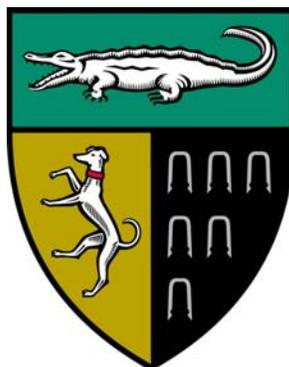


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Law, Public Interest and Interpretation: Prolegomena of a Normative Framework on Administrative Discretion in the EU

by

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Abstract: It is conventionally assumed that administrative discretionary decisions are determined by political and expert-driven considerations and that law's structuring and constraining capacity in that regard is and should be limited. Law defines a space within which discretionary choices are irrelevant to law because they have the same legal value. These tenets have shaped both the ways the Court of Justice of the European Union has approached judicial review of discretion and, more generally, the way law is perceived to structure administrative discretion in the Member States and also in the EU. However, the recent expansion of the regulatory powers of the European Union justifies revisiting these basic axioms. In particular, how far should discretion be shielded from the values that EU law conveys?

This paper proposes a normative elaboration of a core idea of public law to stress that law twins administrative discretion with a duty of regard to pre-determined public interests. On this basis, legal rules are able to provide a yardstick of critique of decisions that administrative officials adopt within spaces of discretion. An analysis of the *Meroni* judgment shows how this argument applies to EU law. But this claim only prepares the ground for a more complex inquiry: How does law operate – and how should it operate – within the spaces of administrative discretion, and how should courts review discretionary decisions? Administrative decision-makers construct the law in a specific institutional context in view of their specific tasks. Arguably, one should understand the specific processes through which they interpret the law to know how law may provide substantive criteria that guide discretionary choices. Such understanding would also be the basis to define and assess suitable degrees of judicial review of administrative discretion. One could then make a critical assessment – difficult to make at present – of the shifting boundaries between spaces of discretion and of judicial review that the dictum “manifest error of assessment, misuse of power or excess of power” conceals. This latter argument draws on the debate among US administrative law scholars on agency interpretation of statutes, but it is also mindful of conceptual distinctions that have prevailed in legal scholarship in Europe. The paper defines the prolegomena of a normative framework of a broader research project. It is work in progress.

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1. Constitutional change, judicial deference and administrative discretion

The turmoil that has shaken the European Union since 2008 has produced a previously unforeseen transfer of powers to its institutions on macro-economic and fiscal policy as well as on the supervision of financial markets. The increase in the Union's powers has thrown into sharp relief the challenges of EU law in constituting, framing and constraining the decision-making processes and political choices that support European integration.² At the same time, the EU is living through an unprecedented period of change that has had significant constitutional consequences. Intergovernmental negotiations have

² E.g., the Commission has been given powers to support the implementation of legal regimes defined by some of the Member States in international agreements at the margin of the EU Treaties (see the *Treaty on Stability, Coordination and Governance*, signed in March 12, 2012 (e.g. Articles 5(2) and 6) and the *Treaty Establishing the European Stability Mechanism* signed in February 2, 2012 (Article 5(5)(g), 13(1) and (7)). These international agreements have allowed the signatory States to circumvent the lack of legal basis in the EU Treaties, or the lack of political agreement that otherwise would have been required under the Treaties. Another example is the high profile decisions of European Central Bank (ECB), whose grounding in the Treaty is questionable, (e.g. ECB decision of 6 September 2012 concerning a certain number of technical characteristics relating to Eurosystem Outright Monetary Transactions on the secondary sovereign debt markets', which is the object of a preliminary reference procedure initiated by the German Constitutional Court, currently pending).

prominently shaped the responses to the crises in ways that have caused far-reaching shifts in the EU's institutional balance. The solutions found have resulted in legal differentiation between Member States that strengthens past political power imbalances.³

The EU institutions appear to be changing under the weight of their newly acquired powers, while institutional creativity in the name of “what needs to be done” seem to strain the Treaty and other legal boundaries. Thus, for instance, the Court made the legality of the competences acquired by the Commission, the European Central Bank and the Court itself under the Treaty establishing the European Stability Mechanism (ESM) dependent on one condition: that those competences would not alter “the essential character of the powers conferred on those institutions”.⁴ This considerably loose requirement placed no constraints to the Court's conclusion of compliance.⁵ In another instance, the power of the European Securities and Markets Authority (ESMA) to temporarily prohibit or restrict short-selling activities, in cases of threat to the stability or integrity of the financial markets, and to override insufficient national measures was considered lawful because, inter alia, the powers of ESMA are “precisely delineated” and “amenable to judicial review”.⁶ Underneath this clout of legality, crucial questions remain unanswered. For, in the mentioned case of ESMA, its “precisely defined executive powers” include the very definition of the substantive

³ See, e.g. E. Chiti and P. Teixeira, “The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis”, 50 *Common Market Law Review* 683 (2013), in particular 705-707; A.J. Menéndez, “Editorial: A European Union in Constitutional Mutation?”, 20 *European Law Journal* 127 (2014), at 128-38; P. Craig “Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications” in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints*, pp. 19-40 (Hart, 2014); M. Dawson and F. de Witte, “Constitutional Balance in the EU after the Euro-Crisis” 76 *Modern Law Review* 817.

⁴ Judgment in *Thomas Pringle v Government of Ireland et al.*, C-370/12, EU:C:2012:756, para 158. *Pringle* was decided in Full Court, comprising 27 judges (Article 60(2) of the Rules of Procedure of the Court of Justice (OJ C 337/1, 6.11.2012) and Article 16(5) of its Statute (OJ C 326/210, 26.10.2012)). In addition, the powers at issue could not fall under the exclusive competence of the Union. See further, P. Craig, “Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance” 9 *European Constitutional Law Review* 263 (2013), in particular at 270-1 and 276. Craig points out the lack of procedural constraints regarding the institutions' decision to take on new powers under international agreements signed by some of the Member States (the ESM Treaty was signed by 17 of the then 27 Member States), and regarding the involvement of the institutions excluded from the agreement (the European Parliament has no powers under the ESM Treaty).

⁵ Judgment in *Pringle*, EU:C:2012:756, para. 160 and ff.

⁶ Judgment in *United Kingdom v European Parliament and Council (ESMA)*, C-270/12, EU:C:2014:18, para 53 (reasoning on para 43 to 52) and para 105. This case was decided in Grand Chamber, according to Article 60(1) of the Rules of Procedure of the Court of Justice and Article 16(3) of its Statute.

conditions that trigger its authority to act. These include decisions on whether there is “a threat of serious financial, monetary or budgetary instability” or “the possibility of default by any Member State or supra-national issuer”.⁷ How far does and should law provide criteria that guide the substantive choices of EU administrative actors? And, if the possibility of judicial review has become the threshold of legality, what degree of judicial review would be suitable to ensure legality? If the extent to which the EU Courts are willing or capable to review the exercise of administrative discretion may be minimal, in what way does the possibility of judicial review ensure us of legality?

These questions pertain to the relationship between law and administrative discretion that lurk underneath the more conspicuous constitutional changes. Their relevance extends beyond the policy areas that were directly affected by the new Union structures of economic governance. Addressing them will provide a better understanding of how law governs and should govern, in substance, the administrative acts of the EU administration, at a time of fundamental changes of constitutional significance.⁸ This inquiry is all the more relevant when, at first sight at least, the Court of Justice seems to have chosen to defer to the sense of urgency that has explained the increase of the EU executive powers.⁹ While it is uncertain how recent changes may affect the EU administration and its ways of acting, it is unlikely

⁷ Article 24(3) of Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events (OJ 2012 L 274, p. 1)

⁸ “Administrative acts” is used here in a non-technical sense, to include various legal forms of action of the EU administration of individual and general scope.

⁹ See supra notes 5 and 6. Also in matters of crucial institutional significance that are not related to tackling the Union’s crises responses to monetary or financial problems (or overhauling its “economic governance” structures), the Court of Justice may be retreating to a fundamentally deferential approach. In the *Biocides* case (Judgment in *Commission v Parliament and Council*, C-427/12, EU:C:2014:170), the Court stressed the discretion of the EU legislator in defining whether a non-legislative measure shall be adopted via a delegated or an implementing act, without referring to the need for it to articulate objective criteria amenable to judicial review (para 40; confront with the Judgment in *European Parliament v Council*, Case C-355/10, EU:C:2012:516 – the Schengen Borders case - para 67). It should be recalled that the powers of the EU institutions, namely those of the Council and of the Parliament, in the adoption of delegated and implementing acts considerably differ. The Court, without much argument, also held that, in the case at hand, the power conferred on the Commission “may be considered reasonable for the purposes of ensuring uniform conditions of implementation” (para 53), thereby depriving this condition of any real meaning in limiting the power of the Union to adopt implementing acts under Article 291 TFEU. These fundamental questions are essentially left to the negotiation processes that involve the three institutions.

that they will remain unaltered. The potential metamorphosis capacity of recent changes arguably requires revisiting some of the established tenets that hitherto have underpinned the law governing the actions of the EU institutions, and specifically the way law relates to the exercise of discretion. They indicate that legal norms and principles define a space of decision in which substantive choices are the responsibility of administrative bodies; that courts control the legality of the decisions, not their merits. These axioms conceal disparate degrees of constraint and deference. Because of their generality, they arguably hinder normative critique.

