

Josephine Hartmann, 'A Blessing in Disguise?! Discretion in the Context of EU Decision-making, National Transposition and Legitimacy regarding EU Directives'

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A distinct characteristic of European Union (EU) directives is that they are only binding as to the results to be achieved and legal scholars have acknowledged that discretion is inherent to EU directives (Hofmann et al. 2011). However, scholars disagree on the normative implications of discretion and its general legitimacy (Dworkin 1977; Galligan, 1986; Hawkins, 1992). In social sciences, the normative question features less prominently. Instead, EU discretion is mainly analysed regarding its role for EU decision-making (Franchino, 2007; Thomson & Torenvlied, 2011) and transposition (Zhelyazkova & Torenvlied, 2009). J.H Hartmann's dissertation titled 'A Blessing in Disguise?! Discretion in the Context of EU Decision-making, National Transposition and Legitimacy regarding EU Directives' connects the legal scholars' interest in discretion with

the social scientists' insights on the delegation of discretion. In her dissertation, Hartmann specifically asks which role EU discretion plays in EU decision-making and transposition and which impact it has on the legitimacy of EU law (p. 12). Hartmann divides her research into EU level and national level questions. At EU level, she investigates the conditions under which discretion is delegated to national transposition actors. At national level, Hartmann aims to find out how discretion is used during transposition and how it affects the transposition outcome (p. 13). For the EU-level analysis, discretion mainly serves as dependent variable. For the transposition analysis, discretion is treated as independent (and mediating) variable to explain transposition outcomes. The dissertation has a clear structure. Hartmann first reviews legal

perspectives on discretion and its implications for legitimacy. She complements these views with political science and public administration literature regarding discretion. In order to develop testable expectations on the role of discretion in EU decision-making and national transposition, Hartmann primarily relies on the social science literature on delegation (e.g. Epstein & O'Halloran, 1999; Franchino, 2004; Huber & Shipan, 2002; Thomson & Torenvlied, 2011). Based on this literature, Hartmann argues that discretion in EU directives will be high under four conditions: first, when *the policy area* is less influenced by EU law (p. 57), second when the policy is *sensitive* (p. 58), third, when there is low *compatibility* between the EU directive and national legislation (p. 59), and fourth, when the *European Parliament* has

a strong role in the decision-making process (p. 61).

For the transposition level, Hartmann forms the hypothesis that discretion in EU directives will generally lead to better incorporation of the directives in national law (p. 66). Moreover, Hartmann establishes a range of expectations as to how EU discretion might mediate the effect of other factors on transposition outcomes. That is to say, she assumes that *disagreement* of the Member State with the directive limits the likelihood of compliance and the effect increases when discretion decreases (p. 67). Next, *compatibility* between EU directives and national rules will improve compliance and the effect will increase as discretion increases (p. 69). Furthermore, *administrative capacity* increases the likelihood of proper transposition but the effect decreases when discretion increases (p. 70). Finally, Hartmann assumes that the presence of many *transposition actors* increases the likelihood of deficient transposition and the effect will increase when discretion increases (p. 71).

The dissertation investigates the expected causal mechanisms empirically through in-depth case studies that examine EU decision-making for six EU directives in policy areas as diverse as migration, consumer protection and environment. For the transposition analysis, Hartmann examines the incorporation of the six directives in Dutch law. She uses an impressive amount of policy documents and several interviews with experts and administrative actors involved in EU decision-making and Dutch transposition to trace the decision-making processes. In order to determine the level of discretion in EU law, Hartmann makes an in-depth legal analysis of the six directives by developing a codebook to qualitatively investigate discretion (Chapters 6 and 7). Each of the six case studies has a descriptive part, which outlines the EU negotiation process and the Dutch transposition process (Chapters 9, 10, 11, 12, 13 and 14). At the end of each descriptive part, Hartmann discusses in an analytical section to what extent the case supports her expectations regarding the role of discretion for decision-making and EU compli-

ance. Following the case studies, the dissertation presents a comparative chapter where the directives are analysed in pairs along with the theoretical framework (Chapter 15). Hartmann concludes that the migration directives have considerably larger margins of discretion than the directives in the field of consumer protection and environment. This observation supports her expectation that the level of harmonisation of a policy determines the level of EU discretion (p. 383). Moreover, political sensitivity and compatibility with national law raise the level of EU discretion because it facilitates compromise. This mechanism becomes again particularly obvious regarding the conflict-ridden decision-making processes of the two migration directives.

