was, in particular, due to two reasons: First, the directives introduced technical amendments to be addressed in comitology committees chaired by the European Commission in the so-called committee procedure. Second, codifying directives, in bringing together already existing legislation and all its amendments in a new single act, do not specify any new transposition deadline. The total number of directives finally boiled down to seventeen basic legislative acts: ten environmental directives, three consumer protection directives and four directives on migration (see the listing of directives in the Appendix).

8.2.2 Directives for case study analysis

In a next step, the seventeen directives were subjected to content analysis and the application of the codebook to determine individual discretion margins. Since directives with lower and, in particular, higher discretion margins are expected to affect transposition differently, I decided to select directives with varying discretion margins (small and large) for the case study analyses and subsequent comparison of directive pairs. Accordingly, the case study approach entails the analysis of six individual cases which include three directives that grant more and three directives that grant less discretion. These directives make up the directive sample of this study: cases that represent the directive population, in other words the 'immediate subject' of the case studies (Gerring, 2007: 21).² The individual analyses are followed by a paired comparison to highlight and discuss the effects of larger and smaller margins of discretion on the negotiation and transposition of European directives.

1 Modifying directives or modifications is used here as a general denominator for amendments, codifications and recasts. Amendments imply changes to an already existing directive. Unlike amendments, codifications as well as recasts entail that a new law is adopted which brings together the legislative act and all its amendments in one piece of legislation. Codifying directives replace the acts being codified. The acts subject to recasting are repealed. Both codification and recasting are techniques that result from the European Commission's Better Regulation strategy aiming to achieve better accessibility, comprehensibility and coherency of European legislation as well as the latter's smoother transposition and implementation. See the relevant definitions provided by the European Commission's legal service (2015) Available at: http://ec.europa.eu/dgs/legal_service/index_en.htm (accessed 7 August 2015). See also Voermans, W. (2009). *Regelvermindering via codificeren en consolideren*, *Regelmaat* 24(3): 179-182.

2 Next to the aim of having six cases for the case studies and comparison, another reason for drawing a directive sample from the population of directives is to ensure that carrying out the analysis is feasible. A population of cases is usually too large in size to be analysed by an exploratory case study approach like the one applied in this study. For this reason, some further systematic choices were made, resulting in the creation of a directive sample from which finally six directives were selected for further analysis.

The decision to compare cases had implications for the further case selection process. Comparative case study methodology offers different strategies to select cases depending on the exact purpose of the comparison (Lijphart 1971; 1975; Pennings et al., 1999; Blatter and Haverland, 2012). I decided to apply the ‘most similar systems design’ (Lijphart, 1971: 687-690; Seawright and Gerring, 2008: 304-305; Blatter and Haverland, 2012: 42-44),³ because in my view, it most adequately addresses the purposes and goals of the present study. The starting point of the most similar systems design is to select two cases based on the assumption that while they are similar in respect of several aspects, I refer to as background factors, they differ regarding the factor(s) that are to the study’s prime interest. The latter factors have been referred to as presumed cause and outcome or independent and dependent variables depending on the type of research and methodological approach that scholars apply. According to Pennings et al., the main concern of comparative case studies with a most similar systems design is the correspondence between the independent and dependent variables based on their variation across cases under review (see Pennings et al., 1999: 38). Translated to the present context of transposition, what is analysed is the link between a larger discretion margin – the independent variable or presumed cause – and the outcome which is proper or deficient transposition whereby ‘proper’ is understood as timely and legally correct transposition. More concrete, the more discretion a directive grants the more likely it is that transposition is proper or deficient.⁴ Proper and deficient transposition are understood as compliance and non-compliance with EU law, respectively, and may, from the viewpoint of legitimacy, be considered as detrimental or beneficial for both the process and outcome of national decision-making for the purpose of formally implementing directives.

To focus on the correspondence between the amount of discretion and the corresponding transposition outcome across cases means that the focus is on the question whether or not variations of discretion lead to different transposition outcomes. In line with a positive reading of discretion, it is expected that more discretion leads to proper transposition in terms of timeliness and legal correctness. What has to be taken into consideration, however, is that the outcome of interest may be produced by a ‘plurality of factors’ (Blatter and Haverland, 2012: 24). In order to consider separately the impacts of individual factor(s) on the outcome, and, in particular, to focus on the particular relationship between the presumed cause (discretion) and outcome of interest (transposition result), these other factors must be held

3 Lijphart refers to it as ‘comparative method’ or ‘comparable analysis on comparable cases’. Cf. Lijphart, 1971, p. 687.

