Law and administrative discretion in the EU: value of a comparative perspective

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1. EU administrative discretion in a comparative perspective

The crisis-induced reforms of economic governance and financial market regulation in the European Union (EU) have reinforced the role of its executive. The stronger implementation competences of the European Commission in the area of economic governance, the role of the European Central Bank as lender of last resort and as supervisor of the European financial system, as well as the powers of the EU financial agencies are some of the changes that have re-shaped the EU.¹ Some have been

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¹ This paper is work in progress (apologies to the reader for the sometimes convoluted reasoning). Section 3, in particular, needs to be completed with different sources and revised. Comments are most welcome. This research is funded by the Netherlands Organization for Scientific Research (NWO), under the VENI grant scheme.

perceived as bypassing or exceeding the legal limits to the powers of the EU institutions defined in the Treaties and established in long-standing case law of the Court of Justice of the European Union. These accrued powers raise the question of how far legal norms may reach in limiting and structuring the exercise of discretion of the EU executive.

This question has been much debated in the EU in relation to the ability of EU primary law to contain the growth of powers of EU institutions and of EU created bodies, focusing on the constitutional and democratic implications thereof. High profile judgments of the Court of Justice that have endorsed the powers acquired and attributed to EU executive actors also fuelled the discussion.\(^2\) This paper takes a different angle. It returns to a classic theme of administrative law – discretion and its relation to law – core to the conceptions of rule of law (in the sense of Etat de droit or Rechtsstaat) that recent developments in the EU appear to have challenged. The focus is on how law may constrain and structure the substantive choices that EU administrators make within the spaces of discretion.\(^3\) A comparative analysis on how law and discretion have been addressed in national administrative law will lay the basis for a normative conception that stresses both the autonomy of EU administrative actors in making policy choices – even where doctrines of delegation would seem to deny it – and the role of law in structuring those choices beyond what courts might be willing or capable of enforcing. While discretion in legal writings has been predominantly addressed from the perspective of judicial control, the paper argues that the question of its relation to law is broader than what the judicial paradigm lets envisage.

Part 2 briefly outlines two approaches to administrative discretion in EU law and argues that they are anchored in a distinction between political choices and technical assessments. It explains the pervasiveness of the Meroni dichotomy between “wide discretionary powers” and “clearly defined executive powers” in interpreting the legal norms that attributed powers to EU agencies; it cursorily outlines one established standard of judicial review of discretion in EU law. Part 3 revisits classic themes of law


\(^3\) Law is used here to refer to legal norms that attribute and frame discretion and to legal principles and values that, in a constitutional system, administrative action ought to concretise and respect. On the principle of legality in EU law and on its difficulties, see Azouliai and Clément-Wilz, “Le principe de légalité” in Auby and Dutheil de la Rochère (eds.), Traité de Droit Administratif Européen (Bruylant, 2014), 543-563, pp. 544-55.
and discretion as developed in the legal orders of selected Member States. Some of those themes, theories and dogmas, have arguably been influential in the way administrative discretion has been approached in EU law, their variety notwithstanding. Probing into some of those discussions will both show those influences and highlight the limits of a classic administrative law view on discretion anchored on a judicial perspective. Classic does not mean uncontested. Building on the views that have contested the classic paradigm, Part 4 lays the foundations for a normative conception of law and discretion in the EU. It presents a unitary concept of discretion as a process of normative concretization in view of partially pre-determined ends and relativizes the distinction between political choices and technical assessments, between cognition and volition, which seems to pervade discretion in EU law and in some national doctrinal constructions. It points out that administrative discretion, even where it is not subject to judicial review, is a space that is not free from legal-normative determinations and, specifically, from the value judgments that underlie and are expressed in legal norms. Part 5 briefly outlines the relative normative consequences of two different comparative approaches to the study of law and discretion in EU law.

2. Two settings of discretion in the EU

Both the doctrine of delegation to administrative agencies in the EU, as revisited in the ESMA judgment, and the standard of review consistently invoked by the EU Courts when reviewing discretionary acts of the EU institutions convey, in different ways, an approach to administrative discretion that is anchored in a distinction between political and technical assessments.

In the ESMA case, the Court dismissed the claim of the United Kingdom according to which the powers of the European Securities and Markets Authority (ESMA) breached the limits of delegation as defined in previous case law. At stake was the power attributed to ESMA regarding the notification, prohibition or limitation of short-selling activities, sensitive, among other aspects, because such decisions override decisions of national competition authorities (either to act or not to act). The Court examined the nature of this attributed power taking as a starting point the dichotomy between “discretionary powers” and “clearly defined executive powers”, for which

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4 Article 28(1) and (2) of Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, O.J. 2012, L 86/1.
Meroni became a landmark ruling in EU law and which had grounded the UK’s plea and its contestation.⁵ The existence of “a significant number of factors” that define the parameters of discretion grounded the Court’s conclusion that ESMA’s powers are “precisely delineated” and “amenable to judicial review”.⁶

Although the Court did not go as far as stating that ESMA’s powers are not discretionary, by reiterating the Meroni dichotomy it also did not reject the assumption that these powers do not imply a “wide margin of discretion [that may] make possible the execution of actual economic policy”.⁷ This had been the argument of the Parliament (the decisions are determined not by policy considerations but by “complex professional considerations”), of the Council (“ESMA does not have any margin of discretion … it is obliged to adopt such measures if certain circumstances arise”) and of the Commission (“the assessment of factual elements referred to in the relevant legislation does not entail [ESMA] in making economic policy choices but simply in making a technical assessment in their field of expertise”).⁸ The Court did not reject these arguments. It stressed in several passages that ESMA’s powers refer to technical factual assessments or are in any event “dependent on specific professional and technical expertise”.⁹ The focus of its argumentation was the amenability of agencies’ powers to judicial review, rather than the nature of these powers: as long as they are amenable to judicial review, their legality is not affected.¹⁰ In the Court’s view, the various conditions legally established fulfilled this requirement. They detailed the powers of the agency in a precise way. Among them is the verification of whether there is a “any threat of serious financial, monetary or budgetary instability” that “may seriously threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union” or the possibility of a default by any Member State or supra-national issuer”.¹¹ The Court seemed to consider that the verification of this and other legal conditions requires complex technical assessments that rely on the professional expertise that the agency is well suited to muster.

⁵ ESMA, C-270/12, para 27 to 40.
⁶ ESMA, C-270/12, para 53 (reasoning on para 43 to 52) and para 105.
⁷ Case 9/56, Meroni v High Authority, EU:C:1958:7, as invoked by the Court in ESMA (C-270/12), para 41.
⁸ ESMA (C-270/12), para 35, 37 and 40, respectively.
⁹ ESMA (C-270/12), para 52, 82 and 105 (the last referring in general terms to the powers of agencies or bodies).
¹⁰ The fact that the powers at issue were part of larger regulatory framework – and consistent therewith – was another argument invoked by the Court to endorse ESMA’s powers (para. 44).
Where would the Court draw the boundaries of judicial review of ESMA’s discretionary decisions, should it ever be confronted with a legality challenge? EU Courts have maintained a pragmatic approach to review of administrative discretion of EU bodies and institutions. Yet, one may identify the main lines of how the EU Courts have reviewed legal acts entailing discretion, in particular when discretion is considered to stem from complex technical assessments. Where the EU institutions have wide discretion, judicial review is limited to examining whether procedural rules were complied with and whether an act contains a “manifest error or constitutes a misuse of powers, or whether the authority did not clearly exceed the bounds of its discretion”.

The formula has been relatively stable, yet the stringency of judicial review has varied significantly over time and across sectors. In an important tendency, which may be traced back to merger cases (specifically to Tetra Laval), the courts have performed a searching review of factual assessments, in a way that may “[potentially neutralize] de facto the very principle of the recognition of a margin of economic assessment”. In Tetra Laval, the Court of Justice acknowledged that the applicable legal provisions “[conferr]ed on the Commission a certain discretion, especially with respect to assessments of an economic nature”. Nevertheless, the Commission’s margin of discretion with regard to economic matters does not mean that “the [EU] Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature”. The Court added that the Courts must “establish whether the evidence relied on is factually accurate, reliable and consistent[,] whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it”. This line of reasoning has been confirmed in subsequent cases, in different policy areas.

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16 Case C-12/03, Commission v. Tetra Laval, EU:C:2005:87, para 38.