Regarding the effects of discretion on transposition, the findings are more mixed: no clear pattern concerning the established expectations emerges, neither for directives with large margins of discretion, nor for directives with small margins of discretion (p. 383). For example, the analysis of the Returns Directive highlights that discretion, in combination with low compatibility with EU law and a high number of stakeholders can complicate transposition. By contrast, in the case of the Blue Card Directive, discretion combined with high compatibility facilitated transposition. Hartmann concludes that in the other cases, discretion did not play a significant role for Dutch transposition. This applies particularly for the Waste Framework Directive and the Stage II Petrol Vapour Recovery Directive with its limited discretion. While these inconsistent effects of discretion on transposition leave the reader somewhat puzzled with regard to theoretical implications of the findings, the analysis highlights that the effects of discretion are highly context dependent.

In the last chapter of the dissertation, the author returns to the concept of legitimacy and argues that despite the rather negative connotation of discretion in legal studies, discretion also has legitimacy-enhancing potential. By focusing on the output, input and throughput aspects of legitimacy, Hartmann argues that when discretion facilitates

compliance, it contributes to the realisation of EU goals which increases output legitimacy. Moreover, discretion may enhance input and throughput legitimacy of EU law because it gives national actors the opportunity to deliberate on EU law (pp. 399-400).

Generally, the dissertation is rich in nuanced observations and provides many thick descriptions on the role of EU discretion that may deserve a closer discussion. In the following I highlight the main theoretical and methodological contributions as well as the key conclusions drawn from the study. Connected to these achievements, I raise some critical follow-up questions.

Starting with the theoretical chapters, Hartmann developed her hypotheses carefully by zooming into the underlying mechanisms of delegation and compliance theories. The comprehensive discussion of legal and social science views on discretion is highly insightful. Hartmann's conceptualisation of discretion and legitimacy effectively combines social science and legal studies. Her discussion on the available literature shows that the disciplines have approached discretion from different angles. Hartmann illustrates that combining the approaches may be fruitful for the understanding of discretion across disciplines. Nevertheless, on a more critical note, the causal mechanisms assumed in the theoretical section sometimes blur a bit in the empirical analysis. For example, the theoretical chapter suggests that the level of conformity of the legal framework of the Member States and the EU directive determines if the Member States agree on a discretion-constrained directive. However, in the empirical chapters, Hartmann focuses mainly on compatibility between Dutch law and the EU legislative proposal to explain the level of EU discretion (e.g. p. 192). To me, it seems questionable if the focus on Dutch legal misfit can really test the expectation. Instead, the misfit of all national laws of the Member States seems relevant for the causal mechanism. Moreover, with regard to the expectations on the transposition level, Hartmann claims that discretion functions as mediator. Yet, her argumentation