4 This expectation is formulated in line with the objective of the study to highlight the potential of discretion in facilitating decision-making processes regarding directives. As previously shown in the theoretical part and reflected by the analytical framework, however, this study does not disregard evidence to the contrary and therefore the purported negative effects of discretion.

constant. In research methodology this is referred to as the *ceteris paribus* assumption⁵ (see Lijphart, 1971; Gerring, 2007). Applied in the present context this means that more discretion leads to proper transposition as long as all other factors that might affect the transposition outcome remain constant. In this way, it is possible to zoom in on the relationship between discretion and transposition by screening out, to the greatest extent possible, the influence of other factors on transposition. For a better understanding, the underlying logic of the research design is visualised in table 6.

Table 6: The role of discretion according to the most similar systems design

	Type of directive	Number of transposition actors	Sort of transposition measures	Number of transposition measures	Directive's margin of discretion	Transposition outcome
Case 1	1	1	1	1	1	1
Case 2	1	1	1	1	0	0
Case 3	1	1	1	1	1	1
Case 4	1	1	1	1	0	0
Case 5	1	1	1	1	1	1
Case 6	1	1	1	1	0	0

The first transposition case shows that in the presence of five other factors, including discretion, timely and legally correct transposition is achieved. This, however, does not say anything particular about the link between discretion and transposition outcome. Only if other transposition scenarios are included, it becomes possible to detect a pattern. As shown in the figure, the transposition outcome changes, in case that the directive's margin of discretion changes, while all other factors remain the same. These factors are the background factors which are addressed below. The underlying expectation of the relationship between discretion and transposition is, as noted above, that in case that more discretion is available for transposition, compliance with the directive is achieved. Assuming that 1 indicates the presence of larger margins of discretion, its positive effect on transposition is illustrated in table 6 by the hypothetical cases 3 and 5 which show that with more discretion being available, proper transposition / compliance (indicated by 1) is achieved. Deficient transposition / non-compliance is the outcome in case that only little discretion is conferred upon Member States (indicated by 0 for both margin of discretion and transposition outcome) – as reflected in the transposition scenarios 2, 4 and 6. If the relationships between margins of discretion and transposition outcomes just described will show empirically remains to be seen. The case study analyses below are used to look further into the link between these two.

5 The literal meaning of *ceteris paribus* is 'other things being equal'.

Transposition is known to be a multifaceted phenomenon and, as a rule, has been analysed by taking into consideration a number of factors (Sverdrup, 2007). Therefore the most similar systems design comes in handy because it creates a research setting which allows for taking into account other alternative explanations for outcomes of transposition. On the other hand, this can be considered a weakness of the case study approach. In this regard, it can be argued that the case study approach suffers from the fact that there are more potentially relevant independent variables than cases examined which may deliver only tenuous findings. But it is exactly at this point where the most similar systems design shows its merit. In making the transposition cases 'comparable' by ensuring the similarity of their background factors, it helps to minimise the number of alternative explanations and enhances the plausibility of explanations that relate to the factor of prime interest (Gerring, 2007: 71). It is obvious that the key factor considered to influence the national transposition of EU directives is discretion. But what are the background factors in the present study?

Table 7: Selection criteria directives

1	Policy Area	differ
2	Margin of discretion	differ
3	Number of transposition actors	similar
4	Sort of transposition measures	similar
5	Number of transposition measures	similar
6	Time for transposition	similar

As shown in table 7, the background factors relate to national characteristics and include the sort of directive (new and adopted by the Council or the Council and European Parliament), the number of transposing actors as well as the number and sort of national transposition measures. Additionally, since more time available has been assumed to contribute to timely transposition (Kaeding, 2007b: 122), transposition time was added as an additional condition that should not differ between the two cases compared.⁶ While the background factors should be as similar as possible, the two directives should differ as to their discretion margin and policy area. In other words, each of the three paired comparisons eventually included two directives that vary in their discretion margins (small vs. large) and policy area⁷ they

6 This latter condition could be ensured by selecting directives with the same amount of time - usually 24 months as stated in the directives' final provisions.

7 The remaining directives in the area of justice and home affairs pertain mostly to migration policy, including those selected for the case studies, which is the reason that aspects of this particular sub-domain of the JHA area (legal and illegal migration) are addressed in the empirical analysis of the dissertation.

address but are both new legislative acts which have been adopted by the Council or the Council and the European Parliament. Furthermore, the cases to be compared had to meet three further conditions: their transposition required the same or a similar number of transposition actors, and the same or a similar number and sort of transposition measures. It was furthermore important to ensure that both directives allocated the same amount of time for transposition. These criteria were thus used to match six directives into three pairs for the empirical analysis (see box 7).

Box 7: Pairs for comparative case studies

Blue Card Directive 2009/50/EC & Pyrotechnic Articles 2007/23/EC
Waste Framework Directive 2008/98/EC & Toy Safety Directive 2009/48/EC
Return Directive 2008/115/EC & Stage II Petrol Vapour Recovery Directive 2009/126/EC

So far the background factors have merely been mentioned but still need to be addressed in more detail. Prior to that, however, two additional notes have to be made. First, similarity of background factors is an ideal condition but reality usually does not provide for ideal settings. Second, in making the final choice, the availability and commitment of interview partners was also taken into consideration.