This paper constitutes a first step in a broader research project on EU administrative discretion that aims at a clearer understanding both of how law may influence the substantive choices that EU administrators make within their spaces of discretion, and of the loose boundaries between the spaces of administrative discretion and of judicial review in the EU. It lays out the normative foundations for a renewed discussion on the meaning of law in constraining and structuring EU administrative discretion. Section 2 presents the basic axioms of public law that, in general terms, ground current understandings of how law relates to administrative discretion in Member States and also in the EU. It directs the discussion to one specific aspect: the way substantive law may condition discretionary decisions of the EU administration. Section 3 maps one dimension of how law relates to discretion: the ways in which the Court of Justice of the European Union (specifically, the Court of Justice and the General Court) has approached judicial review of discretion. It illustrates the shifting boundaries of legality control and indicates the factors that may explain variation. It also shows the difficulties in both explaining and assessing the different degrees of review that the Court has been conducting. Furthermore, it argues that the possibility of critically assessing judicial review of discretion is crucial when the availability of judicial review becomes the main threshold of legality and the ultimate boundary of institutional empowerment. In the absence of yardsticks of critique, the degree of judicial review in given instances may be too easily accepted – because courts cannot substitute administrative decisions with their own assessment of the merits of decisions, they should only be effective guardians of the law – and too easily contested – because either the Court has retreated from its duty to ensure that the law is observed or is overstepping its powers, and thereby eliminating discretion.

Sections 4 to 7 lay out the building blocks of a normative framework for law and administrative discretion that may ground normative critique. Such a framework must be adjusted to the institutional contexts to which it is meant to apply (Section 4). Arguably, the role of law may differ depending on who exercises discretion, given the specific composition, functions, procedures and forms of actions of the institutions and bodies that compose the EU administration. This institutional perspective sets the background to retrieve and elaborate a core idea of public law: administrative discretion is functional to the furtherance of public interests incorporated in legal norms (Section 5). Administrative action is hence essentially teleological. Its ends are defined in a dialectical process of norm interpretation and factual assessment. In this process, administrators are bound by a legal duty of regard to legally protected public interests.¹⁰ Such a duty frames the way administrators construct the law in their specific institutional context. Thus, under this view, legal norms do more than define spaces of discretion where the reconciliation of competing interests informs policy choices. An analysis of the *Meroni* judgment of the Court of Justice shows that the idea of discretion as a power bound by a legal duty in regard to the legally protected public interest is present in EU law (Section 6). Yet, in itself this normative proposal does not bring us much closer to understanding how law structures the discretion of EU administrative bodies. Claiming that discretion – even in the core of policy choices that stem from the weighing of competing interests – is not a space free of law does not determine either how law operates within the spaces of discretion or how far courts should go in reviewing discretion. The paper then suggests that understanding the institutional implications of the proposed way of approaching law and discretion (including the role of judicial review) requires an examination of how EU administrative bodies interpret the law they are bound to implement (Section 7). It concludes by summarizing the main arguments that constitute the prolegomena of a normative framework on law and administrative discretion in the EU (Section 8).

¹⁰ This view draws on the work of R. Soares, *Interesse Público, Legalidade e Mérito*, (Atlântida, 1955), as indicated in Section 5 *infra*.

2. Administrative discretion and substantive legality

Administrative discretion determines the day-to-day operation of legal rules. Much more than interstitial, discretion is at the very heart of what administrations do. Discretion may be understood as the power that law (both legal norms and general principles of law) explicitly or implicitly grants to officials to define the standards they will follow in the exercise of their mandate, and to define a course of action accordingly.¹¹ This power may stem from the *interpretation* of both the decision-makers' legal mandate and of the applicable legal rules; from the legal and factual *complex assessments* they are required to make; or mainly from the *balancing* of competing legally protected interests.¹² Discretion lives within the boundaries of often loose statutory requirements and of various degrees of deference allowed by judicial review of facts and law. Loose as they may be, those boundaries limit (or so they should) the range of permissible options. They define the spaces of discretion. This link of discretion to law is still today a core normative premise of liberal-constitutional conceptions of government.

From here derive a series of well-trodden observations on the relation between law and administrative discretion that, as such, are largely devoid of interest. Administrative action cannot be fully explained in terms of legality, but legality ought to remain its anchor. Law defines the broad normative boundaries (e.g. competence, respect for fundamental rights), the scope of the mandate of the administrative decision-makers (e.g. the goal to be achieved, the factors that administrative decision-makers need to consider), the public interests they are bound to pursue, the means through which administrations may act. While even highly detailed legislative provisions may leave crucial political choices to administrative

¹¹ This is, for now, a working definition that draws on D.J. Galligan, *Discretionary Powers. A Legal Study of Official Discretion* (Clarendon, 1986), at p. 21. For the purposes of this analysis, at this stage, it has the advantage to be relatively neutral to the role of law in the definition of those standards. The variety of meanings that can be given to administrative discretion – or the difficulty of pinpointing its essential meaning – is perhaps best expressed by those who prefer to approach it as a sliding scale between bounded powers and arbitrariness (see, e.g., B. van der Esch, *Pouvoirs Discrétionnaires de l'Exécutif Européen et Contrôle Jurisdictionnel*, (Kluwer, 1968), p. 10; H. Hofmann, G. Rowe, and A. Türk, *Administrative Law and Policy of the European Union* (Oxford, 2011) at 493.

¹² In the legal systems of some of the Member States, these different sources of discretion are treated as different types of discretion, subject to different degrees of judicial review. The main lines of differentiation are schematically described in J. Schwarze, *European Administrative Law*, (Sweet & Maxwell, 2006), pp. 261-295 (the book is a republication of Schwarze's first edition of 1992). However, as will be shown in more detail at a later stage of this project, the extent to which these conceptual distinctions can be faithful to reality is limited. See, for now, Section 7.2 *infra*.

decision-makers, these choices need to be framed and grounded in law. Administrative acts, whichever their form, are the expression of authority, but of authority limited by the duty to pursue the public interest within the limits of legality. It is this link to law that grounds judicial review. At the same time, legal boundaries seem to be too often too loose to be effective in structuring administrative decisions. What the role of law is and should be in, for example, defining emission standards for air pollutants is far from evident. How far can such a decision be structured by substantive legal determinations? This is only one example of the multitude of decisions requiring discretion in every-day practice of bureaucracies. The limits of law are, therefore, the other part of the narrative. They have different dimensions, ranging from the variety of informal administrative acts and material actions that challenge or escape legal controls to the institutional and material reasons that prevent judges from second-guessing the choices of administrative decision-makers. But the mere verification of such limits still leaves us a step too far from grasping the complex relationship between law and administration. In any legal system grounded on the rule of law, those axioms express a relationship between law and administration that can only start being properly understood if one knows how and to what extent officials interpret, observe and develop law in making their substantive discretionary choices.¹³

The link of discretion to law has in the EU a perhaps more profound meaning. In the EU, law is a structural aspect of the Union itself and of its competences. The principle of attributed competences defines the boundaries of EU action vis-à-vis the Union's Member States. Article 291(1) of the Treaty on the Functioning of the European Union (TFEU) now confirms that the administrative implementation of EU law is primarily a competence of the Member States. Again here, the legal argument faces significant complications. The boundaries of attributed competences are dynamic and often slippery, as the recent developments sketched above forcefully show. They are constructed by the institutions and controlled by a Court that often times has been deemed to be too active in pursuing European integration, and too deferential to the uses the EU institutions make of the Treaty legal bases. It is, for example, far from clear whether the requirement of "uniform conditions of implementation" indicated in Article 291(2) TFEU is a constraining limit to the

¹³ See Section 7 below.

administrative functions of the EU.¹⁴ Similarly, the 2014 *ESMA* judgment appears to break another frontier of the ability of the so-called internal market competence to ground EU administrative powers attributed by the EU legislator to the Commission (whether or not mediated by comitology committees), or directly to EU agencies.¹⁵ Still, one would argue, the principle of attributed competences is not a legal fiction. It may be mostly visible when it becomes a bone of contention between the EU institutions, or between institutions and Member States who are outvoted in given decisions. However, it remains a shadow capable of conditioning the negotiations behind the adoption of Union legal acts.

The law governing Union decision-making procedures defines further legal boundaries to EU officials' discretionary choices. As in national legal systems, EU procedural law that conditions administrative behavior seems to be plentiful, even if procedural rules do not cover different policy sectors in a consistent way and may be lacunose in many respects.¹⁶ The law of procedure has, however, two important limitations. Procedural rules do not tell us much about how law conditions the substantive legality of decisions, about how law provides substantive criteria that guide discretionary choices. They have the capacity to influence the material justice of the final decisions and to be carriers of constitutional principles and values, translating them into administrative action.¹⁷ In particular, they are crucial in structuring the relationships between the administration, affected persons and the public, as well as those between different administrations. But, depending on how they are practiced and on the respective mechanisms of control (judicial or otherwise), they may only “[assure] us of the objectivity of administration even as [they subject] us to the discretionary dominion of administrators.”¹⁸ This is true also of those rules

¹⁴ On the relevance of “uniform conditions of implementation”, see Judgment in *Biocides*, EU:C:2014:170, para 52 (and supra n. 9).

¹⁵ Judgment in *Germany v Council*, C-359/92, EU:C:1994:306, para 37; Judgment in *United Kingdom v European Parliament and Council*, C-66/04, EU:C:2005:743, para 45 to 50; Judgment in *United Kingdom v Parliament and Council*, C-217/04, EU:C:2006:279, para 42; and, now Judgment in *ESMA*, EU:C:2014:18 (supra n. 6), para 102-117.

¹⁶ This is one of the reasons that would justify the adoption of a EU law on the administrative procedure. See the Model Rules on EU Administrative Procedure proposed by ReNEUAL (available at <http://www.reneual.eu/>), in particular the Introduction to Book I.

¹⁷ J. Mendes, *Participation in EU Rulemaking. A rights-based approach* (Oxford, (2011), p. 17 (footnote 39), Chapter 2, Section 2.2 and Section 2.5. D. Curtin, H. Hofmann, J. Mendes, “Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda”, 19 *European Law Journal* 1 (2013), 3-6.