17 Case C-12/03, Tetra Laval, para 39; see also para 43, where the Court indicates that the Commission should reach “the most likely conclusion”. The ECJ upheld the judgment of the General Court (Case T-2/05, Tetra Laval v. Commission, EU:T:2002:264), refusing the Commission’s claims that the GC unjustifiably raised the standard of judicial review (thereby abandoning the manifest error of assessment
While the *Tetra Laval* standard of review does not cover the spectrum of possibly varying degrees of intensity of judicial scrutiny, it does indicate that the EU courts may go quite far when applying the test of “manifest error of assessment” to review discretionary decisions.\(^1\) They may not only scrutinize the information on the basis of which the act was adopted, the way the decision-maker has collected and treated that information but also assess the plausibility of the conclusions it took therefrom. Nevertheless, review appears to remain restricted to a control over complex assessments that ground the legal qualification of facts and, hence, constitute the basis of discretionary decisions.\(^2\) This approach arguably entails a distinction between complex technical assessments and public interest appraisals (that may entail policy choices). While the intense scrutiny of the complex technical assessments may lead to an assessment of the core of the discretion, possibly confining the choices that would be considered reasonable or plausible, the *Tetra Laval* type of review is arguably still about verifying the correctness of the factual basis of discretionary decisions, not the policy choices that stem from the exercise of discretion. It enables the courts to scrutinize those choices that follow logically from factual assessments – as a matter of cognition – not the choices that stem from balancing the public interests that ought to be pursued against those that may be forfeited in the given circumstances – a matter of volition.\(^3\)

This brief overview indicates that the distinction between technical assessments and policy choices pervades the way discretion is approached in EU law. Yet, the Court’s position in this respect remains ambiguous. It neither rejected nor explicitly endorsed this distinction in the *ESMA* judgment. Moreover, the boundaries that one may detect in...
the Tetra Laval type of review stem only from the starting point of review: judicial review of wide discretion is limited but it does not exclude an exhaustive control of the Commission’s interpretation of information that grounds complex technical assessments.

As will be seen below, the focus on judicial review when addressing discretion (salient in ESMA), the classic formula of limited judicial review in the face of wide discretion (on which Tetra Laval builds), the assumption (arguably implicit in ESMA) that the verification of criteria of action does not entail discretion, and the distinction between the technical assessments and policy choices resonate conceptions that have pervaded theoretical constructions on discretion and its relation to law in national legal systems. Revisiting some of those conceptions may contribute to a better understanding both of these traits of EU law and of the relation between legal norms, judicial review and discretion.

3. Discretion and law: selected themes

3.1. Excès de pouvoir and the boundaries of legality

Judicial review of discretion often implies, implicitly or explicitly, the definition of the boundaries of legality, i.e. of the aspects that courts may control. Apart from the more evident parallelisms that have been made between French law and EU law regarding the control of legality (the grounds of action as defined in the Treaty, the objective model of judicial review), the discussion held among French authors on the boundaries of judicial review is instructive for our purposes. What do courts control when they review discretion in an increasingly stringent way?

The discretionary power of the administration in France has been defined largely by the control judges have exercised in the recours pour excès de pouvoir. Excès de pouvoir comprises varied grounds of review (moyens), including irregularities regarding the legal and factual reasons (motifs), the purpose (but) and the content (contenu) of the act subject to control. According to established case law, administrative courts control the exercise

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22 E.g. the brief overview in P.-L. Frier and J. Petit (2008), Précis de Droit Administratif, Moncestrien, 5th ed., pp. 469-70; and J.-M. Woehrling (1999), “Le contrôle juridictionnel du pouvoir discrétionnaire en France”, Revue Administrative, Vol. 52 (7), pp. 75-97, at p. 75-6. The brief overview provided in this section is based on secondary sources, including classical works in French administrative law (the older pieces were checked against more recent sources to check their actuality). It aims at providing the classic and, presumably, prevailing view on discretion and judicial control in France. It is not a perspective immune to contestation. For a criticism, see Woehrling, p. 96-7.

23 The grounds of review mentioned in the text allow the courts to control the so-called internal legality of the fact. The external legality of the act may be compromised by lack of competence (incompétence),
of a choice made by the administrative body that, depending on where it is located in the
decisional process and on the degree of judicial control applied in each instance, may be
considered discretionary or not.24 Neither the determination of the applicable legal norms
and the verification of the factual elements that ground the decision, nor the purpose of
an administrative act are discretionary. In their examination of these elements, the courts
do not restrict the degree of judicial control, even if in practice there are considerable
difficulties in examining whether the act was adopted in view of a purpose different from
the one legally determined (détournement de pouvoir).25 Discretion may arise in the
appreciation of the facts and in their legal qualification, when the facts are put in relation
with the norms to determine whether the legal conditions are fulfilled and which action
to take in view of the factual and legal reasons – the core of the decision-making
process.26 In this respect, the judge may apply various degrees of stringency of control.
Hers is fundamentally a pragmatic choice where policy reasons (e.g. the need to avoid
conflicts with the administration in sensitive areas) and technical reasons (e.g. lack of
expertise needed to solve a given matter) alike may weigh in.27

One of the possibilities available to administrative courts is to control whether
the decision-maker committed a manifest error of assessment, a technique developed in
the case law of the Conseil d'État since the 1960s. Only evident mistakes may engender
illegality, as the exercise of discretion entails the possibility of error (which, therefore,
should not be judicially sanctioned). Nevertheless, the detection of what is manifest is
often only possible after a complex inquiry. Together with the subjective character of an
assessment of what is manifest, and with the pragmatism that characterizes the case law
on the control of discretion, this feature blurs the boundaries between this type of
control and a normal (i.e. not limited) control of legality.28 The degree of judicial review

procedural flaw (vice de procédure) and formal flaw (vice de forme). On these, see further, e.g., Frier and Petit,
Précis…, cit. supra note 22, pp. 471-3; Woehrling, “Le contrôle juridictionnel…”, cit. supra note 22, at p. 76.
24 Woehrling, “Le contrôle juridictionnel…”, cit. supra note 22, p. 76. Bonnard defended that the
identification of the discretionary elements of a legal act required an analysis and a differentiation between
the various moments of the making of the act (Bonnard, “Le pouvoir discrétionnaire…”, cit. supra note 30, p. 367-8)
26 Woehrling, “Le contrôle juridictionnel…”, cit. supra note 22, p. 77. Reasons should not be confused with
reasoning or motivation of the act. They refer to the causes and bases of a decision.
27 Woehrling, “Le contrôle juridictionnel…”, cit. supra note 22, pp. 78-80, 89-91; Frier and Petit, Précis…,
cit. supra note 22, p. 478-83. Pointing out the vain character of attempts to systematize the case law, and
Contrôle…”, cit. supra note 27, p. 285-89; Woehrling, pp. 85-86; Frier and Petit, Précis…, cit. supra note 22,
p. 478-79, 480-81.
performed by EU Courts on the basis of a very similar standard is often discussed in the same terms.\textsuperscript{29}

This brief overview reflects an historical evolution that saw, initially, the Conseil d’État and, later, other administrative courts progressively diminish the scope of discretion of the administration.\textsuperscript{30} This tendency appears to have prevailed despite the extension of the areas of intervention of the administration that occurred in particular since the 1970s.\textsuperscript{31} The close ties (including organic links) between the Conseil d’État and the administration may mitigate the objection to judicial control of discretion on grounds of the capacity of the judiciary to assess the substance of administrative decisions that rely on political, economic and social assessments, often escaping a logic of legality.\textsuperscript{32} They also diminish the institutional distance between the judge and the administrator.

The progressive extension of the scope of judicial control challenged the premise according to which when administrative courts control the legality of discretion they ought not to stray beyond issues of legality (understood in a large sense to include general principles of law, the constitution, international agreements, regulations, in addition to laws).\textsuperscript{33} It is noteworthy that this premise had been contested early on by Hauriou. Tracing the historical origins of the recours pour l’excès de pouvoir, Hauriou noted the mixed character of this legal action.\textsuperscript{34} At its roots, excess of power was different from legality and, in Haurou’s view, it kept in 1933 a distinct and more complex function. Beyond legality, he noted, there were rules of administrative conduct that can reach farther than the rules externally imposed on the administration in structuring administrative discretion. Excès de pouvoir covered also the control of these rules, and therefore included a dimension of control that would be typical of an administrator in a superior position. In particular, détournement de pouvoir, through which the Conseil d’État

\textsuperscript{29} See, e.g., references supra in note 19.
\textsuperscript{31} Wochriling, “Le contrôle juridictionnel…”, cit. supra note 22, p. 93. The same concerns that determined the expansion of judicial review in EU law, justified also the expansion of judicial review in France – see Braibant on proportionality, cited by Devolvé, “Exite-t-il un Contrôle…”, cit. supra note 27, p. 301; Wochriling, “Le contrôle juridictionnel…”, cit. supra note 22, p. 75.
\textsuperscript{33} Devolvé, “Exite-t-il un Contrôle…”, cit. supra note 27, p. 276-7.
\textsuperscript{34} Hauriou, Précis…, cit. supra note 30, p. 404-9.
controlled whether discretion had been used for purposes other than the safeguard of the general interest and the bien du service, could not be reduced to a matter of legality.35 Unlike legality, excès de pouvoir originated in an idea of self-limitation of power: “discretionary power defines itself its limits by an internal effort of reason”.36 One of such limits would be the moral consideration according to which, if not needed, the administration should not encroach upon the sphere of private life.37