8.3 BACKGROUND FACTORS

While there certainly is a plethora of factors that may affect the national transposition of European directives, it is important to bear in mind that not all of these factors are relevant in the context at hand. Considering that this book presents a single-country study and that transposition studies were carried out in the Netherlands helped in reducing the number of relevant factors. For instance, factors were excluded that seem to make more sense in a cross-country analysis such as, for instance, ‘comparative economic powers’. Furthermore excluded were factors that are unlikely to apply to the Netherlands, taking into consideration that it is an EU founding member and an economically as well as democratically advanced country. From this it follows that, factors such as ‘approval of democracy’ or ‘financial capabilities’, to mention only a few examples, were deemed irrelevant.⁸ Considering the transposi-

8 The examples are taken from the implementation of EU law database which provides more examples. See Toshkov, Dimitar (n.d.) Implementation of EU Law: An Online Database of Existing Research, in cooperation with the Institute for European Integration Research. See also footnote 47.

tion context also helped to identify factors that are of key importance for the purposes of this study. To give an example, in the Netherlands transposition is carried out first and foremost by ministerial units. Hence, in contrast to other stages of the implementation process which involve, for example, other public authorities or sectors of industry, transposition is carried out by state administration. This is why factors that relate to transposition, being conceived as a largely administrative process, were regarded as highly relevant. Nevertheless, transposition is also a political process. It can trigger political controversy between the domestic actors involved in the process of incorporating EU rules into national law. For instance, due to different political interests and preferences they pursue, the national Government and Parliament may hold different views on how transposition should be carried out.

The selection of background factors, which are further considered in this study and therefore included in the present research design, follows from the foregoing considerations. The background factors are now addressed in more detail, starting out with the sort of directive, followed by the number of implementing actors and number and sort of transposition measures.

8.3.1 Sort directive

The sort of directive is expected to affect national transposition. It has already been noted that modifying directives are believed to be faster transposed since they do not entail substantial changes for national law. The sort of directive can, however, also refer to the EU body by which the directive was enacted. Hence, the distinction is made between Commission directives, Council directives adopted by unanimity, and finally directives that are adopted by both the Council of Ministers and the European Parliament according to the former co-decision procedure (corresponding with the period considered in this study and preceding the entry into force of the Treaty of Lisbon). Commission Directives are found to be more swiftly transposed than Council directives or directives which are adopted by co-decision. The sort of EU decision-making processes, and the applicable formal decision-making rules in particular, apparently play a role (Mastenbroek, 2003). According to Mastenbroek, speedy transposition of Commission directives is due to the better quality of these directives which makes transposition easier and therefore faster. Directives that are adopted by the Council or by the Council and the European Parliament together are, by contrast, associated with political controversy and lower quality of legislation. Low quality stems from the fact that directives represent compromise texts that are vaguely worded. As a consequence, these directives are associated with difficulties in the interpretation and application by domestic actors and therefore with delayed transposition. It should be noted that Council directives and directives enacted by both the Council and the European Parliament are considered to require the same amount of time for being transposed into national legislation (Mastenbroek 2003: 375-376).

8.3.2 Number of transposition actors

To analyse national transposition and the role of discretion therein, specific attention has to be paid to actors and their preferences – as emphasised by the veto-player approach (Tsebelis, 2002) – and in the literature on implementation (see Kaeding, 2007b; Mastenbroek, 2007; Steunenberg, 2007; Thomson, 2007). Transposition may involve actors with different preferences as to the way the directive should be transposed. It may also entail problems of coordination between actors. For this reason, transposition delay is associated with more actors being in charge of converting EU rules into national law: ‘the number of political and administrative actors involved is often related to a decrease in decision-making speed’ (Steunenberg and Kaeding, 2009: 438). Put differently, the fewer actors involved, the more it is likely that transposition is timely (Kaeding, 2006: 239). The number of actors needed for transposition is thereby related to the directive’s scope and policy issue which may fall within the remit of one or more ministries and consequently require intra- or inter-ministerial coordination (Haverland and Romeijn, 2007). If the policy issue at stake concerns a new topic of legislation, it may additionally require the involvement of Parliament.