¹⁸ J. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University

that may ambiguously straddle the boundaries between the substantive and procedural realms – such as the duty to give reasons – and that, as such, have an important instrumental role in the review of substantive legality.¹⁹ At the same time – and this is a second limit – outside the more classic formal schemes of regulation, the role of procedural law is even thinner, if at all relevant. Decisions – such as those defining standards of good water quality – have been withdrawn from the immediate purview of legality. They are defined in networks of experts that produce technical standards or benchmarks, which are periodically reviewed under vague framework laws. These standards and benchmarks – “post-legislative guidance” – may however remain legally relevant to assess compliance of Member States with EU law.²⁰ Similar regulatory structures are part of the current EU economic governance. Mechanisms of policy coordination, grounded on guidelines and peer review mechanisms, lead to national reports on the basis of which the Commission and the Council may initiate a sanctioning process, following the verification of breaches of fiscal rules.²¹ Data collection, reporting and monitoring are crucial mechanisms to define whether or not there was a breach.²² But these processes ward off binding procedural rules that could ground legal guarantees of fairness and impartiality. They are purposively carried out via mechanisms that do not have legal form.²³ Procedural rules may have no place in what are in essence regulatory processes that expressly shun law. But the ensuing decisions are still adopted under the shadow of law and may have significant legal consequences. What then to make of legality in these cases?

General legal principles – such as proportionality, non-discrimination, and legitimate expectations – may place stronger constraints on the exercise of discretion than procedural

Press, 1997), p. 109.

¹⁹ One may argue that where procedural guarantees mask hard look substantive review they no longer function as procedural guarantees in a strict sense but as a substantive ground of review.

²⁰ One example would be the definition of good water status, under the Water Framework Directive, which relies on informal technical decisions adopted in the Common Strategy of Implementation. On the legal issues raised by post-legislative guidance, J. Scott “In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law”, 48 *Common Market Law Review* 329 (2011), stressing the legal problems posed by some of those practices.

²¹ See, further, K. Armstrong, “The new governance of fiscal discipline”, 38 *European Law Review* 601 (2013), detailing how different instruments and modes of governance are brought together to “enhance governance capacity” (609-612).

²² Armstrong, *idem*, 613.

²³ Data collection, reporting and monitoring are mechanisms that can also directly produce formally legal acts.

rules. Yet, arguably the extent to which they inform the substantive legality of decisions depends on the possibility and degree of judicial review, which in turn conditions administrative behavior. The degree of judicial review in these matters tends to face the Court's restraint in reviewing matters where the EU institutions retain a wide margin of discretion. The relation between proportionality and discretion, despite being particularly intricate, confirms what was just stated: the Court will only review the proportionality of discretionary decisions to check whether they are manifestly inappropriate.²⁴ In this case, the capacity of general principles of law to structure discretion may be minimal.

Thus, the question remains: to what extent does EU law ground, structure or condition the discretionary choices of the EU administration? Within the boundaries of general principles of law and of the law of procedure, how is substantive legality ensured in the discretionary choices of the EU administrative decision-makers? Substantive legality conveys the idea that Treaty rules and legislative acts define a frame of administrative action, including the purpose of that action and the way choices are made about policy. They bear substantive values that the EU legal order protects and that are capable of grounding normative critiques of the actions of the EU institutions, bodies, offices and agencies. The assumption here is that these values ought to pervade the EU administration as well. Substantive legality matters at two levels: it enables critique of administrative discretionary choices in view of the substantive values that the EU legal order protects; it makes it possible to judge whether a measure pursues the public interests mandated by the applicable legal rules.²⁵

A first step in approaching how EU law frames and structures the substance of administrative discretionary decisions is to look at what the EU Courts have said in this regard. This is a limited approach. Judicial review only unveils the way courts and lawyers approach the interplay between law and administrative discretion.²⁶ It is, nevertheless,

²⁴ D. Sarmiento Ramírez-Escudero, *El control de proporcionalidad de la actividad administrativa* (Tirant lo Blanch, 2004), p. 625. See, for a recent example, Judgment in *Commission v Council*, Case C-111/10, EU:C:2013:785, para 97, 110 and 117. In general on the lack of success of claims grounded on review of proportionality, see R. Van Ooik, "Evenredigheid in het EU-recht", 28 *RegelMaat* 166 (2013).

²⁵ The above considerations on substantive legality constitute a first approach to defining the problem of how law frames discretion. They are further developed in Section 5, below, which also indicates why this way of approaching law and discretion does not amount to endorsing a transmission belt model of administration.

²⁶ The trade-offs and paradoxes of judicial review of administrative action will be considered in a more

important to know how Courts have reviewed discretion. The answer to how law conditions the substantive legality of decisions depends to a large extent on the interaction between the administration and the courts, via judicial review of administrative discretion. More fundamentally, when judicial review becomes the threshold of the legality of the powers of the EU institutions and bodies, it is important to know how stringently or how loosely the EU Courts exercise their jurisdiction. The next section will then shed light on how the EU courts view the role of law vis-à-vis administrative discretion.

3. Discretion before the EU Courts

3.1. Shifting boundaries

The EU Courts have long since established that, in the face of wide discretion, their review of legality 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”.²⁷ The formula resonates with French standards of judicial review of administrative discretion (*erreur manifeste d’appréciation, détournement de pouvoir*), but, in these general terms, it equally resembles those of other Member States’ legal systems.²⁸ It is vague enough to allow for the fine balances that judicial review of administrative discretion require. While too intrusive judicial review may encroach upon the political space of the other institutions, judicial review that is too deferential is open to the criticism that it does not provide effective judicial protection.²⁹

systematic way at a later point of the project.

²⁷ E.g. Judgment in *Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof*, Case 55/75, EU:C:1976:8, para 8 (complex economic assessments).

²⁸ See, in more detail, Schwarze, *European Administrative Law*, cit. supra n. 12, pp. 261 and following; R. Caranta, “On Discretion” in S. Prechal and B. van Roermund (eds) *The coherence of EU law: the search for unity in divergent concepts* (Oxford, 2008), pp. 185-215, at 187-95, 206. The contexts in which these terms apply in the Union legal system are quite different from their national counter-parts. Their meaning may vary accordingly. However, these differences do not deny that a deeper knowledge of the national concepts and normative schemes from which EU law has also emanated will contribute to a better understanding of EU law, both from a *de lege lata* and from a *de lege ferenda* perspective, both in explaining the origins of the EU system and in understanding how it operates in the present. For an analysis of EU law on discretion viewed through the lens of national law but heedful of the EU law specificities, see A. Bouveresse, *Le pouvoir discrétionnaire dans l’ordre juridique communautaire* (Bruylant, 2010).

²⁹ On fine balances, see D. Ritleng, “Le juge communautaire de la légalité et le pouvoir discrétionnaire des institutions communautaires”, *L’Actualité Juridique – Droit Administratif*, 645 (1999), p. 647, sustaining, on the basis of an in-depth analysis of the Courts’ case law up to 1998 that the Court had succeeded in achieving a

For its flexibility and capaciousness, this formula has been virtually the same over the past 40 years. It has enabled over time a significant variation in the Courts' willingness (or ability) to scrutinize the factual basis of legal acts and the questions of law that underpin them.³⁰ The following observations provide a cursory overview of two main threads of the EU Courts' case law.³¹ In one line of cases, the Courts have performed a searching review of factual assessments that ground the legal acts of the EU administration. When dealing with claims of manifest error of assessment, they have held that, in view of the margin of discretion of the Commission,

“the [Court must not] refrain from *reviewing the Commission's interpretation of information of an economic nature*. Not only must the [Court] *inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent* but also 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*.”³²

The same degree of review has been applied to Council's acts and, at least in one case, to acts adopted by European agencies, as well as to areas where the complexity of the

suitable balance between discretion and the requirements of judicial protection.

³⁰ See, generally, P. Craig, *EU Administrative Law* (Oxford, 2012), p. 409. An important watershed was the creation of the General Court in 1999 dealing at first instance with complaints from individuals (e.g. A. Fritzsche, “Discretion, Scope of Judicial Review and Institutional Balance in European Law”, 47 *Common Market Law Review* 361 (2010), p. 378). The length of judgments is sometimes noted as an indicator of the Courts' willingness to engage in more or less intensive judicial review – see, e.g., Fritzsche, “Discretion, Scope of Judicial Review...”, *cit.*, p. 378; Craig, *EU Administrative Law*, *cit.*, p. 419.

³¹ They are the starting point of more searching analysis that this work will include at a later stage.