Hauriou’s conception, despite naturally developed in view of the specificities of judicial control in France, is arguably capable of challenging the view according to which discretion and legality are mutually exclusive categories. If a court – even if one with the specific characteristics of the Conseil d’Etat – when controlling the exercise of discretion could review issues that are not strictly legal, arguably this would show the blurred limits between what is legality and what is beyond.38 Nevertheless, as the scope of judicial control expanded, legality seemed to absorb the moral considerations that, according to Hauriou, fell originally outside its scope. In fact, the moral consideration pointed out by Hauriou in 1933 would today be captured by the principle of proportionality.39

Hauriou’s view on excès de pouvoir was vehemently opposed by Bonnard. Focusing in particular on the control of the reasons (motifs) and of the purpose of the act, Bonnard pointed out that their control remained purely a control of legality and not a control of opportunité.40 There could be room for discretion in the identification of the causes and in the delimitation of the purpose of the act, depending on what would be legally specified

35 Hauriou, Précis …, cit. supra note 30, p. 406, fn 13, 406-8; 442-44. Implicitly in a similar sense, Le Droit Administratif Français, cit. supra note 28, p. 525, considering the détournement de pouvoir to be the minimal control of administrative morality.
36 Hauriou, Précis …, cit. supra note 30, p. 438. Hauriou goes as far as saying that légalité and excès de pouvoir are two divergent notions.
37 Hauriou, Précis …, cit. supra note 30, p. 440 (note for the author: a breach of this moral consideration lead to incompetence “ratione materiae” – to which he refers in p. 406).
38 The mutual exclusion between discretion and legality seems to pervade legal writings: see, e.g., Bonnard, “Le pouvoir discrétionnaire…”, cit. supra note 30, p. 388; Devolvé, “Existe-t-il un Contrôle…”, cit. supra note 27, 271 (he contraposes legality to opportunité, which he qualifies as a freedom of choice; on the relation between the two see note 40, below); implicit also in Frier and Petit, Précis…, cit. supra note 22, p. 470, who indicate that diving line between legality and opportunité moves to the detriment of the later as judicial review expands.
39 Considering that proportionality is not purely a legal parameter, see E. Schmidt-Assmann (2003), La Teoría General del Derecho Administrativo como Sistema, Marcial Pons, Madrid, p. 221.
40 Opportunité is used here as a synonym of discretion (pointing out the overlap between the two, Hauriou, Précis …, cit. supra note 30, p. 351), insofar as it generally refers to assessments that are external to legal determinations. Yet, this equivalence may be considered inexact. Some Italian authors make a similar distinction between discretion and merito (merito), the latter coming quite close to the French notion of opportunité. Merito is defined in negative terms as an area of free administrative activity, regarding the choice of options that are equally valid, reasonable and proportional, in line with the public interest. The merit of a discretionary choice is thus not subject to judicial control of legality (see, e.g., M. Clarich (2015), Manuale di Diritto Amministrativo, Il Mulino, 2nd ed., p. 123-4). This sharp distinction is, however, questioned (see B. Mattarella, “L’Attività” in S. Cassese (ed.) Trattato di Diritto Amministrativo, Milan: Giuffrè, p. 674-5).
in this respect. Yet, even if the law would be silent, the causes that determine the adoption of an act need to exist. Only then the competence of the decision-maker is regularly exercised. A decision that lacks underlying reasons is irregular, because it defies a rational process of decision-making. It is illegal, because it breaches the customary rule according to which an act needs to have a motive. Even if one needs to adopt a large meaning of legality, the causes of an act are always an element of legality and are as such subject to judicial control. Depending on the content of the applicable law, there might be discretion in the assessment of the value of those underlying reasons, but not in their existence.\textsuperscript{41} Similarly, the judicial control of the purpose of the act is also a control of legality, since an act needs to be practiced in view of a goal that is legally endorsed. Even if the goal is only defined in abstract terms, the purpose of an administrative act ought always be one of \textit{service public} and it is always a legal element of the act.\textsuperscript{42}

Several decades later, Devolvé attempted to overcome the assumption that an extended control of administrative acts, while narrowing down the scope of discretion, had breached the tenet that judges ought not rule on issues of \textit{opportunité}. The question, as Devolvé noted, was politically salient since it delimited the boundaries of credible judicial intervention. By then, most of his contemporaries – among them a significant number of authoritative administrative law scholars – admitted that judicial control could go beyond legality. In an attempt to refine this doctrine, Devolvé stressed that the \textit{Conseil d'État} when acting judicially performs a control of conformity with norms. Although the \textit{Conseil d'État} does not fully stray away from issues of \textit{opportunité}, Devolvé argued that issues such as the characteristics of monuments that may justify their classification, the representative character of a trade union, or the urgency that justifies the expulsion of a foreigner are not matters of \textit{opportunité} but rather pertain to the qualification of facts, the assessment of which a legal norm requires before an act is adopted.\textsuperscript{43} At stake is the assessment of whether the facts at issue have the legal nature needed to trigger the application of the norm. In his view, the improvement of techniques of control via mechanisms such as the \textit{théorie du bilan} had not changed the nature of the control made.\textsuperscript{44}

\textsuperscript{41} The point was not whether the causes or reasons had been stated or not. At the time, most administrative acts did not need to be accompanied by a statement of reasons. Bonnard’s point is that any legal act needs to have underlying reasons and that the very existence of these reasons or causes (rather than their expression) is an element of the legality of the act.
\textsuperscript{44} Devolvé, “Existe-t-il un Contrôle…?”, cit. supra note 27, p. 291-2.
The emphasis placed on the rational elements of a decision-making process as an element of their legality (Bonnard) and on the verification of the conditions that a norm attaches to the exercise of discretion (Devolvé) enables the perpetuation of the assumption that, no matter how far an administrative court decides to go in each instance, judicial control is always restricted to a matter of legality. In this conception, situations in which judicial control generates rules that were inexistent before the instance of control and cases when such control leads the court to examine issues the legal nature of which are far from evident, do not alter that conclusion. Crucial is the ability of courts to control administrative choices to preserve the tenets of the *Etat de droit*, an approach that is arguably recognizable in the ESMA judgment. The same concern underlines the conventional approach to administrative discretion in German law, albeit with a different focus (subjective protection of rights, rather than the objective control of legality).

3.2. Undetermined legal concepts

The discussion on what administrative discretion is, what it entails and how it relates to legal norms has in Germany, as in France, been dominated by the evolution of judicial review. In Germany, full control of matters of fact and of law is anchored on Article 19(4) of the Basic Law, a provision that, while focused on the judicial protection of any person’s rights, has resulted in intense judicial control of administrative action and a considerable reduction of the space of discretion. Taking as a reference point the different logical moments of decision-making, doctrinal analyses of discretion conventionally distinguish factual assessments, the interpretation of the applicable legal norms, the subsumption of facts in the legal norm and the determination of the ensuing legal consequences. All may be subject to full judicial control, as a result of the

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46 This section requires substantive revision. A few details need to be double-checked.
48 An approach also seen in French law (see note 24 supra). This distinction appears in textbooks as a premise to the study of discretion (e.g. H. Maurer (2009), *Allgemeines Verwaltungsrecht*, Beck, 17th ed., pp. 133-4).
constitutional norm on rights’ protection before the exercise of public authority.49 Limits to judicial control are admitted to preserve the space for choices (of a discretionary or similar kind) that are under the responsibility of administrative decision-makers, but such limits need to have a legal foundation – i.e. it must be possible to determine via interpretation of the applicable legal norms that these intended to attribute discretionary power to the decision-maker and to limit judicial control thereof.50

One distinctive feature of the German legal system is the richness of analytical distinctions aimed at refining discretion and its relation to law, even if the limits of this approach are also acknowledged. In fact, it is conceded that the ways in which legal norms bind and delimit the margins of maneuver of administrative decision-makers are too varied to fit within a satisfactory typology.51 Part of that doctrinal elaboration is a distinction between undetermined legal concepts (unbestimmte Rechtsbegriffe) and discretion (Ermessen).52 It has been accompanied by a sharp partition of the legal norm in the part that defines the conditions under which a decision-maker may act (Tatbestand), on the one hand, and the part that indicates the possible legal consequences (Rechtsfolgenfolge), where discretion may be attributed, on the other. Despite the discussion and contestation of this dogmatic approach to discretion, it still seems to remain influential in German administrative law.53 It could be one way of explaining, in part, how the Meroni distinction between “wide discretion” and “clearly defined executive powers” has been virtually set in stone in EU law and the way discretion and law appear to be conceived in the ESMA ruling. It will be briefly explained next.