Research focusing on the Dutch transposition context confirms that it is worth looking at the number of actors involved in analysing the transposition of European directives, and hence, to take into consideration the inter-ministerial and intra-ministerial coordination of this process (see section 4.2.2). A 2008 study of the Dutch Court of Audits has brought to light that lacking inter-ministerial coordination is an administrative shortcoming that impedes timely transposition. Having examined the Dutch transposition of European directives in the period from 2001 to 2006, the authors of the study conclude that involvement of more than one ministry led to delay in 80 percent of the cases (*Parliamentary Papers II* 2007/08, 31498, no. 1&2, p. 12). One explanation is that national ministries tend to remain attached to their individual autonomy rather than engaging in inter-ministerial collaboration for the purpose of transposition (*Parliamentary Papers II* 2007/08, 31498, no. 1&2, p. 56). Regarding intra-ministerial coordination, Mastenbroek has pointed to the so-called problem of ‘chinese walls’ which describes the fact that the political and legal units of a ministry involved in the negotiations and transposition of a directive work in isolation. This is expected to result in poor communication and coordination between these departments and to contribute to delay in transposition (Mastenbroek, 2007: 38-39).

In fact, both inter-ministerial and intra-ministerial coordination problems can be linked to difficulties that are associated with the number of transposition actors. But also other approaches are possible. In this study, intra-ministerial and inter-ministerial coordination are not discussed under the same heading. Intra-ministerial coordination problems and lacking transposition knowledge are used to describe the two dimensions of the

concept of the ‘administrative capacity’ of transposition actors, focusing on the ministerial level. Inter-ministerial coordination between national ministries, on the other hand, is linked to the concept of the ‘number of transposition actors’. This concept is more broadly understood to include not only the transposition debates at the ministerial but also the political level and therefore refers to the involvement of other domestic actors such as national parliament.

8.3.3 Sort and number of transposition measures⁹

Both final background factors that the present study takes into account pertain to the national transposition measures created to incorporate EU directives into national law. In the Netherlands, transposition legislation is formulated and adopted by means of the same legislative procedure as national legislation (Steunenberg and Voermans, 2006). Transposition may, however, involve various legal instruments which differ as to the number of actors involved and therefore the time needed to create and adopt them. It is carried out by means of high and low order regulation, the former pertaining to parliamentary acts, the latter relating to administrative acts, including orders in council and ministerial orders (Van der Burg and Voermans, 2015: 144). Parliamentary acts require, alongside the ministerial department(s) responsible for transposition, also the involvement of the Council of State and Council of Ministers, as well as the active participation of the national Parliament which in the Dutch context includes the House of Representatives and the Senate.¹⁰ Fewer domestic actors are involved in the creation of orders in council and ministerial orders. This difference is important to the study of transposition performance and there seems to be agreement that the higher the level of transposition, and thus the more actors involved not only at the ministerial but also political level, the more likely it is that a directive will be transposed with delay. This has been found to hold true for not only the transposition of directives in the Netherlands but also in other EU Member States (*Parliamentary II* 2007/08, 31498, no. 1&2, p. 12; König and Luetgert, 2008). With specific regard to the Dutch transposition context, faster transposition is expected from the use of orders in council and, in particular, from the use of ministerial decisions which, unlike other sorts of transposition measures, do not require any consultation or scrutiny procedures (Bovens and Yesilkagit, 2010: 61). Parliamentary acts, by contrast,

⁹ A note on terminology: ‘transposition measures’ and ‘transposition legislation’ are used interchangeably in the dissertation and correspond with ‘implementing measures’, a third term used in implementation studies.

¹⁰ The Netherlands have a bi-cameral system: the lower house (or House of Representatives) is known as ‘Tweede Kamer’, the upper house (or Senate) as ‘Eerste Kamer’. Whereas the political debates take place in the former, it is the quality of a legislative proposal that is of primary importance to the upper house (Eerste Kamer). Cf. Breeman and Timmermans, 2012, pp. 153-154.

take the longest, requiring about a year until they are enacted (Breeman and Timmermans, 2012: 153). Alongside the level of transposition, the number of transposition measures required to incorporate a directive into national law has been found to cause delay. Mastenbroek (2003; 2007) as well as Steunenberg and Kaeding (2009) claim that the higher the number of implementing measures, the more time it takes to transpose a directive. According to Mastenbroek this is related to the fact that the likelihood for implementation problems to arise is higher if many implementing measures have to be introduced or changed (Mastenbroek, 2003: 377; 2007: 37).

How was the information on background factors obtained? To this end, the earlier-mentioned EU database EUR-Lex proved useful. First of all, it provides access to the text and sort of a directive – the latter being immediately revealed by the directive's heading. From the heading it becomes evident whether the directive is a new legislative act and by which EU bodies it was enacted. Furthermore, the database offers an overview of national transposition laws that Member States have adopted and notified to the European Commission to meet their transposition obligations. This provided me with the knowledge on the number and sort of legal acts of individual transposition measures taken by the Dutch transposition authorities. As for the number of transposition actors, information on this factor could be gathered from the governmental overviews on the status of transposition processes being underway. These overviews provide a timeline-view including all stages of the transposition process and actors involved.¹¹

8.4 SUMMARY

This chapter has so far set out the step-wise approach to the selection of cases for the purpose of arriving at six transposition processes which were carried out in the Netherlands. These processes shall be further examined by means of case study analyses and paired comparisons. To this end a population of cases was defined followed by the application of further systematic choices resulting in the creation of this study's directive sample, including six directives, two from each policy area addressed (consumer protection, environment and migration). Alternative explanations which are alongside discretion expected to affect national transposition were presented as background factors in line with the most similar systems design.