³² This standard, followed to review merger control decisions, was first established in *Tetra Laval* (Judgment in *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, para 39, emphasis added), an appeal case in which the Court of Justice sided with the General Court. The Courts have reiterated this standard in subsequent judgments - e.g., Judgment in *Bertelsmann and Sony v Independent Music Publishers and Labels Association (Impala)*, Case C-413/06 P, EU:C:2008:392, para 144-145 (where the Court of Justice nevertheless found that the General Court had committed errors of law in using this standard of review – see para 146-150); Judgment in *KMG Germany and Others v Commission*, Case C-272/09 P, EU:C:2011:810, para 94, 102; Judgment in *MasterCard Inc and Others v Commission*, Case C-382/12 P, EU:C:2014:2201, para 155-156 (considering that the General Court had not applied the correct standard of judicial review – para 157-160, 167, 169). The same standard is used in other areas of EU law: state aids (Judgment of 17 May 2011, *Buczek Automotive v Commission*, Case T-1/08, EU:T:2011:216, para 83, referring to review of the Commission's interpretation of economic or technical data to define what is state aid – the standard of judicial review was confirmed on appeal; Judgment in *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32, para 73-75); economic and financial sanctions directed at suspects of terrorist association (Judgment of 30 September 2010, *Kadi v Commission*, Case T-85/09, para 142, upheld on appeal: Judgment in *Commission and others v Kadi*, Joined Cases, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, para 97, 119, 124). In the area of risk regulation, see Case T-475/07, *Dow AgroSciences Ltd and Others v Commission*, General Court, Judgment of 9 September 2011, para 150-153.

case does not stem only or at all from economic assessments.³³ In another line of cases, before the acknowledgement of a wide discretion in the application of a given legal regime or rule, judicial review has been more deferent:

“(…) [the Courts] must restrict themselves to considering whether the exercise of that discretion contains a manifest error or constitutes a misuse of power or whether [the institutions] clearly exceeded the bounds of their discretion. The depth of the Court’s review must be limited in particular where [the institutions] have to *reconcile divergent interests* and thus select options within the context of the *policy choices which are their own responsibility*.”³⁴

One could infer from these different formulations that the Courts seem to be more demanding in cases where discretion would stem mostly from the assessment of complex technical facts than in cases where discretion contends with balancing interests. In this reading, different types or sources of discretion could lead to different degrees of judicial review. Verification and qualification of facts could be subject to more intense judicial review than the determination of the content (or, even, of the aim) of the act, which depends on weighing competing interests and is guided only by vague and capacious legal boundaries.³⁵ But this inference suggests a distinction between questions of fact, legal qualification of facts, and questions of law and legal interpretation. These are difficult lines to draw.³⁶ One may query the extent to which these distinctions, further elaborated in doctrinal constructions, accord with the reality of decision-making and do correspond to different degrees of judicial review.³⁷ Another possible explanation would be a variation

³³ For an instance where it applied to a decision of an EU agency, see Judgment of 19 November 2008, *Ralf Schröder v Community Plant Variety Office (CPVO)*, Case T-187/06, EU:T:2008:511, para 61. In this case, the Court explicitly added that the same standard can apply in cases where the technical complexity stems from “appraisals in other scientific domains, such as botany or genetics” (para 62). For its application beyond cases involving complex economic assessments, see the Judgment in *Kadi*, EU:C:2013:518, para 97, 119, 124.

³⁴ Emphasis added. Judgment in *Fedesa and Others*, Case C-331/88, EU:C:1990:391, para. 14 (common agriculture policy); Judgment of 5 June 1996, *NMB France and Others v Commission*, T-162/94, EU:T:1996:71, para. 70 (anti-dumping duties); Judgment in *Rica Foods (Free Zone) NV v Commission*, C-41/03 P, EU:C:2005:456, paras 52-54 (imports originating from overseas countries); Judgment in *Herbert Schaible v Baden-Württemberg*, C-101/12, EU:C:2013:661, para 47 to 48 (agriculture – a discretionary act is reviewed for compliance with the principle of proportionality).

³⁵ For an analysis in this sense, see Caranta, “On Discretion”, *cit.* (supra n. 25). For a systematization of discretion, see Ritleng, “Le juge communautaire de la légalité.” *cit.* (supra n. 29), at 647-50.

³⁶ Hofmann et al, *Administrative Law*, *cit.* (supra n. 11), p. 496-7.

³⁷ See P. Pescatore, “Commentaire de l’article 164” in V. Constantinesco, J.P. Jacqué, R. Kovar and D. Simon, *Le Traité Instituant la CEE. Commentaire Article par Article* (Economica, 1992), pp. 941-74, at p. 969-70. See also

according to issue areas. The Courts have used the former standard of review in competition law cases (anti-trust and state aids), risk regulation, and fundamental rights; and the latter in the review of discretion in common policies, in particular agriculture.³⁸ But there is also variation within given policy areas.³⁹ Other possible variables – not as visible in the quoted excerpts and cases – are the different institutional capacities of the General Court and of the European Court of Justice;⁴⁰ the type of legal action in which the legality of a discretionary decision is challenged, in particular whether it is an action for annulment or an action for non-contractual liability;⁴¹ the author of the challenged act (whether it is an EU institution or a Member State authority).⁴² The general or individual nature of the measure could be an additional factor of variation.⁴³ A systematic study of how the Courts have approached administrative discretion would need to take these factors into account. But it would still leave us one step too far from normative critique.

3.2. Pragmatism and its limits

Legal analysts seem to agree that the case law is unclear regarding the criteria that have led the Courts to conduct more or less exact judicial review of discretion.⁴⁴ They deplore the lack of consistency of the case law. But irrespective of what the Courts may have left unsaid, consistent criteria may simply be impossible to discern. The Courts may be more or less exacting in their review depending on the information they have available and on their

Subsection 7.2 *infra*.

³⁸ Craig, *EU Administrative Law*, *cit.* (supra n. 30), p. 437-8, offering a plausible explanation (and pp. 415-31, in more detail).

³⁹ Craig, *EU Administrative Law*, *cit.* (supra n. 30), p. 437.

⁴⁰ See, e.g., Craig, *EU Administrative Law*, *cit.* (supra n. 30), p. 438-40.

⁴¹ See, e.g. Caranta, “On Discretion”, *cit.* (supra n. 28), at 196-214.

⁴² See, e.g. Caranta, “On Discretion”, *cit.* (supra n. 28), at 201-206, focusing on the differences in the review of discretion in the context of liability claims against Member States and against the EU institutions.

⁴³ See Ritleng, “Le juge communautaire de la légalité..” *cit.* (supra n. 29), at 650, who also indicates that the case law shows no significant variance depending on whether the measure is legislative or administrative.

⁴⁴ Craig, *EU Administrative Law*, *cit.* (supra n. 30), p. 436; Fritzsche, “Discretion, Scope of Judicial Review...”, *cit.*, (supra n. 30), p. 379-80; Hofmann et al, *cit.* (supra n. 11), p. 498-9. Craig points out that “the repeated articulation of manifest error conceals more than it reveals” (p. 471, 1st edition); Fritzsche indicates that “the courts have neither announced nor applied the standards of review consistently even when dealing with similar questions (p. 379) and concludes that his study of the Courts’ case law on discretion confirms that the Courts “leave crucial things unsaid” (p. 402). Hofmann et al. note that the courts have approached judicial review of discretion with “great pragmatism... at the cost of a certain lack of dogmatic clarity and coherence in relation to the underlying problems” (p. 489).

material and institutional ability to peer into the decision-making process. Procedural rights – in particular, the duty to give reasons and the duty of careful and impartial examination – are crucial in facilitating substantive review of discretion, as they enable the Courts to examine the reasoning process of the administrative decision-maker.⁴⁵ At the same time, the extent to which administrative discretion may be co-determined by standards of judicial review ultimately depends on the very possibility of judicial intervention – hence, on the likelihood that a legal act will be challenged, in view not only of the rules of standing but also of the likely capacity of those who are entitled to bring legal challenges to effectively come to court. Indeed, legal reasons aside, one should not exclude the capacity of powerful litigants to mobilize resources to press for intense judicial review. In anti-trust cases, for instance, undertakings have promptly invoked Article 47 of the Charter of Fundamental Rights (the right to effective judicial protection) to add normative strength to their due process claims with the aim to trigger searching judicial review of administrative discretion.

Only beyond these thresholds – standing (both formal and effective) and information – can the Courts choose the appropriate standard of judicial review, within the scope of their material and institutional capacity. This choice may be mainly – or only – pragmatic. Judicial review is shaped by the questions formulated by the complaints of plaintiffs in the context of a given conflict. The particular circumstances of the cases before them may lead the Courts to adopt a more stringent approach to review or, on the contrary, to defer to the processes of political accommodation and preserve the balances struck by decision-makers. As pointed out by Jean Rivero:

“the judge remains a judge, not a theorist, concerned above all with the case on which he needs to rule, concerned also with preserving his future freedom by not tying his hands with too stringent prescriptions. (...) Expecting to draw from a nuanced case law, heedful of particular circumstances, a clear and certain criterion is to search for what its authors certainly did not wish to place therein”.⁴⁶

Even where apparent neat general formulae may be found in Court judgments, the way they are used may vary considerably. They may ultimately be determined, at least in part,

⁴⁵ E.g. Craig, *EU Administrative Law*, *cit.* (supra n. 30), p. 443; H. Nehl, *Principles of Administrative Procedure in EC law* (Hart, 1999), p. 105, 118-9.

⁴⁶ Jean Rivero, “Exist-il un critère du droit administratif?” 69 *Revue du Droit Public et de la Science Politique en France et à l'Étranger* 279 (1953) at 281 (my translation).

by fortuitous considerations linked to the case at hand.⁴⁷ The clear consistency of doctrinal constructions may be at odds with the malleability that judicial review should preserve to adjudicate concrete disputes. All in all, even on the basis of a thorough analysis of the case law, it may be difficult to determine beforehand which criteria could trigger the verification of an error of assessment, a misuse of power, or an ultra vires action.

Why then should one pursue the attempt to find criteria or principled grounds that would delimit the spaces of administrative discretion and of judicial review? There are two main reasons of principle. First, normative criteria that would indicate, from a normative perspective, spaces of discretion and of judicial review would enable a critical assessment – difficult to make at present – of how the EU Courts have interpreted in different ways their role in ensuring that “the law is observed” when reviewing the exercise of administrative discretion in the EU. As mentioned, such a critical assessment is crucial when the possibility of judicial review becomes virtually the ultimate constraint on institutional growth.⁴⁸ Such criteria would flesh out the often too general statements recommending judicial restraint or intervention grounded on the material and institutional capacity of the Courts. These general statements tend to be justified on the basis of the principle of institutional balance.⁴⁹ But this principle provides little normative justification for delimiting the powers of the Court vis-à-vis the other EU institutions. Without a firmer idea of the boundaries of law and of

⁴⁷ Axiomatic principles (e.g. courts should not refrain from assessing technically complex situations; non-legal technical expertise is better assessed by administrators than by judges) may simply cloak pragmatic reasons. In the US, Justice Stevens who delivered the opinion of the Supreme Court in *Chevron* – where this Court famously established a broad rule of deference on administrative interpretation of law – has later explained his position in that case. He has been reported to have said: “When I am so confused, I go with the agency” (W. Eskridge and L. Baer, “The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*”, 96 *The Georgetown Law Journal* 1083 (2007), at 1086).