Legal norms use undetermined legal concepts when defining the conditions of administrative action (Tatbestand), such as “public order”, “harmful effect of the environment”, “best available technique”, “important reason”. There are different causes of indeterminacy, and different types of undetermined concepts. Where they are

52 The distinction between discretion and undetermined legal concepts is not exclusive of German administrative law (see e.g., M.S. Giannini (1939), Il Potere Discrezionale della Pubblica Amministrazione, Concetto e Problemi, Milano: Giuffrè pp. 69-70, referring to what, in the German construction, would be undetermined legal concepts), but it has been at the core of the analysis of discretion in this legal order. As will be indicated below, it has influenced the administrative laws of other states.
determinable by the verification of facts (empirical concepts, such as “local custom”, scientific concepts regarding which there is consensus), they are in principle subject to full judicial review and may therefore have been determined by previous case law, even if the later may be continuously adapted.54 Discretion is, in principle, excluded (although there are exceptions, e.g. when such assessments are, by legal determination, made by independent expert committees in cases of urban planning or activities with relevant political impact). The indeterminacy of other type of concepts may entail a space of concretization that may be left to the responsibility of the administration (normative or value concepts).55 They do not seem to infringe the constitutional principle of sufficient normative determination. They may be subject to full judicial control unless, via interpretation, it is possible to determine that the legislator intended to leave a margin of appreciation to the decision-maker (Beurteilungsspielraum).56 Yet, this seems to be accorded only exceptionally.57 When the definition of the meaning of such undetermined notions requires specialized technical knowledge, this reason alone will not suffice for the administrative courts to recognize a margin of appreciation to the decision-maker.58 The problematic character of complex technical evaluations hinges then on the organization and procedure of the body in charge, which should provide enough guarantees to ensure a complete and impartial interpretation of the terms at issue.59 At any rate, the definition of the content of undetermined legal concepts seems to be predominantly understood as a matter of cognition and legal interpretation, not as a source of discretion. Administrative discretion, on the contrary, requires volition in the definition of the content of the act or in making a choice that is allowed by law. In a conventional understanding, administrative discretion would emerge in the determination of legal effects, i.e. in the definition of the content of the act (Rechtsfolge).

Some authors consider that the conventional view anchored in these distinctions has been overcome, at least to a considerable extent. Discretion would then be admitted, by legislative attribution, also in the part of the norm that defined the factual conditions

54 Wolff, Bachof and Stober, Direito…, cit. supra note 46, p. 450-1.
55 Maurer, Allgemeines Verwaltungsrecht, cit. supra note 53, p. 146.
56 Wolff, Bachof and Stober, Direito… cit. supra note 46, p. 453-8. Maurer, Allgemeines Verwaltungsrecht, cit. supra note 53, p. 146. The term was coined by Bachof in the 1950s and as been subject to contestation (Maurer, Allgemeines Verwaltungsrecht, cit. supra note 53, p. 145 and 148. For a glimpse on the discussion of the constitutional issues that this doctrine raises, see Maurer, Allgemeines Verwaltungsrecht, cit. supra note 53, p. 147-8.
59 Bullinger, “Le pouvoir discrétionnaire…” cit. supra note 51, p. 687. [update]
of action. In this view, the holders of discretionary power concretize the directives stemming from legal norms under their own responsibility. Schmidt-Assmann, for instance, endorses a large notion of discretion encompassing the choices of administrative decision-makers entailed in the concepts of Ermessen and Beurteilspielraum. In his view, these convey different techniques of normative formulation that, from a methodological perspective, should be treated in similar terms. Yet, the discussion continues, also under the influence of EU integration. The fact that this distinction is not as sharply made in other EU legal orders could hinder a discussion and understanding of the same problem across borders. In any event, how far judicial control may go in cases where the legislator intended to attribute discretionary power remains a point of contention.

The distinction between discretion and undetermined legal concepts has been influential in other legal systems in Europe. García de Enterría and Fernandez Rodriguez, leading Spanish administrative law scholars, explicitly invoked the merits of the German legal doctrine. In their view, this conception overcomes a major confusion that has marked the history of administrative law. Undetermined legal concepts do not support quantification or rigorous definition. They may rely on experience (e.g. capacity to exercise a function, urgency) or on value assessments (e.g. public utility). But they are concretized in the moment of qualification of the concrete circumstances to which they are applied. These authors endorse a view that takes the distinction to an extreme, by defending that at the moment of law application, undetermined concepts entail only one fair solution (e.g. in the face of a given factual situation, either there is harmful effect to the environment or there is not such an effect). Their concretization is a matter of

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60 Bullinger, “Le pouvoir discrétionnaire...” cit. supra note 51, p. 689. See also Maurer, Allgemeines Verwaltungsrecht, cit. supra note 53, pp. 146-7, yet critical of this position.
63 The argument is made by Schmidt-Assmann, “La teoria general...”, cit. supra note 39, p. 221.
65 Indicating the recent reception of the term undetermined legal concepts in Italian case law, see Clarich, Manuale..., cit. supra note 40, p. 115. For a glimpse of its influence in Portuguese administrative law, see inter alia, M. Rebelo de Sousa e A. Salgado Matos (2008), Direito Administrativo Geral - Tomo I - Introdução e Princípios Fundamentais, Lisboa: Dom Quixote, p. 190ff (I am grateful to Filipe Brito Bastos for this reference); and B. Diniz de Ayala (1995), O Dífe de Controlo Judicial da Margem de Livre Decisão Administrativa, Lisboa: Lex, p. 120, p. 128-9; 150-52, arguing that undetermined legal concepts give rise to a form of autonomy which is not administrative discretion. A view that is contested by other authors in Portugal (e.g. J.C.Vieira de Andrade (2011), Líios de Direito Administrativo, Coimbra: Imprensa da Universidade, pp. 47-49).
67 Maurer, Allgemeines Verwaltungsrecht, cit. supra note 53, p. 144 (but see p. 146).
subsuming concrete real circumstances under a situation that is legally determined. Their interpretation does not entail a choice between various possible solutions, typical of the power of discretion. It is an intellectual process of understanding a reality on the basis of the evidence collected, in accordance with the sense intended by the use of the undetermined legal concept. For this reason, it is a process that, as a matter of principle, should be subject to full judicial control, unlike the process of making a choice between alternatives that are equally valid before the law.\(^{68}\) The consequence of this construction is clear: an expansion of judicial control that narrows down the scope of discretion.

Also in EU law, this distinction between undetermined legal concepts and discretion proper seems influential, at least in legal commentary.\(^{69}\) It could be one way to explain and justify the ESMA ruling. In this view, the verification of whether, inter alia, there is a “threat of serious financial, monetary or budgetary instability” would amount to filling in undetermined legal concepts via an essentially cognitive process. To the extent that they are determinable by resorting to specialized knowledge, verifiable, despite possibly subject to different expert views, this legal condition would be one among others delimiting ESMA’s executive power in a sufficiently precise way. The argument would be reinforced by an additional consideration. The function of the mentioned requirement in the legal norm attributing discretionary power is to delimit the terms under which ESMA may lawfully prohibit or limit short-selling activities (\textit{Tatbestand}). The proponents of this approach would argue that, as such, it cannot attribute discretion. ESMA’s discretion in this case is limited to choosing whether it requires notification of short-selling positions, or it prohibits or imposes restrictions on transactions, since the possible consequences (\textit{Rechtsfolge}) are indicated as alternatives.\(^{70}\) The argumentation of the Parliament and the Council in this case does not stray far from this view. The Parliament points out that the ESMA’s decision is only permissible if intended to address certain “well-defined threats”, requires a high level of technical expertise, and is subject to very specific criteria and limitations; the Council stresses that EMSA is obliged to adopt the measures envisaged “if certain circumstances arise” and that these will be executive decisions (i.e. non-discretionary) adopted in a “specific factual context”.\(^{71}\)


\(^{70}\) Art. 28(1)(a) of Regulation (EU) 236/2012, cit. supra note 4.

\(^{71}\) ESMA (C-270/12), para 35 to 38.
Yet, as mentioned, the rigidity of this approach to discretion has been subject to critique in the legal order where it stems from. As will be seen below, that critique may be the ground to an alternative view, which is arguably more pertinent to understand the discretion ESMA has been given, and, a fortiori, the discretion of the EU institutions when acting in an administrative capacity.

3.3. Interest appraisals and technical assessments

A distinction between discretion proper and technical discretion has pervaded Italian doctrine and jurisprudence under the influence of the work of Giannini. In a monograph of 1939, written with the purpose of defining the dogmatic notion of administrative discretion and identifying its basic attributes, Giannini identified discretion as the margin of choice stemming from the comparative assessment of public and private interests that conflict in a given situation. In his view, discretion enables the search of the solution that best serves the public interest and is guided by the value the legal norms attributed to the conflicting interests, as constructed by the administrative decision-makers. When making a discretionary choice, administrative decision-makers need to consider not only the interest that the enabling legal norm identifies as the purpose of the act (primary public interest), but also other public interests that are legally protected (secondary public interests). No interest exists in isolation from others. The later may impact on the value decision-makers should give to the public interest that constitutes the raison d’être of its power; their protection may even prevent the pursuance of that public interest. Crucial is the assessment of the circumstances in which the decision is taken in view of the value judgments inherent in the applicable legal norms.