11 These overviews are provided by the so-called 'i-timer'. It offers information concerning the state of affairs regarding the implementation of EU directives and framework decisions into Dutch law and is published quarterly by the Ministry of Foreign Affairs and submitted to the Dutch Senate and House of Representatives. The i-timer was developed by the Ministry and is used by the Interdepartmental Commission for European Law (Interdepartementale Commissie Europees Recht, ICER) to monitor the progress made in the Dutch implementation of EU law. Cf. Mastenbroek, 2007, pp. 31-32.

This case study design allows for singling out the factor of discretion for explicit evaluation of its effects regarding the national transposition of EU directives.

8.5 CASE STUDY ANALYSIS

In addressing the case selection strategy and method of comparison, the preceding discussion anticipated two important elements of the case study approach. Other relevant aspects shall now be addressed in more detail. The discussion commences by stating the objectives of the case study analysis, including some methodological reflections on the approach. It then turns to the data gathering process and, in a last step, sets out the structure for the discussion of EU and national decision-making processes concerning directives. One concept that has been identified in the theoretical discussion as being linked with discretion is the compatibility of EU and national law. It is a concept which has seen different interpretations and applications in implementation studies. The last section therefore concludes by addressing the concept of compatibility in the context of national transposition as it is used and operationalised in the present study.

8.5.1 Objectives

The overall objective of the case study approach is to throw light on the role of discretion in the negotiation and transposition of European directives in accordance with the research questions of this study. Drawing on the analytical framework the relevance of discretion is assessed under particular circumstances – i.e. in relation to other contextual factors considered relevant in the decision-making processes under study. The EU negotiation process is analysed with the aim of understanding under what circumstances more or less discretion is incorporated into directives and how discretion affects legislative decision-making. The transposition of directives in the Netherlands is examined with a view to the questions of how discretion was used to convert the directive into national law and how discretion affected the process; did it facilitate or impede it? The insights gained from the analysis of the six case studies inform the subsequent comparative investigation. Finally, the findings from both analyses are used to illustrate aspects of the relationship between discretion and legitimacy within the context of national transposition.

8.5.2 Approach

To reach the study's objectives I decided to apply the case study method. It allows for an in-depth investigation of an event or process (George and Bennett, 2005; Creswell, 2009), such as EU and national decision-making concerning directives addressed in this book. Its merits regarding the analysis

of national transposition have been acknowledged by a number of implementation scholars, including those that apply quantitative and statistical methods to analyse transposition (Falkner et al., 2005; Kaeding, 2007b; Mastenbroek, 2007; Steunenberg, 2007).

A case study approach is deemed appropriate because it matches the explorative purposes of this study which seeks to further develop the concept of legislative discretion. The decisive advantages of the case study approach lays furthermore in the fact that it allows for a close analysis of the negotiations and transposition of directives. It helps to uncover the corresponding decision-making processes at both the EU and national-levels. In so doing, the case study approach is used to trace the sequences of events, to identify actors, and preferences concerning the content as well as transposition of the directives analysed. In short, the case study research opens up rich sources of information that are used to assess the sets of expectations about the role of discretion in the relevant EU and national decision-making processes. Such an in-depth analysis implies that case study research addresses a limited number of cases (Gerring, 2007: 50) which is useful when it comes to identifying characteristics and idiosyncrasies of cases. What's more, it is considered important, since one of the main objectives of the present study is to specify the circumstances under which discretion unfolds its facilitating or impeding effects. This requires attention to detail. For instance, the approach adopted here may help to explain cases with similar transposition outcomes but which are different regarding the way discretion affected the process. Especially in these cases it makes sense to have a closer look at the context of transposition by looking beyond the mere existence of the expected relationship between the two factors of discretion and transposition outcome. Hence, it is considered useful to shed light on causal paths and mechanisms which constitute the different ways in which entities (e.g. transposition actors) and their activities (e.g. measures taken to transpose a directive) shape the link between discretion and transposition (George and Bennett, 2005; Gerring, 2007; Beach and Pedersen, 2013). In other words, the detailed examination of cases serves to open the black box between discretion and transposition; it can be used to describe their relationship in more detail and identify factors that influence it.