⁴⁸ Judgment in *ESMA*, EU:C:2014:18, para 41 and 53. The existence of objective legal criteria that “clearly” delimit the executive powers of the ESMA was crucial in the Court’s judgment. This is a necessary condition of the *possibility* of judicial review, in addition to the mere formal *availability* of judicial review. Those criteria define the parameters of administrative discretion and, at the same time, the legal boundaries that the Courts may be able to verify. But, as pointed out above, an equally crucial question is where the Court would draw the boundaries of judicial review of ESMA’s discretionary decisions, should it ever be confronted with a legality challenge.

⁴⁹ Hofmann et al, *Administrative Law*, *cit.* (supra n. 11), p. 495. Analysing judicial review of administrative discretion from the perspective of institutional balance, see Fritzsche, “Discretion, Scope of Judicial Review...”, *cit.*, (supra n. 30). The link was made in Judgment in *Meroni v High Authority*, Case 9/56, EU:C:1958:7, where the Court analyzed with some depth the exercise of discretion by the High Authority of the ECSC, and for the first time stated the principle of institutional balance. The case is analyzed in Section 6 below (although focusing on other aspects).

administrative discretion, to claim that institutional balance dictates judicial restraint in reviewing discretionary choices amounts to a circular reasoning. To date, the principle of institutional balance has mostly supported the Courts' endorsement of institutional practices, the Court being generally unwilling to unsettle practices that have been accepted by the institutions as being compatible with the Treaty.⁵⁰ Recent cases confirm the Courts' lukewarm (if not a-critical) approach to reviewing legislative discretionary choices that enhance significantly the administrative powers of EU agencies, and of the Commission with important consequences in terms of the relative powers of the institutions.⁵¹

Secondly, institutional dynamics may create 'micro-institutional balances' between the Courts and the EU administrative decision-makers. The latter may know how far they can go, because they know 'their' potential litigants, their likely capacity to effectively come to court, the type of information that may or not reach the courts, and the boundaries beyond which courts are unlikely to go. Courts, on the other hand, if called to intervene, may ground their assessment on how far the challenged decisions deviate from established practices (whether or not these are known to potential litigants), thus partially compensating their lack of the specialized knowledge that some assessments of legality would require. On occasion balances may be disrupted, lead to 'judicial battles' between administrative decision-makers and the Courts, which, ultimately, may re-define balances (e.g. the Commission's appeals as a reaction to the more intense judicial review of discretion in anti-trust cases by the General Court, following *Tetra Laval*).⁵² But what are the legal normative boundaries of such dynamics? If law is the pillar of the Union's powers acquired on the basis of the Treaties, arguably, it ought to intervene where there may be a potential harm to the values it protects (including, among others, the publicity of reasons that condition judicial assessments, legal certainty as to the standard of review that the Courts may apply).⁵³

⁵⁰ B. de Witte, "The agenda of the European Court of Justice in shaping the institutional balance in the EU", Outline for the Workshop 'Checking and Balancing Law-making Beyond the State', Amsterdam 20-21 March 2014 (on file with the author). De Witte points out that "the acceptance of institutional 'creativity' is particularly visible in cases where all three institutions agree to engage in a new institutional practice that is then challenged before the Court by a Member State or by a private party, in an action for annulment or a preliminary reference".

⁵¹ Judgment in *ESMA*, EU:C:2014:18, and Judgment in *Biocides*, EU:C:2014:170.

⁵² For references on the Commission's reaction to *Tetra Laval*, see Craig, *EU Administrative Law, cit.* (supra n. 30), p. 424, fn 99.

⁵³ Characterizing legally relevant facts by reference to their potential social relevance and to the values that law

Normative criteria that would help to delimit the spaces of administrative discretion and of judicial review would be indicative of what ought to be susceptible of a legal judgment on the propriety of a decision, irrespective of whether that judgment is, or ought at all be made via judicial review.

The Courts are often called upon to assess the legality of acts that arise out of delicate compromises or heated debates among the institutions involved in decision-making. Such circumstances as well as the need to bridge national differences in the way of approaching judicial review of administrative discretion in the EU, may explain in part the pragmatism of the EU Courts.⁵⁴ However, the sheer dimension and political significance of the tasks that the EU administration performs today arguably would recommend overcoming what appears to be an essentially pragmatic approach to the review of administrative discretion, or at least one that may be perceived as favoring the growing powers of the EU administration.

But if criteria are needed to delimit spaces of administrative discretion and of judicial review, where can such criteria be found? On which basis can one even begin to propose such delimitation? The Courts' case law may be of little help in this respect. A systematic study thereof may explain variation, but *per se* it will not provide a normative benchmark that can guide critique. The sections below will provide the normative grounds of the inquiry.

4. Institutional competence and legitimacy claims

A normative construction on the way administrative discretion relates to law needs to be placed in context if it also seeks to provide benchmarks for a critique of the way courts review administrative discretion. There are at least two different dimensions to this claim. First, a theoretical conception of the relationship between discretion and law (in the sense of substantive legality explained above) should be informed by the specific characteristics of EU law. Second, how far should the EU Courts go in reviewing administrative action is also a question of institutional competence, both of the Courts and of the author of the challenged act, i.e. who they are (composition), what they do (functions), how they decide as

protects, see R. Soares, *Interesse Público...*, *cit.* (supra n. 10), p. 3.

⁵⁴ Fritzsche, "Discretion, Scope of Judicial Review...", *cit.* (supra n. 30), p. 402, who points out that reaching "consensus on outcomes" was easier than finding consensus on reasons.

an organization (procedures and forms of actions). One thing is to arrive at a conception of law and discretion that identifies how law should operate within the spaces of administrative discretion. Another is the relative demarcation of the spaces of discretion and of judicial review.

One structural characteristic of the EU, which conditions the role (and the meaning) of law within it, is its functional character.⁵⁵ The EU acts on the basis of attributed competences to the attainment of the objectives of integration defined in the Treaties. Some authors would argue that, as a result, there would be no reason to distinguish discretion exercised by the EU legislator and discretion exercised by the EU administration.⁵⁶ This point is obviously crucial to delimiting the scope of this work. In national legal systems, the bounded nature of administrative discretion is the distinctive feature that singles it out from legislative discretion. The legislator is free to define the goals of its actions (within the broader constitutional limits); the administrator is not. It is bound to pursue the public interest defined by the legislative norms it needs to apply within the boundaries of the powers attributed by the legislator.⁵⁷ This fundamental difference places administrative and legislative discretion in normative worlds apart. The distinction does not hold, at least not in these terms, in the EU. The EU legislator, contrary to national legislators, is bound to pursue the objectives of the Union defined in the Treaty and is bound to act within the powers attributed by the Treaty. And yet, this trait provides no ground to blur the distinction between legislative and administrative discretion to the point of making it a unique reality.⁵⁸ The institutional competence of the EU legislator is different from that of the EU

⁵⁵ See, e.g., G. Davies, “Social legitimacy and purposive power: the end, the means, and the consent of the people” in D. Kochenov, G. de Búrca and A. Williams (eds.) *Europe’s Justice Deficit?*, forthcoming (on file with the author). On the impact of this feature on the exercise of discretion see, Bouveresse, *Pouvoir discrétionnaire*, *cit.* (supra n. 27). pp. 105-112.

⁵⁶ Bouveresse, *Pouvoir discrétionnaire*, *cit.* (supra n. 27), pp. 212-213. For different reasons, but leading to a similar conclusion, see P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford, 2010), p. 19-20.

⁵⁷ See, e.g., R. Soares, *Interesse Público...*, *cit.* (supra n. 10), p. 100 (“of all the three State functions, only the legislative is free – my translation); B. Mattarella, “Discrezionalità Amministrativa” in S. Cassese et al. (ed.) *Dizionario di Diritto Pubblico*, Vol. III (Giuffrè, 2006), pp. 1993-2003, at 1993 (“Some legal powers are free ... such as..., within certain limits, the legislative power. The administrative power is discretionary and not free, because, while making a choice, the administration must pursue the public interest indicated in the norm or inferable from the powers attributed to the administration [“*attribuzione*”] or from the competence of the administrative office [“*competenza*”]” – my translation).

⁵⁸ The view Bouveresse explicitly defends, and also Lindseth (see note 56 supra).

administrative actors. Their institutional features (composition, functions, procedures and forms of actions) allow them to draw on different legitimacy assets.⁵⁹ Their institutional competence grounds the type of acts they adopt and their respective justification. Accordingly, it also influences the ways law should structure their power to choose between alternative courses of action.⁶⁰

The policy choices of the EU legislator are the result of the combined will of the Parliament (representative of the citizens), of the Council (representative of the will of Member States) and of the Commission (putative representative of the Union interest). Legislative acts of the Union have a thick cloak of formal legitimacy, which stems from the convergence of different types of legitimacy assets.⁶¹ The degree of involvement of these institutions in legislative procedures varies. It varies of course according to the concrete legislative procedure followed.⁶² But it varies also according to institutional practice. Trilogues are a telling example of how formal procedures may be bypassed.⁶³ Ultimately, they may challenge the assumptions on the legitimacy basis of legislative acts.⁶⁴ These variations notwithstanding, legislative acts have presumably a legitimacy basis that

⁵⁹ This approach informs also the analysis of separation of powers beyond the State in a joint project of J. Mendes and I. Venzke, “Relative Authority in European and International Law: Balancing Institutions in Comparative Assessments”, forthcoming.