Different from discretion proper are choices entailed in technical assessments. While the former refers to value judgments stemming from the weighing of public interests, the latter consist in the verification and qualification of facts by application of

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73 Giannini, Il Potere Discrezionale…, cit. supra note 52, p. 74-75, 78 (on the intention of his monograph, see p. 10)

74 Giannini, Il Potere Discrezionale…, cit. supra note 52, p. 76-79. For the examples of the jurisprudential reflection of this idea in cases of the 1990s, see Mattarella, “L’Attività”, cit. supra note 40, p. 670, fn 156.
technical or scientific concepts. Such assessments may be subject to different opinions and be disputed, but the margin of choice that they may entail (technical discretion) is considered distinct from the choices implied in the exercise of discretion. They do not require an act of volition that discretion presupposes. Technical discretion and discretion proper thus refer to different moments of the decision-making process, which are often treated as logically distinct: factual assessments and public interest appraisals, respectively.

It is noteworthy that, while this seems to be the prevailing view under the influence of Giannini’s thesis, Giannini indicated that the distinction between the two types of judgments is far from certain. In his view, where technical assessments do not lead to an unequivocal solution, the choice between alternatives entails discretion proper. More importantly, in his conception, discretion entails both cognition and volition. Discretion presupposes understanding and establishing the relationships between conflicting public interests and determining the value that should be attributed to each – making a choice on the basis of such assessment. Furthermore, in Giannini’s view, while there is not discretion proper without an act of volition, the cognitive aspect of discretion may be determinant to weigh the public interests that forms the core of discretion and may be governed by the non-legal concepts and rules to which legal norms refer. The dichotomy cognition/volition is thus not a decisive criterion to distinguish discretion proper and technical discretion. A different view, which appears predominant, would stem from a wrong reading of Giannini’s work. As defended in his monograph, the difference would rather lie in the type of judgment that precedes the act of resolution or determination (volontà: based on scientific criteria, in the case of technical discretion, or on the identification of the value judgments on the public

75 Giannini, Il Potere Discrezionale... cit. supra note 52, p. 42-3, according to whom “technical discretion gives rise to a scientific assessment, pertaining to the natural phenomenon, not in relation to other social phenomena”, while discretion proper gives rise to an assessment of political nature pertaining to a social phenomenon linked to other social phenomena. These are two different types of judgments of advisibility (opportunità). See also Clarich, Manuale..., cit. supra note 40, p. 125.
76 Considering that the term “technical discretion” (discrezionalità tecnica) is inaccurate for this reason and preferring the term “assessments that require specific technical competences” (valutazioni che richiedono particolari competenze tecniche), used in Italian positive law, see Clarich, Manuale..., cit. supra note 40, p. 125.
77 Cases where they coexist may be referred to as mixed discretion (discrezionalità mista) – see Clarich, Manuale..., cit. supra note 40, p. 126, critical of the term.
78 Giannini, Il Potere Discrezionale... cit. supra note 52, pp. 44-45.
79 Giannini, Il Potere Discrezionale... cit. supra note 52, p. 79-81.
80 Giannini, Il Potere Discrezionale... cit. supra note 52, p. 70, 81 and 85.
interests at stake that the decision-maker concludes to be enshrined in the applicable legal norm, via a comparative assessment, in the case of discretion proper.\(^{82}\)

The consequence of denying a sharp distinction between technical and discretion proper on the basis of a criterion of cognition/volition would be that the two types of judgment should be subject to a similar type of judicial control, limited to the verification of objective factors without entering the realm of disputed judgments.\(^{83}\) However, more recently, the tendency of judicial control of discretion by Italian administrative courts appears to favour a stronger control of technical assessments.\(^{84}\) Judicial control entails not only the verification of whether there have been errors of assessment or incongruences, but also whether the technical assessments have been made on the basis of logical argumentation and well structured techniques.\(^{85}\) This development resembles a similar evolution in EU law, as indicated above.\(^{86}\)

The way the distinction between discretion proper and technical discretion has predominantly been received in Italian doctrine resembles the German dichotomy between discretion proper and the choice stemming from undetermined legal concepts,\(^{87}\) and has been influential in other legal orders.\(^{88}\) Giannini’s work indeed made this distinction. Yet, his deeper analysis of the connection between elements of cognition and volition entailed in the exercise of discretion seems to have remained lost in some of the subsequent accounts. It sets the ground for developing a broader view on discretion that is arguably more suitable to capture the complexity of this phenomenon.\(^{89}\)

3.4. Comparative assessment: a judicial paradigm of discretion

The doctrinal constructions briefly accounted above express a conventional view on discretion and law focused on the judicial control of discretion, one that is arguably pervasive (even if also contested) in legal doctrine, and that has been influential in the way administrative discretion is understood in EU law.\(^{90}\) Those constructions reflect the often complex and intricate case law in the various jurisdictions where they have

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\(^{82}\) Giannini, *Il Potere Discrezionale…*, cit. supra note 52, p. 74-75.


\(^{85}\) Clarich, *Manuale…*, cit. supra note 40,p. 125

\(^{86}\) Section 2. See, further, Mendes, “Discretion, Care and Public Interests”, cit. supra note 13, pp. 427-37.

\(^{87}\) Making the parallel between empirical undetermined legal concepts and technical assessments, see Clarich, *Manuale…*, cit. supra note 40,p. 124.

\(^{88}\) E.g. in Portugal Ayala, *O Défice de Controlo Judicial*, cit. supra note 65, pp. 112-4.

\(^{89}\) See Sub-section 4.3. below.

\(^{90}\) For two examples of this approach, see Craig, *EU Administrative Law*, cit. supra note 14, and Ritleng, “Le juge communautaire de la légalité…” cit. supra note 12.
emerged; at the same time, they have shaped, to a greater or lesser extent, the approaches to the discretionary power of the administrations in national legal systems. They reflect also the history of these legal systems. It is perhaps no coincidence that influential Spanish authors writing three decades after the democratic transition praised the German distinction between undetermined legal concepts and discretion as a hallmark of enhanced judicial control over the discretionary power of the public administration.

The distinctiveness of the various legal systems, including the processes of judicial control, would advise against both direct transpositions of doctrinal constructions and too superficial critical assessments of their value. Yet, at a certain level of abstraction they have traveled between legal systems. It is also possible to identify some common features stemming from the shared focus on judicial review. The role of administrative courts in reviewing discretion is largely dominated by the concern to tame an otherwise unbridled authority. Even if most contemporary authors would acknowledge and stress the merits of a space of autonomy that is constitutionally given to administrative decision-makers, the prevailing assumption still seems to be, implicitly or explicitly, that in an ideal state of realization of the rule of law (in the sense of Etat de droit, Rechtsstaat, or Stato di diritto), administrative powers should be bound by law in their entirety and, as such, subject to judicial review.\(^91\) That this is also the starting point of critique by proponents of “new administrative law” shows how pervasive this approach remains.\(^92\)

a) “Negative” discretion

From the perspective of judicial review, discretion tends to be approached in negative terms. It is defined by the absence of legal norms or principles that, once interpreted, would be capable of indicating the solution that should apply in a specific case. Discretion entails a choice that is not legally determined, in the sense that it is not given or discernable via interpretation. Yet, since the exercise of such choice is valid as long as it does not go beyond limits that are nevertheless legally defined, the scope of discretion is also determined by the degree of judicial control. Discretion is defined even in a residual manner, as “what is left outside of judicial control”.\(^93\) It extends as far as the

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judge allows when performing a control of legality. It is the role of courts to determine via the interpretation of legal rules and principles what was the scope of choice that an administrative decision-maker had in each instance.

In this view, judicial review and discretion are seen as mutually exclusive and antagonistic phenomena: if courts stray beyond the boundaries of legality, they risk annihilating the margin of discretion that administrative decision-makers would otherwise have. Yet, such a discussion eludes two important points. First, it shuns the difficult delimitation of the boundaries of legality, as evidenced by the discussion between French administrative lawyers on the distinction between legality (légalité, in a broad sense, including general principles of law, European and international norms) and advisability (opportunité). The argument invoked by Bonnard to claim that judicial control over the motives of an act is still a control of legality is illustrative in this respect. It led him to transform a rational element of decision-making – every act needs to have a cause – into an aspect of the legality of the act, even if taken in a broad sense to include customary law.94

Second, the assumption that a control of a discretion ary decision may curtail or annihilate the space of discretion overlooks that judicial control could be better perceived as a second step in the process of regulation, in which courts rather than weakening the position of the administration may collaborate (undisputedly in a different role) in the achievement of a solution for a complex socio-economic reality.95 In doing so, rather than destroying a space of choice between various possible alternatives that administrative decision-makers would otherwise have, courts may structure the exercise of discretion in a way that may contribute to the future quality of administrative decision-making. The classic view on discretion and judicial control overlooks the way in which the courts shape the role of law (in its broader sense of a normative legal order that bears fundamental political-legal values) in structuring discretion, beyond the possible limiting effects of judicial control. One example of the more systemic effects of judicial review is the aftermath of the Tetra Laval ruling: the appeal judgment of the Court of Justice was one among others (decided in a similar sense) that triggered profound changes in merger control policy, by, inter alia, reinforcing the importance of grounding completion law and

94 Bonnard, “Le pouvoir discrétionnaire…”, cit. supra note 30, p. 388. Today, the motives of an administrative act are an element of legality controlled by French administrative courts.
policy on “economic learning”.