Notwithstanding this intense investigation, the underlying idea of the case study method is that findings from the analysis of a few cases (directive sample) shall be generalised to the entire group of cases (directive population). This, however, has been considered as a weak point of the case study method by some who argue that an analysis of merely a small number of cases precludes the generalisation of outcomes to a larger number of cases (Gerring, 2007; Creswell 2009; Toshkov et al., 2010: 7). Put differently, case studies suffer from a lack of external validity. This is due to the specificities and small number of cases as well as the fact that the book presents a single-country study which makes it impossible to generalise its outcomes to transposition in other Member States. Apparently, decisions concerning the research design come with trade-offs. It is then necessary, as sought

here, not to turn a blind eye to the downsides of one's approach but to mention them. The decision to apply the case study method despite the downsides just mentioned was based on the consideration that its advantages justify possible disadvantages. These advantages pertain first of all to the consistency of the present approach, in other words, its reliability in analysing transposition. In this regard, a single-country study has the merit that analysing transposition across cases is possible without having to account for differences imposed by country-specific, legal-administrative contexts. Moreover, conducting a small-n study can also be an advantage for the reason that it is deemed easier to ascertain the veracity of a specific relationship for a small number of cases compared to a larger number of cases (Gerring, 2007: 42). Hence, even if inferences about discretion may 'merely' allow for making modest generalisations due to the small scope of the analysis, applying the case study approach may nevertheless serve to deliver findings that are conclusive and sound. This is not least because both the case selection strategy and overall research design are applied in a manner that aims to achieve great explanatory power concerning the role of a factor such as discretion. In addition, the case study research is not confined to one but extends to six transposition cases and therefore allows for the investigation of the link between discretion and transposition across cases (see also Lieberman, 2005; Seawright and Gerring, 2008). Finally, the issue of generalisation can also be tackled by comparing the results of the case studies to the findings of previous research (Ringeling, 1978: 37). Arguably, in the context of the study at hand this is only possible to a certain extent owing to the fact that how discretion has been used by implementing actors in the national transposition of European directives has hitherto scarcely been dealt with. And yet, all things considered, the small-n approach and cross-case evidence thereby provided do not preclude drawing modest and tentative conclusions. Besides, one could reflect about the wider relevance of research findings for transposition contexts that are similar to the Dutch one. These findings could, after all, be used to indicate pathways for future research.

Having outlined the case study approach and explained the reasons for its application, it is now time to address other more practical issues including the data gathering process.

8.5.2.1 *Data gathering process*

How was the case study research carried out? Relevant data was gathered for the analysis by using three key methods and techniques: an extensive literature study, document research as well as expert interviews. The interviews were held with Dutch civil servants from relevant ministerial departments. In most of the six cases analysed, this included actors involved in both the negotiation and transposition of EU directives.¹² Where it was

12 The interviews were conducted in Dutch and then I translated them into English.

deemed necessary, interviews were conducted with other relevant actors. Moreover, in one case, dossier research was carried out at the relevant national ministry. For me, the guiding principle in conducting the case study research was to gain and provide a sound understanding of the processes addressed. The triangulation method was additionally used for this purpose: literature study, document review and expert interviews represent three different sources by means of which the information gathered could be cross-checked and the validity of the negotiation and transposition accounts ensured (Adcock and Collier, 2001: 540). The interviews with experts involved in the negotiation and transposition processes were semi-structured and recorded.¹³ The semi-structured approach allowed for flexibility in addressing the issues raised by the questionnaire and stimulated a two-way communication at eye-level which made it possible for me to gain an in-depth understanding of the processes discussed (Pfadenhauer, 2009). Furthermore the individual and face-to-face interviews were taped with the prior agreement of the interview partners (listed in Appendix). Without intending to deny that recording interviews may inhibit interviewees in revealing sensitive information (Mastenbroek, 2007: 93), my experience is that it enabled me to gather comprehensive information without loss of detail. Each case study chapter was sent to the relevant interview partners for the purpose of checking the accuracy of the information provided. The case study descriptions were informed by the results of a close examination of the relevant literature, and official publications giving insights into the EU preparations and negotiations as well as the Dutch transposition of the directives.