⁶⁰ See *infra* Section 6, Sub-section 6.3.

⁶¹ The following remarks of Pierre-Yves Monjal remain pertinent in the Union post-Lisbon: “the notion of legislative power should be conjugated in a participatory form. It is the convergence of the collective or common action of dynamic bodies that reveals the Community legislator” ... “the notion of legislative procedure, which covers that of legislative power and legislative act, must rely on a triple legitimacy: integrative, through the Commission; democratic, by way of the Parliament; relying on the state, due to the Council”... “organically, the legislator is the trio formed by the dynamic institutions, *the functional and dialectic co-existence of legitimacies*” (Pierre-Yves Monjal, “Remarques sur l’emploi de la notion de fonction législative en droit communautaire”, 23 *Revue de la Recherche Juridique, Droit Prospectif* 1117 (1998) at p. 1141, 1148 and 1149, my translation, emphasis added).

⁶² In the ordinary legislative procedure the Parliament and the Council are co-authors; in the special legislative procedure one of them – most commonly, the Council – adopts the act after consulting or obtaining the consent of the other – usually the Parliament (see, generally, Article 289(1) and (2) TFEU).

⁶³ Trilogues are informal closed meetings between representatives of the three institutions to reach a fast-track agreement at an earlier stage of the legislative procedure. They were introduced in 1999 by the Joint Declaration on “practical arrangements for the new co-decision procedure (article 251 of the Treaty establishing the European Community)” (OJ C 148/1, 28.5.1999), which was subsequently replaced by Joint Declaration of 2007 (OJ C 145/5, 30.6.2007).

⁶⁴ There is a vast literature on co-decision (the ordinary legislative procedure) and on the problems posed by trilogues. In general, on the democratic quality of the ordinary legislative procedure, see C. Lord, “The democratic legitimacy of co-decision”, 20 *Journal of European Public Policy*, 1056 (2013).

administrative acts cannot claim (similarly to what occurs in national legal systems). Institutional practice may deviate from formal rules, but it still proceeds in the shadow of formal rules.⁶⁵

But this also means that acts of the Commission, of the Council only, whether based on the Treaty or on legislative acts, and acts of the EU agencies or of comitology committees do not share the same institutional competence or draw on the same legitimacy assets. Their composition, functions, procedures and forms of actions vary. Accordingly, they act competently on different legitimacy grounds. For instance, the Commission draws its ability to protect the Union interest mainly from its independence and competence (which its composition seeks to ensure) and from collegial deliberation (ensured, at least in principle, but also as a matter of law, by internal structures of decision-making and coordination). These institutional features define the Commission's ability to act legitimately from an institutional perspective. They justify its authority to adopt certain acts both under and at the margin of the Treaties. This perspective not only allows for normative critique of the legitimacy of the Commission's action,⁶⁶ but it should also influence the way law relates to its discretionary decisions. Specifically, it should condition the role of the Courts when reviewing them. The relative institutional competence of EU administrative actors and of the EU courts helps delimiting the spaces of discretion. Thus, it can guard both against possible pernicious consequences of judicial review.⁶⁷ The same argument could also ground a differentiation of the degree of judicial review depending on who the author of the act under review (the Commission, the Council, an EU agency or the Member States).

These preliminary observations situate the theoretical analysis that follows. The next section elaborates the meaning of bounded administration. It relies on national doctrinal constructions to propose a conception of how law should operate within the spaces of discretion.

⁶⁵ E.g. where veto powers are formally envisaged, veto may be never invoked practice but the possibility that it *may* be invoked conditions decision-making.

⁶⁶ Mendes and Venzke, "Relative Authority in European and International Law", *cit.*, supra n. 59; J. Mendes, "The Legitimacy of the EU Administration: Between Institutional and Democratic Claims", forthcoming.

⁶⁷ For an overview of institutionalist approaches to judicial review, see J. King, "Institutional Approaches to Judicial Restraint", 28 *Oxford Journal of Legal Studies* 409 (2008), at 422-30.

5. Discretion, public interest and a duty of regard

Conceptually, discretion presupposes a choice between alternative solutions that have an equal legal value, that is, it presupposes a choice made under the law. Normatively, the EU administration is at the heart of a polity founded in values – human dignity, freedom, democracy, equality, the rule of law and respect for human rights (Article 2 TEU). The institutions, agencies, bodies and offices that compose the EU administration – and also the Member States when implementing EU law – ought to respect these values while pursuing the objectives of European integration within the framework of the Treaties and of EU law.⁶⁸ This constitutional framework has a high level of generality. It applies indistinctly to all functions of the EU institutions, whether administrative or not. In practice, it will live insofar as the decisions of the institutions, agencies, bodies and offices concretize it. But this framework confirms that administrative discretion is far from operating in a legal vacuum. At the same time, due to their generality, these arguments do not contribute to defining how law should operate in structuring substantive choices made by EU administrative actors. Recalling these broad constitutional grounds does, however, invite further elaboration on the place of law vis-à-vis the discretionary choices of the EU administration. It indicates that judgments about the propriety of the decisions, also from a legal perspective, ought to be possible.⁶⁹ Ultimately, it indicates that the reconciliation of divergent interests and the making of policy choices grounded in the Treaty do not define a space that is irrelevant to law.

The EU administration adopts rules and decisions that concretize and further define EU policies as laid down in the Treaty on the Functioning of the European Union, controls the correct application of EU law, decides on the allocation of resources in given instances (state aids), manages programs. It exercises these powers on the basis of the Treaties and on the basis of the legislative acts of the Union, which indicate the ends that such powers ought to serve. This is a stylized and partial view of what the EU administration does,⁷⁰ but one

⁶⁸ See Committee of Independent Experts, *Second Report on the Reforms of the Commission*, vol. II, 10 September, 1999, paragraph 7.2. “The fundamentals”, p. 111-112.

⁶⁹ The possibility of passing a legal judgment does not mean that such legal judgment should be made by courts.

⁷⁰ serves, for the moment, as a “working tool”. The important nuances that it hides and the specificity of the functions of the EU administration will be taken into account at a later stage of this work. This account

that both captures a significant part of its functions and stresses an important characteristic that it shares with national administrations. The power of decision-making given to EU administrative actors is functional to the furtherance of pre-designated ends: the public interests postulated by the legal norms under which the EU administration acts.⁷¹ These legal norms are primarily those that administrative decision-makers are directly pursuing in a given instance, which define criteria of decision-making. However, they cannot be isolated either from other relevant norms that also define legally protected interests, or from general legal principles that underpin the legal system in which they operate. In this way, law binds the administration, *inter alia*, because it empowers it to pursue the public interests specified in the legal norms. Specific public interests “received and incorporated in the norm” set the purposes that need to imbue the choices of administrative decision-makers.⁷² This is the aspect of legality that this work zooms in on.

This ‘bindingness’ may be more fictional than real.⁷³ In reality, the claim that public action is justified by the pursuance of the public interests defined by law may be only a formal empty shell, a frail attempt to hold on to the shards of lost constitutional-liberal ideals. The public interests that the law is deemed to enshrine may be unclear, due, among other factors, to the possible conflicting views on the very purpose of a law.⁷⁴ Moreover, the

excludes, for now, the agenda-setting function of administrations, which in the EU a crucial role of the Commission (as well as, with increasing relevance, of the European Council).

⁷¹ This feature does not follow so much from the functional nature of the EU as from the specific position of its administration within it. Nevertheless, the extent to which the specific nature of the EU may influence how law should condition the discretion of its administration merits further reflection (in line with the first claim made *supra* in Section 4).

⁷² R. Soares usefully distinguishes these public interests (which he terms secondary public interests) from the general legal interest. “The determinant element of administrative bindingness [*vinculação administrativa*]” lies in the former (R. Soares, *Interesse Público...*, *cit.* (supra n. 10), p. 120, my translation).

⁷³ The binding character of pre-designated public interests or the very possibility of ascertaining the existence of a public interest that can serve “as a meaningful guide to administrative decision” is contested – see, e.g. R. Stewart, “The Reformation of American Administrative Law”, *Harvard Law Review* (1975), 1683. Tracing the evolution of US administrative law, Stewart notes: “Exposure on the one hand to the complexities of a managed economy in a welfare state, and on the other to the corrosive seduction of welfare economics and pluralist political analysis, has sapped faith in the existence of an objective basis for social choice” (*idem*). The “reality-check” to the normative arguments developed here will be provided by the empirical part of this work.

⁷⁴ This is particularly fitting in the EU. Union legislative acts are the result of the competing views of, at least, the Commission, the Council and the Parliament, and may be conditioned also by the Member States. The possibility of different meanings being given to the purpose and meaning of legislative norms is structurally imprinted in EU law, given the double-headed legislator (Council and Parliament) acting on a proposal of the Commission.

process of concretizing public interests, or of accommodating conflicting public interests, is inherently political and, in this process, the ability of the administration to carry out the public interest mandated by the applicable legal norm may fail.⁷⁵ Also, if public interests incorporated in legal norms do determine the purpose and scope of administrative action, they do so at a high level of generality. The identification of prevalent public interests, the definition of the range of possible solutions that would fall within the scope of permissible action, and of the solution that best serves the public interest, is a construction of the administration made on the basis of abstract legal determinations.⁷⁶ But what these arguments mainly show is that administrative acts are both executive and constitutive of legislative intent. Irrespective of more or less ‘dense’ substantive legal norms applicable in a given instance, the administrative decision-makers will always need to build bridges between the abstract scheme defined in legal norms and the circumstances that they regulate. In this process, the thread that links administrative action back to the enabling law, and specifically to the public interests it defines, may be quite thin. And, yet, it remains crucial.