The prevailing negative view on discretion that a judicial paradigm still conveys arguably fails to capture the complexity of the interaction between legal rules and discretion.

b) Doctrinal constructions

The pragmatism pointed out by French authors to characterize the approach of administrative courts in determining in each instance what is the suitable degree of review is also a feature of judicial review of discretion in EU. They have typically performed a more stringent control in competition law cases (anti-trust and state aids), risk regulation, and fundamental rights, and less severe in the review of discretion in common policies, in particular in agriculture. But there is also variation within given policy areas. It is difficult to anticipate with a fair degree of certainty how EU courts will review discretion. The boundaries between the spaces of discretion, where in principle courts should not enter, and spaces of judicial review are to a significant degree blurred and shifting. While acknowledging that this essentially pragmatic approach enables the courts to the specificities of each case, some authors are critical of the lack of coherence of the case law, in particular by contrast with the long-established analytical frameworks developed in some national legal orders, which were cursorily revisited above.

Those frameworks provide a grid of analysis that could be analytically helpful in identifying the moments and types of discretion and in defining the role that courts should have in the control of discretion. Normative arguments would prima facie seem to support their transposition to EU law. Increased legal security; coherence that would both avoid the impression of double standards and prevent unnecessary divergences between national courts and EU courts; refinement of procedural and legal tools that could lead to increased degree of judicial review where justified would be some of the reasons to apply them to EU law.

98 Craig, EU Administrative Law, cit. supra note 14, p. 437.
99 P. Pescatore (1992), “Commentaire de l’article 164” in V. Constantinesco, J.P. Jacqué, R. Kovar and D. Simon, Le Traité Instituant la CEE. Commenataire Article par Article, Economica, pp. 941-74, at pp. 969-70, pointing out that “the definition of the reciprocal areas of action of the political powers and the judicial power can only be determined in view of the nature of the conflicts and of their respective constellations.”
decisions stemming from the weighing of competing interests, decisions entailing complex factual assessments and decisions resulting from the interpretation of unclear legal rules may be discernable in some case law and the EU Courts should apply it consistently. Others point out the confusion patent in the case law between technical issues and the margin of decision that should be left to the political-administrative institutions, grounding the distinction largely in the constructions that have been revisited above. They stress that complex technical assessments lead not necessarily to several possible outcomes. Where they do, the EU Courts should resort to expert evidence without fear of substituting their appreciation by that of the institution, which stems from “inferring discretion from technicality”.

Nevertheless, the distinctions between different types of discretion and between discretion and similar phenomena provide no easy recipes, either to solve the inconsistencies of the case law or to clarify the role of law in structuring administrative discretion. Irrespective of a critical assessment of the type of review that courts should perform that they may ground, one should guard against the formalism that they may engender. Given their rationale – determine the scope of discretion in view of the possibilities of judicial review – these distinctions may convey a formal view on the powers of administrative entities that does not reflect the scope of autonomy that in reality they may have. Thus, the distinction between undetermined legal concepts and discretion may hide that, even if the former may be subject to full judicial control, they pose questions that are primarily answered by the decision-maker and that the ways in which they tackle complex issues may be determinant in the type of control that the courts may be able to perform. In addition, depending on the degree and quality of their indeterminacy, they may open a space of choice that may condition the definition of the content of the act. Conversely, by dissecting the legal aspects that condition discretion subject to review from the others that should remain the responsibility of administrative decision-makers, such distinctions may endorse the view that discretion is a space free from legal-normative determinations. The argument would be: if courts go as far as there

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102 Caranta, “On Discretion”, cit. supra note 72, p. 195, 198-204, 214-15, pointing out that policy choices are of a different kind from interpretation choices, Caranta concludes that “consistency in case law would be enhanced if Community Courts were to accept this simple truth, word it clearly, and abide by it” (p. 215).
104 In a similar sense, though referring to the distinctions made by French scholars between, see A. Queiró (1942), Reflexões sobre a Teoria do Desvio de Poder em Direito Administrativo, republished in Estudos de Direito Público, Vol. I, 1989, at p. 103-4.
105 See, further, Sub-section 4.3. below.
is legality to control, beyond what they control there is no relevant element of legality. Yet, as will be defended below, the fact that a discretionary choice should remain the responsibility of the administration, not subject to judicial review, does not mean that such a choice ought not be guided also by legal criteria. Finally, the proponents of adopting such distinctions in EU law also ignore the critical voices in national legal orders that point out how much such categories are attached to a court-centric paradigm of discretion.

4. Discretion and law beyond the judicial paradigm

4.1. Discretion as a construct of law

The classic perspective on discretion focused on judicial control, by stressing the legal foundations, limits and criteria of discretionary power, leaves outside of its radar the institutional and organisational settings that, beyond legislative, constitutional and international rules and general principles of law, condition the exercise of discretion. The legal norms that attribute and delimit discretion stem from and are embedded in complex political and bureaucratic processes that shape the way executive actors concretise those norms, in particular in the exercise of discretion. Far from ignoring these processes, the context-sensitive aspect of judicial review of discretion largely determines the pragmatism pointed out above. Nevertheless, these aspects may be overlooked by doctrinal elaborations of case law that delimit the spaces of administrate discretion and those of legality and, on this basis, build divisions and sub-divisions intended to delimit the purview of the reviewing courts. If one overcomes a perspective on discretion focused on control, and adopts instead the perspective of the administrative process, the question on the relation between law and discretion is no longer how far courts may reach when reviewing discretion, but how legal norms operate in the spaces of discretion that legal norms attribute to decision-makers.¹⁰⁶

Discretion is a construct of law. It is the authority attributed to decision-makers to choose between different alternatives when concretizing legal norms with a view to pursuing the previously defined ends.¹⁰⁷ Legal norms that attribute and delimit discretion

¹⁰⁶ Questioning whether the predominant perspective of judicial control is capable of encompassing all the relevant aspects that a theory of administrative discretion raises, see, among others, Schmidt-Assman, “La teoria general…”, cit. supra note 39, p. 220.
¹⁰⁷ In a similar sense, referring to previously defined ends, Schmidt-Assman, “La teoria general…”, cit. supra note 39, p. 220. Similarly, Franzius, in Voßkuhle, p. 192. Giannini, Il Potere Discrezionale…, cit. supra note 52,
grant authority by reference to the pursuance of public interests (e.g. the protection of public health, the international competitiveness of a given industry, financial stability, etc.). By identifying public interests even if at a high level of generality and, accordingly, defining the conditions that decision-makers need to abide to when exercising discretion, legal norms reflect a compromise between competing interests that reacts to specific social-economic, political or cultural contexts. They also define the terms of prospective action. They define normative programmes that reflect value judgments on which public interests should be protected, weighed, given preference or sacrificed by decision-makers when performing their administrative function. Discretion is not only created by law; it is the ability to make a choice that best concretizes the normative programmes that political processes have converted into legal norms, to choose the options that best fulfill the public interests that are legally protected, in accordance with the founding values and legal principles that ground the legal order of which they are part.

Conceiving discretion as a construct of law and as a concretization of law (in a large sense that transcends the enabling legal norms), as highlighted here, neither annihilates the ability to make a choice that is the core of discretionary power nor the autonomy of administrative decision-makers that discretion expresses. The public interests that, by legal determination, should be protected, weighed and pursued in each instance are defined at a high level of abstraction (even if they may be concretized by the criteria of action that are legally defined). The value judgments that legal norms enshrine may be subject of different interpretations and justify different solutions depending on the factual circumstances that require regulation. Both are determinable and determined via the intervention of decision-makers to whom discretion was attributed. However, it stresses that, even in areas where legality is thinner (because of the indeterminacy and open-ended character of legal norms, or because of decision-making that escapes formalized processes), as well as in areas where discretion is delimited by a series of legal

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108 The idea that the pursuance of public interests is the essence of administrative action, particularly relevant in the exercise of discretion, is widely acknowledged among administrative law scholars (e.g., Giannini, *Il Potere Discrezionale*, cit. supra note 52, p. 46. The consequences thereof to the delimitation of the role of law in structuring discretion are however not often elaborated outside analyses on the scope of judicial control, despite important pointers sometimes given. On these, See Franzius, in Volkkuhle, p. 192; See Mattarella, “*L’Attività*”, cit. supra note 40, p. 668, indicating that, because administrative action is directed at the pursuance of public interests, there is always an element of power and duty.  