Regarding the EU-level process, the key documents assessed included, alongside directives and the corresponding Commission proposals, also the minutes of the Council meetings and other negotiation-related documents, such as the legislative resolutions of the European Parliament.¹⁴ The Commission proposals enabled me to gain knowledge on the reasons underlying the submission of the draft directive and its content. The EU's legal database EUR-Lex was used to study the length of negotiations and the way a directive proposal was treated at Council level in order to establish whether or not reaching an agreement on a directive was cumbersome and lengthy. In this regard, information about the treatment of a directive proposal by the Council of Ministers proved useful. After all, if a legislative proposal is dealt with as 'B-item' on the Council agenda and examined at both lower and higher Council levels it can be considered as having caused difficulties in the negotiations on a directive. Proposals scheduled as B-items usually pertain to controversial issues which are in any case subjected to meetings at the level of Ministers as they require further debate (see for instance Sherrington, 2000: 61). A-items, by contrast, refer to proposals on which agree-

13 Except for one case where I took notes of the interview.

14 The analysis thus takes into account the main decision-making players, leaving out third parties such as business or interest groups.

ment is reached at the lower Council level and therefore they only need to be formally adopted by the Council.¹⁵ Especially the minutes of the meetings of the Council working parties as well as information taken from the minutes of the Committee of Permanent Representatives (Coreper) and the Council's General Secretariat offered insights into the issues at stake during the negotiations, revealing the views and preferences of Member States in the Council but also those of the European Parliament. The Dutch position within the EU negotiations was of immediate interest to this study and examined by making use of the Dutch Government's Position Paper, better known as BNC-fiche. The BNC-fiche is named after its author, the Working Group Assessment New Commission Proposals, (*Werkgroep Beoordeling Nieuwe Commissievoorstellen*)¹⁶ which draws up the fiche to inform the Dutch Parliament about new EU legislative initiatives. The BNC-fiche consists of a short summary and assessment of the Commission proposal, including key issues the Government wishes to amend. Since it represents a snapshot of the Government's initial view and considering that preferences can change over time, the study of negotiation documents as well as interviews with national civil servants involved in the negotiations on the respective directive were used to account for possible changes of the Government's position and strategy.

The Dutch transposition of the directives addressed in the case study analyses was mainly reconstructed by studying the transposition measures, including the explanatory memoranda and correspondence tables setting out in detail how individual directive provisions were incorporated into Dutch law. Examining these sources carefully, proved useful since they offered illuminating insights into the considerations made by the actors in charge in choosing particular transposition techniques and instruments. At the same time, it also shed light on the key question of how legislative discretion was used in transposing directives. Again, expert interviews proved valuable since they provided me with an additional possibility to trace the reasons for particular choices in transposition and by asking more detailed questions to check my own comprehension of sometimes complex processes. To gain a deeper understanding of the transposition debate between the leading ministry and Parliament and additional views held by other relevant domestic actors such as the Council of State and stakeholders, studying further legal and policy documents was crucial. Most of these documents were accessed through the database *overheid.nl*, commissioned by the Ministry of the Interior and Kingdom Relations, providing access to information about government organisations of the Netherlands. Finally,

15 Council preparatory bodies refer to institutions such as Council working parties, the Committee of Permanent Representatives (Coreper: stands for 'Committee of the Permanent Representatives of the Governments of the Member States to the European Union') or senior committees. Cf. Wallace, 2010, pp. 75-82.

16 The Working Group is composed of representatives of the ministries and local government representatives. Cf. Steunenberg and Voermans, 2006, pp. 18-19.

information concerning the timeliness of transposition was gathered from closely examining the timeline of the process – as outlined by the national transposition monitoring instrument ‘i-timer’¹⁷ and the overviews of notified transposition measures stating the dates from which these measures took effect. As to timeliness as well as legal correctness, examining the European Commission’s implementation reports and further communication on transposition performances, (e.g. Commission press releases), was used to establish whether or not Dutch transposition was in compliance with the directive concerned.

8.5.2.2 Structure

From the previous sections, it may have become obvious that the case study analyses include complex accounts of the relevant EU and national decision-making processes regarding the six directives analysed. That is why, before diving into the cases, the structure of the analyses is set out more clearly in order to provide for better guidance in reading and to avoid redundancy.

Each of the six case studies comprises an analysis of the EU negotiation and an analysis of the national transposition process. The structure of the two analyses is roughly the same. Both EU and national decision-making processes are presented by means of a descriptive analysis, followed by an explanatory analysis. The descriptive analyses are organised with the aim in mind to provide comprehensive and relevant information on both the negotiation and transposition processes regarding each directive. Hence, in a first step, the purpose, background as well as content of the directive analysed are described, including an outline of the policy area the directive’s subject matter addresses. This is also done with a view to the idea that, as mentioned before, discretion margins vary among directives from different policy areas. In a next step, detailed insights are provided into the negotiations on the directive, especially the position of the Dutch delegation, as well as into the Dutch transposition processes including all relevant stages and actors.

The information presented informs the subsequent explanatory analyses which aim to illuminate the role of especially discretion but also other factors expected to affect EU and national-level processes by assessing the expectations constituting the analytical framework of the dissertation.¹⁸ Despite the interrelatedness of EU and national levels in a directive’s life cycle, the actors, dynamics and issues at stake are certainly different and expectations were developed accordingly. One important concept addressed in both the EU and national decision-making analyses is the compatibility between the EU directive and national law which can not only serve to explain why discretion is granted to Member States for implementation but also in what ways it contributes to a certain outcome of transposition.