5.1. A duty-bounded power

Because the power of administrative decision-making is functional to the pursuance of public interests, it is connected to a duty to pursue those interests.⁷⁷ This duty is twofold. First, the administrative decision-makers are bound to assess the real-life situations that may need to be acted upon. Second, where action is deemed required, they need to act in an adequate way, i.e. in a way that ensures, in substance, the realization of the public interests they have identified.⁷⁸ The decision-makers need to choose the course of action that they

⁷⁵ On these problems of the “transmission belt theory”, see Stewart, “The Reformation”, *cit.* (supra n. 73), p. 1676ff, 1682-4.

⁷⁶ Talking about *the* public interest, in the singular, only makes sense as a result of balancing competing public interests that converge in a given situation, either attempting to mutually accommodate them or defining priorities between them. Such balancing should be made on the basis of criteria deduced from the applicable legislative provisions (and also from the mandate of decision-makers), but is also conditioned by the concrete circumstances that require administrative action.

⁷⁷ R. Soares, *Interesse Público...*, *cit.* (supra n. 10), p. 181.

⁷⁸ R. Soares, *Interesse Público...*, *cit.* (supra n. 10), p. 188-9. Soares calls this the duty of good administration. In his view, because the ends of administrative action are predetermined, the judgment of the adequate means to fulfil a public interest (*conveniência*) is a purely technical judgment: the administrator needs to find “the *only* means that fully satisfies the public need” (p. 189, emphasis in the original, my translation). This is not the view defended in this work.

consider is required by law, or that, according to their interpretation, fulfills the legal norms they are deemed to apply. They also need to deploy the adequate means to define that course of action. In this sense, administrative action is inherently teleological.⁷⁹

Stressing that the power of administrative decision-makers is connected to a duty to pursue public interests may be too obvious to be worth reiterating. But it is this link that allows us to better grasp how law may structure the exercise of administrative discretion. The assessment of the real-life situations and the identification of the public interest – i.e. the weighing, mutual accommodation and ordering of competing public interests – are in a dialectical relationship. The public interests envisaged in the abstract scheme of the law acquire significance in the process of assessing the circumstances that may require administrative action: those circumstances unveil the interests that need to be protected. But this process occurs in relation to, and is hence co-determined by, the legal determinations of the interests the administration ought to be pursuing in the first place.⁸⁰ Crucially, it is this assessment of the circumstances 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.⁸¹ A fundamental question then is who ultimately gets to decide on what that public interest is or should be: the administrative decision-maker or the courts when reviewing compliance of those decisions with the legal determinations. An answer to this question requires criteria that this normative construction does not yet provide.⁸²

This dialectical relationship means that the duty of careful and impartial examination is intrinsically linked to a duty to pursue public interests. As enshrined in the Courts' case law, this duty is essentially a tool to revise the factual bases of administrative decisions.⁸³ It refers to a process of collecting the information needed to assess the relevant factual and legal aspects of a given situation. But, importantly, that process is guided by a specific purpose: the pursuance of the public interests that the decision-maker purports to fulfill (or

⁷⁹ R. Soares, *Interesse Público...*, *cit.* (supra n. 10).

⁸⁰ R. Soares, *Interesse Público...*, *cit.* (supra n. 10), p. 195. An illustration of this dialectical relationship is given below, in the analysis of the *Meroni* judgment of the Court of Justice (Section 6).

⁸¹ See *infra* n. 87.

⁸² Section 7, *infra*, gives indications on how one could arrive at such criteria.

⁸³ Crucially, one that has allowed the Courts to engage in more intrusive judicial review without apparently changing their standards of review (see Nehl, *Principles of Administrative Procedure*, *cit.*, supra n 45, p. 105, 118-9).

that to which it gave pre-eminence) in view of the legal determinations under which it acts. The duty of care is not dissociable from the duty to act in a way that ensures, in substance, the realization of public interests, i.e. a duty of regard to the competing public interests. This legal duty ought to frame the exercise of administrative discretion. Ultimately, it distinguishes arbitrariness from discretion. It is not a moral duty, but a legal duty that derives from the attribution of an administrative power. It is grounded on the respective enabling legal norms.⁸⁴ In the EU, this connection between power and duty is arguably stronger than in national legal systems, given the principle of attributed competences, and the functional character of the EU polity.

As pointed out above, the pursuance of public interests that are pre-determined by law – their identification by reference to a situation that requires administrative action, the definition of the course of action and of suitable means – is far from being a matter of logical deduction. The assessment of whether the protection of public interests requires action, when that action is due, what it should consist of, and how it should be pursued entails weighing political and technical considerations. Such balancing will determine the adequacy and propriety of a given course of action. The applicable legal norms may be of little help in this regard. In this sense, even if the exercise of administrative power is intrinsically connected to a legal duty, “the position of the administrator is ... much more independent than that of the interpreter of a legal norm”.⁸⁵ Viewing administrative decision-makers as interpreters of legal norms may be misplaced. It is clear that in performing their functions, they will need to resort to legal norms. But their decisions depend essentially on expertise, political orientations and bureaucratic stipulations. The outcome of their actions is likely much more “the product of political struggle” than “the product of [legal] normative idealistic elaboration”.⁸⁶ Ignoring this reality in particular in the EU would be yielding to a legal-formalistic view of decision-making processes. Does this turn the idea of an administration bounded by a pre-determined, heteronomous, public interest into a legal fiction? It does not. The public interests defined by law, and “discovered” by the decision-maker on the basis of law, should direct the course of action it eventually defines, along with

⁸⁴ R. Soares, *Interesse Público...*, *cit.* (supra n. 10), p. 200.

⁸⁵ R. Soares, *Interesse Público...*, *cit.* (supra n. 10), p. 232.

⁸⁶ Mashaw, *Greed, chaos, and governance*, *cit.* (supra n. 18), p. 109.

other factors.⁸⁷ They are the source of its power and the source of its duty. But the process through which public interests are constructed and pursued in the face of the circumstances upon which the decision-maker acts is only partially captured by legal reasoning, general principles of law and legal norms. These are not the main *matter of which* the decision is made.

5.2. Law within spaces of discretion

In the light of the above, 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*” does not define a space of policy-making that is irrelevant to law. Whichever the technical complexity and political sensitivity inherent in decision-making, the public interests at stake may be protected by legal norms..

That much the EU Courts do not deny in their more deferential judgments. When called upon to review legal acts that, in their view, require policy choices of the institutions, they do not refrain from reviewing the substance of the legal acts (formally at least). They simply restrict the scope of review to a minimum application of the standard “manifest error of assessment, misuse of power or excess of power”. One may applaud the Courts’ reserve as adequate to their institutional role; or criticize it, by recalling, for instance, that the notion of ‘misuse of power’ may be ultimately meaningless, given the serious difficulties of succeeding a legal challenge on its grounds.⁸⁸ In any event, it is axiomatic that courts influence the extent to which law may guide policy choices by defining different degrees of deference. The Courts’ definition of these boundaries may be more due to the self-awareness of their role in the EU political system – as an institution among others, albeit one with a specific responsibility vis-à-vis the law – and to the leeway of their intervention in a given

⁸⁷ 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 its action seems *prima facie* implausible. One example is the pursuance of complaints of infringement of competition rules, of Member State infringement of the Treaty, where the Commission purports to act in the “Union interest”, but where it is unclear how it defines that “Union interest”.

⁸⁸ Hofmann et al, *Administrative Law*, *cit.* (supra n. 11), p. 844-6; Craig, *EU Administrative Law*, *cit.* (supra n. 30), p. 429-30, pointing out the rarity of successful claims. See also A. García Ureta, “Misuse of Powers as a Ground for the Annulment of Community Acts: A Case Law Approach”, 8 *Rivista Italiana di Diritto Pubblico Comunitario* 775 (2003).

political context, than to their understanding of what the role of law ought to be in a given case.⁸⁹ Whichever the reasons, the Courts' approach to judicial review determines the boundaries beyond which they will not review discretionary choices (eventually leading to the 'micro-institutional balances' mentioned above).⁹⁰ However, this does not mean that there is no law in the spaces of discretion where the Courts decide not to enter.

The characterization of discretion as a duty-bounded power gives initial indications of how law may operate in those spaces. Administrative decision-makers may derive criteria from abstractly protected public interests via a dialectic process of interpretation. The public interests envisaged in the abstract scheme of the law are 'discovered' in view of the circumstances upon which the administrative decision-maker is entitled or required to act. But the concrete assessment of these circumstances is, in turn, determined by the abstract legal determination of the public interests that administrators ought to pursue. Legal norms are one source of the criteria that decision-makers develop to weigh and ponder competing public interests. This is why the reconciliation of divergent public interests and the selection of options grounded in political and technical assessments is a legal matter in public law. EU law is no exception.⁹¹ These are still general considerations, but they, arguably, bring us one step further in determining the meaning of administrative discretion bound by law. In particular, they show the limits of approaching discretion as "what is left outside of judicial control",⁹² - an approach that conceives of the way law relates to administrative discretion only from the perspective of the role of courts.

6. Bounded discretion in EU law

6.1. Duty of regard in *Meroni*

Are there grounds to sustain this normative conception of law and administrative discretion in EU law? In the EU different interests converge – and diverge – in the pursuance of the

⁸⁹ The Courts' intervention may be the continuation of the political process by legal means. When negotiations between Member States within the Council or between the EU institutions that need to be involved in the adoption of a legal act fail from the perspective of the "outvoted" party or parties they will resort to the Court, if there are sufficient legal grounds to support their claims.