109 Hauriou, *Précis* ..., cit. supra note 30, p. 356, indicating that “public interest is not an absolute and definitive concept, but one affected by a certain relativity, a concept that is progressively determined and, partially so, due to the intervention of the administration” (author’s translation).
conditions the verification of which requires technical expertise, the exercise of discretion includes the reference to value judgments that legal norms incorporate. Such value judgments should remain a core reference point to administrative actors when defining what are the possibilities of norm concretisation and when choosing between different alternatives. In this sense, the verification that, in a given instance, the Union institutions, acting in an administrative capacity, “reconcile divergent interests and thus select options within the context of the policy choices which are their own responsibility” delimits a space of decision-making that, in addition to non-legal considerations, should also be substantively influenced by legal norms.\textsuperscript{110}

4.2. The fluid boundaries between the legal and the non-legal elements of discretion

Administrative decision-makers need to consider and abide by legal parameters of action. Those defined in the applicable legal norms include the purposes for which discretion was attributed. Other indications regarding the value judgements that those norms enshrine may be inferred from the conditions to which they subject the exercise of discretion.\textsuperscript{111} The interpretation of legal norms guides the substantive choices administrative actors may make within the boundaries those norms set. Yet, other factors condition the process of concretizing a normative program of action, which is directed at finding the solutions that are most suitable to pursue the public interests at stake. The exercise of discretion is a process of normative creation (insofar as it generates norms of conduct, whether of general or individual scope) that is influenced by political directions defined by the top decision-makers; it is governed by expert judgments, on the basis of which complex economic and technical assessments are made; it is shaped by bureaucratic motivations, by the moral and ideological preferences of those involved in decision-making, by the specific contexts in which the decisions are made.\textsuperscript{112} Arguably, all these elements come into play when deciding issues such as whether “the possibility of default by any Member State or supra-national issuer” poses a threat to financial stability capable of justifying a prohibition of short-selling activities, or whether a threat to public

\textsuperscript{111} Similarly, Schmidt-Assman, “La teoria general…”, cit. supra note 39, p. 221.
health is serious enough to justify the suspension of imports of wild birds. Those elements condition the interpretation by decision-makers of the legal rules that delimit their discretion and provide criteria of action. Thus, for instance, pointing out the relevance of economic considerations in the legal interpretation by administrative actors, Schmidt-Assmann pointed to judgments of the German Federal Administrative Court where this court indicated that the availability of financial resources was a factor that could influence law interpretation in a situation where benefits would be awarded.

Some of those elements are legally channeled via decision-making procedures, which are conceived to ensure (among other aspects) that decision-makers are capable of making a thorough and impartial examination of the situations they regulate (e.g. via the establishment of inter-administrative relationships with specialized bodies or committees, situated at various levels of decision-making, the consultation of external experts, etc.). They become legally relevant, insofar as a procedural irregularity may affect the correctness or adequacy of the substantive outcomes. Others may be transformed into legal principles of action, or regulated by norms of good administrative conduct which may acquire a legal character.

Others still may remain alien to law. Political choices that influence substantive outcomes may be determined by top-decision-makers through hierarchical links, which may have a legal expression (breach of a hierarchical order may lead to a finding of illegality). In a compound administrative setting such as the EU’s, depending at which level and at which institution or body decisions are substantively formed, political directions may come from domestic governments, high-level bureaucrats, heads of departments or units. But they may also be shaped by the pressure of interest groups outside formalized procedures, or, as Galligan points out, from perhaps less perceptible self-understandings of decision-makers as to their place in a political and bureaucratic

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114 Schmidt-Assman, “La teoria general…”, cit. supra note 39, p. 348-9. Indicating that economic considerations may lead to given preference to one goal of action to the detriment of another and may lead to the pursuance of goals which are not supported by law, see D. Galligan (1986), Discretionary Powers: A Legal Study of Official Discretion, Oxford: Clarendon, p. 135-6.

115 Indicating that legal and non-legal parameters of administrative action are overtime not strictly separated, see Schmidt-Assman, “La teoria general…”, cit. supra note 39, p. 350, referring to principles of good administration. Non-legal criteria of administrative action may be converted into legal principles of administrative action when courts receive them as parameters of control and sanction them accordingly.

116 [References].
system and the factors that may influence support to their decisions. Moral and ideological preferences and allegiances may influence the interpretation of legally defined aims and criteria. In the EU, these may be conditioned, inter alia, by the domestic preferences of representatives of national bureaucracies, by a common organizational culture or esprit de corps, by departmental or professional preferences.

These and other elements may be intertwined in the exercise of discretion to an extent that an analytical distinction between norm interpretation, technical assessments and public interest appraisals may force the reality of administrative decision-making into pre-established categories in a way that is potentially detrimental to a proper understanding of discretion as both a construct of law and a space of autonomy to make choices that have normative effects. Severing these different aspects, in abidance to the premise that judicial review is limited to a control of legality, may serve the analytical rigor of doctrinal constructions but may be illusionary as a means of delimiting the scope of discretion and of identifying the role of law within the spaces of discretion. The boundaries between the realm of law – where courts may freely enter – and the realm of discretion – narrowly understood as a space free from legal determinations – may be untenable. The result of tracing those boundaries may be deceitful, either presuming judicial review where in practice an effective judicial control may not be feasible or normatively desirable or assuming, even if only implicitly, that where the courts would not enter, for lack of substantive or procedural grounds to do so, legal criteria or considerations do not apply or are not relevant.

4.3. Between norm interpretation and factual assessments: a dialectical relationship

A unitary approach to discretion that characterizes it as a space where administrative decision-makers engage in a creative process of norm concretization functional to the pursuance of public interests stresses both the autonomy attributed by legal norms and the bounded nature of that autonomy. It implies that the assessments made in the exercise of discretionary powers cannot be dissociated from a duty to choose a course of

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117 Galligan, Discretionary Powers..., cit. supra note 114, p. 132.
120 Similarly in Mendes, “Discretion, Care and Public Interests”, cit. supra note 13, p. 425.
action that, according to their interpretation, is suitable to achieve the public interests they need to weigh and pursue.\textsuperscript{121}

The process of concretization of normative programs delineated in legal norms implies a dialectical relationship between the assessment of the real-life situations and the weighing, mutual accommodation and ordering of competing public interests that the legal norm identifies. It is during the process of assessing the circumstances that may require administrative action that the public interests envisaged in the abstract scheme of the enabling legal norms acquire significance: those circumstances unveil the interests that need to be protected.\textsuperscript{122} Should the efficiency of financial markets be disrupted by an administrative decision intended to counter a threat to financial stability, within the limits legally defined? What does the protection of financial stability require? These are questions that can only be answered in view of the factual circumstances that the decision-maker confronts. Otherwise it is difficult to indicate, in substantive terms, what the powers of the ESMA to ensure financial stability may mean. In addition, one only knows the type of measures that should be adopted – to the extent that the legislature provides a choice – after a factual assessment of those circumstances. Should it be a notification, an order of disclosure, a prohibition, or the imposition of conditions to given financial transactions?\textsuperscript{123} At the same time, this process occurs in relation to, and is hence co-determined by, the legal provisions that defined the interests the administration ought to be pursuing in the first place (in this case, the functioning and integrity of financial markets, financial stability, the efficiency of financial markets, but also the interests of Member States and of the various financial markets participants).\textsuperscript{124} Arguably, it is this assessment of the circumstances (possibly, complex technical assessments) in relation to the interpretation – and construction – of the public interests envisaged by law that ought to guide the substantive choices of the administrative decision-maker.\textsuperscript{125}


\textsuperscript{122} This position resonates Giannini’s argument, according to which the importance of the cognitive aspect of the exercise of discretion in the assessment is determinant in the weighing of public interests that forms the core of discretion (Giannini, Il Potere Discrezionale…, cit. supra note 52, p. 81).

\textsuperscript{123} Art. 28(1) of Regulation (EU) 236/2012 cit. supra note 4.


\textsuperscript{125} There are areas where it may be particularly doubtful whether there are pre-determined public interests grounding the activity of the Commission, or, at least whether the heteronomous character of the ends of
The dialectical link between complex technical assessment and public interest appraisals may be obvious. Nevertheless, the Court ignores it in some instances. Thus, in the *ESMA* judgment, despite referring to the public interests that ESMA needs to take into consideration, the Court preferred to single out the limb of technical factual assessments to set aside the UK’s claim that the Regulation actually attributed wide discretionary powers entailing an appraisal of competing interests and, hence, policy choices. Arguably, the Court’s concern — and yardstick — was its ability to perform judicial review, which “precisely delineated” powers would enable, while an acknowledgment of the discretionary nature of some of the conditions that delineate ESMA’s powers (e.g. whether a national measure significantly addresses a threat to the orderly functioning of the market) would make this less obvious.

Stressing this dialectical link takes further the view according to which the distinction between technical discretion and discretion proper, on the one hand, and between the interpretation of undetermined legal concepts and discretion, on the other, may be deluding. The choice between alternative views on technical issues and the choice between the various significations that value (undetermined) concepts entail is also a discretionary choice in the broad sense indicated above, insofar as it will determine a certain course of action and entail normative consequences.