17 See footnote 11.

18 The expectations are not always discussed chronologically but rather according to context.

8.6 COMPATIBILITY CONCEPT

A last point which requires elaboration makes part of the analysis of the transposition process and concerns the compatibility concept, also known as (mis)fit or goodness-of-fit concept (Risse et al., 2001; Börzel, 2005) which I chose to apply in the present study. As already noted, implementation studies deal with more than one type of misfit (institutional, legal, policy etc.) resulting from different conceptualisations with varying explanatory power. Carroll takes an in-depth look at the concept and its treatment in implementation studies and notes that ‘the wide variety of approaches identifying themselves with this kind of explanation has led in part to a stretching and thus weakening of its theoretical usefulness’ (Carroll, 2014: 48). In addition, empirically, the misfit hypothesis is not always successful in explaining Member States’ implementation of EU law, as it was illustrated with regard to social policy directives (Falkner et al., 2005: 298-291). While the latter finding is not irrelevant it relates to one specific policy sector and caution should therefore be exercised with a view to generalisation, especially in light of the fact that policy sectors matter for explaining transposition deficits. Both the duration and delay of transposition have been found to differ among sectors (Haverland et al., 2010). Interestingly, also the relevance of different types of misfit appears to vary among policy domains (Carroll, 2014: 49).

Without intending to negate the importance of other sorts of misfit, due to the book’s major concern with the legal or formal implementation (transposition) of European directives, the case study analysis will focus on legal misfit. With regard to the negotiation process, the size of the legal misfit or incompatibility between EU directive and Dutch law can only be roughly indicated based on the position of the Dutch Government on the directive proposal. The actual lack of compatibility can be more precisely determined by taking a closer look at the implications of transposition at the national level, and in particular by considering the characteristics of transposition measures taken to convert directive requirements into national legislation. This can give an idea about the scope of misfit present in a particular case. Steunenberg and Toshkov offer a categorisation of misfit which I deem useful and apply in this study to assess the lack of compatibility between the directives analysed and Dutch law (2009: 959-960). The authors conceive of misfit as showing in four degrees: high, moderate, limited, and small misfit. The different extents of misfit are derived from the consideration of three criteria that relate to national transposition legislation: the number of transposition measures, the level of legislation (parliamentary vs. administrative act) and legislative novelty. Put in their words:

High misfit is registered when a directive requires the adoption of many (more than two) legislative acts, when these acts are of a higher order (laws and regulations) and when the transposition measures are mostly extensive amendments rather than new acts. A moderate degree of misfit is observed when many, high order acts are adopted but the acts

are new and do not replace existing legislation. A limited misfit is present when no more than two transposing acts of second or third order (regulations and ordinances) have been adopted and when these acts are amending existing norms. If two or fewer transposition acts have been adopted which are new and are not primary legislation, we have a small legal misfit (2009: 960).

In attempting to assess the scope of misfit in the six transposition cases by means of this categorisation, experts who were involved in transposition were additionally questioned for verification purposes. They were asked to assess the legal implications of the directive concerned for Dutch legislation. Even though the concept of misfit or incompatibility is used in the present study to explain specific transposition outcomes, it should nevertheless be born in mind that the factor of compatibility has not been found to be a sufficient explanation for transposition deficits. Mediating factors such as a consensus-oriented decision-making culture (Börzel, 2005) – exhibited for instance by decision-making processes in the Netherlands – may ease compliance even in cases where lacking compatibility results into high pressure to adjust national legislation to EU law (Risse et al., 2001).

Under what circumstances discretion facilitates or impedes decision-making on EU directives and their subsequent transposition shall be addressed in the next chapters which comprise the empirical analysis carried out in the Netherlands. The presentation of the six individual case studies is organised with a view to the subsequent paired comparison, starting out with the EU Blue Card Directive, followed by the Pyrotechnic Articles Directive, Waste Framework Directive, Toy Safety Directive, Return Directive and, last but not least, the Stage II Petrol Vapour Recovery Directive.

8.7 SUMMARY

The six transposition cases are analysed using the case study method. The benefit of the case study method for the purposes of this book is that it allows for the detailed reconstruction of negotiation and transposition processes as well as an in-depth study of the role and effects of discretion therein. In each case study, this approach translates into the structure of a descriptive and explanatory analysis of both EU- and national-level processes. Case study research combining literature study, document review and expert interviews offer comprehensive data on which the analyses are based. This includes indicators to describe the concept and scope of the compatibility between EU directive and national (Dutch) law, a factor which is considered relevant in explaining reasons for the granting of discretion to Member States and its effects on the national transposition of directives.