seems to imply that she actually assumes moderating factors (p. 67). Thus, the causal relationship between discretion as independent variable for transposition outcomes and the other independent variables (political conflict, compatibility, administrative capacity, number of actors) remains somewhat implicit. With respect to the methodological contributions of this dissertation, the codebook to measure legal discretion in EU legal instruments particularly stands out. Hartmann's qualitative coding takes into account insights from legal analysis. Her detailed introduction of the codebook goes beyond existing quantitative measures of discretion (Epstein & O'Halloran, 1999; Franchino, 2007; Huber & Shipan, 2002) and has the potential to provide important content sensitive insights into the measuring of discretion. While the author acknowledges that the codebook does not serve to come up with concrete measurements of discretion and mainly serves as case selection tool (p. 406), I wonder why the author did not use the results of her coding more actively in her analysis. Particularly the results of the coding exercise per directive would have enhanced comparability. Beyond the operationalisation of discretion, Hartmann does not explain how she operationalised the other factors of her theoretical framework, such as the transposition outcome and the independent variables assumed to be mediated by discretion. Another question regarding the methodological approach arises concerning the paired comparisons. Hartmann claims that she uses a most similar system designs to compare the role of discretion in transposition (p. 347). However, I wonder if the conditions of a similar system design are really fulfilled. A most similar system design implies that cases differ on the dependent variable but are similar regarding background factors to identify the causal effect. In Hartmann's transposition analysis, the dependent variable is the transposition outcome. However, Hartmann selects the paired comparisons on the discretion level, which is one of the independent variables (Chapter 8). She keeps several 'background' factors, as far as possible, constant across the

comparative pairs (p. 365). Yet, beyond discretion the paired directives still differ on the theorised independent variables, the policy area and the dependent variable.

While the paired comparison raises some questions, the six case studies are a particularly strong part of the dissertation. The cross-sectoral design is highly insightful and tackles the policy sector bias of many EU implementation studies (Toshkov, 2011). The case studies show that the author took great effort to delve into the highly diverse policy areas and decision-making processes at EU and national level. They provide detailed and well-structured insights into six very different decision-making processes that go well beyond exiting quantities approaches towards discretion in EU law. Moreover, Hartmann does not shy away from highlighting inconsistencies in her findings regarding the expected mechanisms (p. 392).

Nevertheless, her conclusions also raise some questions. For example, Hartmann argues for several cases that discretion did not matter for transposition because there was no, or limited, discretion in EU law. This inference implies that Hartmann assumes that her expectations only run into one direction. Thus, we can actually not learn anything regarding cases where discretion is low or absent. This makes it a bit unclear why such cases were at all included in the sample. Alternatively, the developed expectations may run in two directions. In other words, the absence of discretion may also have an effect on transposition and the mediating effects. In order to shed light into this possibility, a table summarising how the six cases score on the independent and mediating variables, as well as the dependent variable could have been insightful.

Finally, while the concept of legitimacy takes a prominent role in the title and beginning of the dissertation, there is only a limited connection between the empirical analysis and the normative discussion on legitimacy. Nevertheless, Hartmann's discussion of discretion in light of legitimacy in the conclusion chapter provides interesting thoughts. Her normative discussion adds to the

existing literature by illustrating the possibly legitimacy enhancing aspects of discretion. At the same time, her discussion provokes also some remarks. First, by pointing at the positive implications of discretion for output legitimacy, Hartmann does not explicitly acknowledge that the more discretion EU law offers to the Member States, the less meaningful compliance with EU law becomes. Under discretion, Member States can in fact keep their legal *status quo*. In my view, it remains questionable if the goal of EU law is to keep the *status quo*. Moreover, regarding input and throughput legitimacy, it is not exactly clear to me why national actors are more legitimated to fill discretion than EU level actors. Considering that the author highlights that national parliaments and relevant stakeholders are typically not involved in national transposition, the potentials of discretion to increase throughput and input legitimacy may be limited. The questions raised above should not distract from the fact that Hartmann triggers a highly important debate concerning EU discretion and its legitimacy. So far, EU implementation studies only rarely investigated the role of legitimacy for EU implementation. However, considering the current legitimacy crisis of the EU, such discussions are more important than ever. By pointing at the potentially 'blessing aspects of discretion' Hartmann provides innovative views on legitimacy of EU law. Finally, Hartmann's dissertation constitutes a successful example of a multidisciplinary and interdisciplinary approach towards the role of discretion in EU law. By connecting literatures across and within disciplines, Hartmann's study provides valuable input for a wide range of EU scholars interested in EU decision-making, delegation and implementation.

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