The delimitation and verification of the conditions of action co-determines the definition of the legal solution, in a way that makes it artificial to segment the decision-making processes entailed in each operation. In reality, the logical processes entailed in the application and concretization of the norm intertwine these two aspects. When identifying the conditions of action that delimit the discretionary power — the hypotheses for which such power was granted — the decision-makers are searching for normative solutions that are the most suitable in view of, among other factors, the conflicting interests that are legally protected. Arguably, both their interpretation of the boundaries set in the legal norm and the verification of the factual conditions (required for the exercise discretion) influence the delimitation of the possible legal consequences that

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126 Case C-270/12, *ESMA*, paras. 45 and 52 (cf. para 29 for the UK’s plea).
127 Queiró, *Reflexões sobre a Teoria…*, cit. supra note 104, p. 134-6. See also Schmidt-Assman, “*La teoria general…*”, cit. supra note 39, p. 220-1, critical of the conventional view in German law that limits discretion to the choice of legal consequences (*Rechtsfolge*) and of the distinction between discretion and margin of appreciation (*Beurteilungsspielraum*).
they may consider most suitable. The interpretation of the conditions identified in the legal norm, including of the undetermined legal concepts, and the verification of the factual conditions, may be predominantly a cognitive process. Yet, it may be deeply interconnected with the determination of the content of a legal act or action and with the aspects of volition that discretion entails. The fact that the judge may perform full judicial review of the interpretation of the norm and of the verification of the factual elements that grounded the adoption of a legal act neither eliminates this interdependence nor the discretion that may exist in the very definition of the conditions of action. For similar reasons, one may contest the distinction between discretion and margin of assessment or appreciation (Beurteilsspielraum) as two distinct legal realities, rather than just different techniques of normative formulation. While not all indeterminacy may give rise to discretion, undetermined legal concepts may entail discretion: they may empower administrative actors to make a choice in the development, construction and application of a legal regime that is capable of engendering legal effects.

Returning to the example of ESMA, the agency may only adopt those measures if there is “a threat to the orderly functioning and integrity of the financial markets or to the stability of the financial system of the Union”. What this means was defined by the Commission in a delegated regulation, which specifies that a threat shall mean, among other things, “any threat of serious financial, monetary or budgetary instability concerning a Member State…” or/and “the possibility of default by any Member State or supra-national issuer”. It is undisputed that the meaning of these concepts will require complex economic analysis. Yet, arguably, the verification of these conditions may entail the weighing of competing public interests and condition the type of measures that the ESMA will decide to adopt. These will be measures with significant political implications regarding the allocation of power between the ESMA and national

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129 Queiró, O Poder Discricionário..., pp. 236-39; a similar view would stem from Giannini’s work (see supra note 122).
130 Schmidt-Assman, “La teoría general...”, cit. supra note 39, p. 220-1 (referring to other German authors). In a similar sense, albeit not adopting a unitary conception of discretion, see Bulliger, considering erroneous the limitation of discretionary power to the issue of the choice of the content of the act (Rechtsfolgsseite) and contesting the usefulness of margin of appreciation as a separate category (Bullinger, “Le pouvoir discretionnaire...” cit. supra note 51, pp. 689-690).
131 Bullinger, “Le pouvoir discretionnaire...” cit. supra note 51, pp. 689-90, who points out that not all indeterminacy gives rise to a discretionary power. Considering that discretion entails normative creation, see Woehrling, “Le contrôle juridictionnel...”, cit. supra note 22, p. 97.
133 Art. 24(3) of Commission Delegated Regulation (EU) 918/2012, cit. supra note 11.
regulatory authorities, and with legal consequences for the legal spheres of market operators and consumers.

A unitary conception of discretion arguably provides a better understanding of the space of autonomy that decision-makers are given in processes of normative concretization, than an approach that seeks to delimit the spaces of discretion by segmenting the legal norm and dissecting the cognitive from the volition elements of discretion. In addition, by pointing out that those choices are made to concretise the normative programs defined in legal norms, in the pursuance of public interests, it also indicates that the value judgments enshrined in legal norms are one of the elements that should structure the exercise of discretion, irrespective of the possibilities of judicial control.

5. Discretion, law and public interests in EU law

Distinctions between discretion stemming from policy choices and discretion ensuing from complex technical assessments, as well as between the interpretation of legal criteria of action and discretion, are discernable in EU law. Even if only indirectly, they influence the conditions under which EU agencies may be lawfully attributed discretionary powers: those conditions need to be sufficiently precise to enable judicial review. They need to be sufficiently determinable by resorting to specialised knowledge. In these circumstances, the assumption is that possible choices that legal indeterminacy may entail will not be policy choices. Those distinctions are also present in judicial review of discretion, where the EU courts, at least in a significant line of cases, perform or endorse a stringent control of the complex assessments that underlie the legal qualification of facts, without prima facie assessing the policy choices that form the core of discretion.

An inquiry into the role of law in constraining and structuring discretion of EU administrative actors could take these distinctions as an entry point to discern the relative spaces of discretion and law. The administrative lawyer would find support in national doctrine to build a grid of different categories that would dissect discretion proper from other types of choices. Despite possibly blurred at some points, such a grid could provide a sense of consistency – should the EU courts decide to follow it, even if only implicitly – or reassure us that the space for autonomous choices of EU administrative actors is either quite narrow (in the case of EU agencies) or amenable to stringent judicial review that would guard against arbitrariness. The courts may choose to adopt a
deferential approach in a context-sensitive manner when judging the compatibility of EU executive powers with the Treaty (as, arguably, the Court of Justice did in ESMA and in Gauweiler). But, at least, one could be reassured that, once those powers are exercised, judicial review of specific discretionary choices can be quite stringent. The techniques of judicial review could be improved and refined by resorting to national dogmatic constructions that, reflecting the evolution of national legal systems, have also contributed to narrowing the legal mesh of discretion.

This approach would solidify at the EU level the prevalent judicial paradigm of administrative discretion. Extrapolating from ESMA, and taking the argument to an extreme, as long as the exercise of discretionary powers is subject to judicial review some leniency in the attribution of powers to the EU executive (and acknowledgement of powers acquired) could be normatively accepted. Yet, this way of conceiving the relation between law and discretion is arguably limited.

The breadth and political salience of the EU executive powers, the exercise of which may or may not be challenged in court, requires an understanding of the role of law in structuring discretion that is not limited to a judicial paradigm. Judicial review may capture only indirectly the composite processes where discretionary choices are made, as courts may not be able to peer into the structures and processes that may condition those choices (e.g. given the possible informality of those structures and processes, limits on standing, context-sensitive considerations that may lead the courts to avoid fully deploying available the tools of judicial review). Administrative laws of the Member States are a useful source also to delineate an alternative approach to discretion and law that is not court-centric. A classic tenet of administrative law indicates that the pursuance of public interests is the essence of discretion. 134 Legal norms attribute and delimit discretion by reference to public interests that need to be protected, weighed, sacrificed or given preference by decision-makers. These interests only acquire meaning in the face of the real-life situations which entail complex factual assessments. The concretization of legal norms – however thin their content may be and however dependent on political processes – combines the verification of the conditions of action and the delimitation of the legal solution that is permissible by law. In these processes, public interest appraisals are intertwined with complex technical assessments grounded on expert knowledge, may

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134 See, among many others, Hauriou, Précis …, cit. supra note 30, p. 355; Giannini, Il Potere Discrezionale…, cit. supra note 52, p. 46 (referring also to the works of Santi Romano and Jellinek making the same point); Soares, “Interesse Público…”, cit. supra note 121, p. 115; Mattarella, “L’Attività”, cit. supra note 40, p. 668; Schmidt-Assmann, p. 221, referring however to pre-determined ends.
be enmeshed in the interpretation of undetermined norms, and are shaped by possibly complex political and bureaucratic processes. Several elements influence the making of a discretionary choice. Among them are the value judgments that legal norms enshrine on the relative assessment of competing interests. They ought to be reconstructed by decision-makers when making a discretionary choice. They may be determinable only via administrative intervention. Yet, decision-makers remain bound by a duty to weigh the various competing interests at stake in a fair and inclusive way, when choosing a course of action that, according to their interpretation of the legal norms and their assessment of the factual circumstances, best serves the normative programs delineated in the applicable legal norms. However far judicial review may reach, the exercise of discretion remains bound by a duty of care in the pursuance of public interests incumbent on the decision-maker.135

The high level of abstraction of public interest provisions is indicative of the difficulties in concretizing the idea of a duty-bounded power. Nevertheless, in a legal order itself based on the achievement of pre-determined ends (the binding character of which is translated in the principle of attributed competences and of sincere cooperation), this would seem a suitable angle to understand the role of EU law in structuring administrative discretion. The EU institutions and bodies, as well as the Member States when mobilizing their administrations to implement EU law, need to act in a way that accommodate and pursue the public interests defined in the enabling legal norms and that is heedful of the value the EU legal order attributes to other protected public interests. How such interests are weighed and accommodated in a given instance is an important aspect of the lawful exercise of their discretionary powers, in addition to the correctness of technical assessments that may lend a sense of objectivity to the choices ultimately made. The exercise of discretion entails a reconstruction of value judgments underlying legal norms, which are the reflection of political compromises that administrative decision-makers cannot ignore. Their reconstruction of those value judgments should be made explicit and justified by reference to those norms. In this sense, law would remain constitutive of discretion irrespective of possibilities of judicial review.

135 Mattarella, “L’Attività”, cit. supra note 40, p. 668, indicating that, because administrative action is directed at the pursuance of public interests, there is always an element of power and duty. Soares, “Interesse Pubblico…”, cit. supra note 121, pp. 196-205.