⁹⁰ See Section 3 *supra*.

⁹¹ See Section 6 *infra*.

⁹² See, *inter alia*, Caranta, "On Discretion", *cit.* (*supra* n. 28), at 185.

goals of European integration: the interests of Member States, the so-called Union interest that the Commission is tasked with guarding, the interests of the citizens – in whose name many EU measures are claimed to be made – and of natural and legal persons otherwise affected by EU law. The possibility of identifying *the* public interests that pre-determine administrative action – even if they stem from a balancing process – would seem even more a legal fiction. But it is this very feature of the EU that recommends understanding administrative discretion as a power bounded by a duty to pursue pre-determined ends. The way that these pre-determined ends ought to legally structure administrative action will become clearer with the analysis of the judgment of the Court of Justice in *Meroni*.⁹³

In *Meroni*, the Court was called upon to assess the legality of a delegation of powers from the High Authority of the European Coal and Steel Community to private bodies. This judgment has long since kept busy legal scholars and political scientists on discussions regarding the legal limits of the regulatory powers of EU agencies. This is not the main reason to return to *Meroni* in these pages. While the way this judgment approaches discretion and, in particular, the imprint it has left in EU law are important to an analysis of EU administrative discretion, this aspect will be bracketed for now.⁹⁴ The aspect of *Meroni* that is important to highlight, at this point, is the way the Court dealt with a decision of the High Authority that appeared to lack legal grounding. *Meroni* complained that, in delegating powers outside the framework of the Treaty, the High Authority had breached the Treaty provision according to which the Authority had the “duty ... to ensure that the objectives set out in [the] Treaty are attained in accordance with the provisions thereof”.⁹⁵ The Court disagreed. The Treaty had given the power to the High Authority to make financial arrangements necessary to the performance of its tasks; this entailed the possibility – not envisaged in the Treaty – of delegating those powers, *but only* to the extent that delegation

⁹³ Judgment in *Meroni*, EU:C:1958:7.

⁹⁴ As will be mentioned below, *Meroni* distinguished between “discretionary powers” and “clearly defined executive powers” (see further Sub-section 6.2. *infra*). This distinction was crucial in the *ESMA* case (Judgment in *ESMA*, EU:C:2014:18, para 41 to 54). It allowed the Court to consider that ESMA’s powers were “precisely delineated” – although the very verification of the conditions upon which ESMA’s powers rest give it a wide scope of discretion in matters of crucial political significance (see also note 48, above). In this sense, the *ESMA* judgment implicitly showed how artificial (and fictitious) a distinction between “discretionary powers” and “clearly defined executive powers” can be.

⁹⁵ Article 8 of the Treaty establishing the European Coal and Steel Community.

would be intended *to pursue the objectives* by which the Authority was bound.⁹⁶ The judgment refers to objectives, not to public interests. However, the significance of *Meroni*, for current purposes, lays not so much in the possible analogy between objectives and public interests as in the legal framework within which it brings the exercise of discretion. The Court made clear that the power of the High Authority was bound by a legal duty, and could only be legitimate, from a legal perspective, if justified by this duty. Equally important is *how* the Court considered that the High Authority was bound by the duty to pursue the objectives set by the Treaty. The Court held:

“Article 3 [ECSC] lays down ... very general objectives, and it is not certain that they can all be simultaneously pursued in their entirety in all circumstances. In pursuit of the objectives laid down in Article 3 of the Treaty, *the High Authority must permanently reconcile any conflict which may be implied by these objectives when considered individually, and when such conflict arises must grant such priority to one or other of the objectives laid down in Article 3 as appears necessary having regard to the economic facts or circumstances in the light of which it adopts its decisions.* Reconciling the various objectives laid down in Article 3 implies a real discretion involving difficult choices, based on a consideration of the economic facts and circumstances in the light of which those choices are made.”⁹⁷

The Court thus identified the source of discretion and the broad legal framework for the exercise of “wide powers of discretion”. In exercising its Treaty powers, the High Authority needed to pay heed to the specific circumstances upon which it was called to act. These circumstances would determine the way it would reconcile the potential conflicts arising from the different general objectives it was bound to pursue. The Authority’s assessment of the circumstances before it would provide the criteria that should guide the priority given to the different pre-determined ends. Those circumstances unveiled the specific ends of its action. The Authority thus constructed the concrete purposes of its action – and hence defined its course of action. At the same time, while considering the cases before it, it could not detach from the general duty to pursue the objectives set by the

⁹⁶ According to the Court, “the power of the High Authority to authorize or itself to make the financial arrangements mentioned in Article 53 of the Treaty gives it the right to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision. However, in the light of Article 53, *such delegations of powers are only legitimate if* the High Authority recognizes them “to be necessary for the performance of the tasks set out in Article 3 and compatible with this Treaty, and in particular with Article 65.” (Judgment in *Meroni*, EU:C:1958:7, p. 151, emphasis added). The Court has termed these tasks “objectives” (see quotation text referenced in the next footnote).

⁹⁷ Judgment in *Meroni*, EU:C:1958:7, p. 151-2, emphasis added.

Treaty. Thus, a prior legal determination framed the Authority's construction of the ends it purported to achieve. That legal pre-determination should, ultimately, ground and guide the substantive choices it made, even if these were equally co-determined by non-legal considerations.

Hence, the duty of examining the circumstances of the case – which is the essence of administrative tasks, irrespective of the general or individual breadth of administrative acts – was intrinsically linked to the duty to pursue the ends that law defined when granting powers to the High Authority. The Court did not qualify the duty to examine the specific circumstances of the case, but one may equate it, in the light of subsequent case law, with a duty of care. In *Meroni* the Court explicitly associated this duty to another one: the duty of regard to the objectives the High Authority was bound to pursue. Together they framed the exercise of its administrative discretion.

6.2. The *Meroni* dichotomy

In *Meroni*, the Court drew an important conclusion from the verification that, when reconciling conflicts between the objectives it was bound to pursue, the Authority was exercising “a discretionary power, implying a wide margin of discretion”.⁹⁸ This type of power – contrary to “clearly defined executive powers” – could not be delegated. Its exercise would imply the definition of economic policy;⁹⁹ delegating it would “bring about an actual transfer of responsibility”, because “it replaces the choices [*apprezzamenti*] of the delegator by the choices of the delegate”. By contrast, “clearly defined executive powers”, for this very reason, can “be subject to strict review [*rigorosamente controllato*] in the light of objective criteria determined by the delegating authority”.

⁹⁸ In the original language of the case, “un potere discrezionale che comporti una ampia liberta di valutazione” (and in the French translation, “un pouvoir discrétionnaire, impliquant une large liberté d’appréciation”).

⁹⁹ The English version reads “a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, *make possible the execution* of actual economic policy” (emphasis added). However, this translation does not correspond to the original Italian version: “un potere discrezionale che comporti una ampia liberta di valutazione ed *atto ad esprimere*, con l’uso che ne viene fatto, una politica economica vera e propria” (emphasis added). *Esprimere* means “to express” or “to voice” (as in “to express one’s own ideas”). Also the French version departs from the meaning of executing and comes closer to the idea of defining economic policy: “un pouvoir discrétionnaire, impliquant une large liberté d’appréciation, *susceptible de traduire* par l’usage qui en est fait une véritable politique économique” (emphasis added).

This distinction between executive powers proper and discretionary powers has been at the core of the debate regarding the permissibility of the delegation of powers in the EU to bodies and agencies created by the EU institutions. Whether the limitations to delegation of power as envisaged in *Meroni* have been overcome by institutional reality or not, is a matter that has been sufficiently discussed.¹⁰⁰ It is pertinent to the purposes of this work to the extent that it may fundamentally question the very distinction between the two categories of power drawn by the Court in this judgment. In fact, the way the Court recently applied it seems to confirm that the distinction between “discretionary powers” and “clearly defined executive powers” does not hold.¹⁰¹ However, what is important to stress at this stage is the way the Court characterized the discretion of the High Authority as a duty-bounded power. In that way, the Court placed under the purview of law what seemed to be beyond the scope of the Treaty – the possibility of delegation – and assessed the act of the High Authority accordingly.¹⁰²

6.3. The value of pre-designated ends: Treaty objectives and public interests

It is important to dedicate a few words to the current validity of the judgment. It is after all a Court decision about the powers of the High Authority of the ECSC based on an interpretation of a Treaty that is no longer in force and, crucially, that never regulated the Union as it exists today. What matters, for our purposes, is not the ability of the judgment to grasp the current tasks of EU agencies, but the current strength of the reasoning that led the Court to characterize the discretion of the High Authority as a duty-bounded power. Could it support the normative conception of law and discretion proposed in the post-Lisbon Union?

¹⁰⁰ See, e.g., E. Chiti, “An important part of the EU’s institutional machinery: features, problems and perspectives of European agencies”, 46 *Common Market Law Review* 1395 (2011), 1422-24; M. Chamon “EU Agencies: between *Meroni* and Romano or the devil and the deep blue sea”, 48 *Common Market Law Review*, 1055 (2011). The *ESMA* judgment marks another stage of this discussion: on the one hand, it explicitly applies *Meroni* to an EU agency (*Meroni* referred to powers the High Authority of the European Coal and Steel Community had delegated to a Fund governed by private law); on the other hand, it reveals how loose the *Meroni* doctrine can be in limiting the powers of EU agencies.

¹⁰¹ See supra n. 94. This issue will be analyzed at a later stage of this research, when elaborating on the concept of administrative discretion.

¹⁰² See further below pp. 36-37.

At first sight, the parallelism between the ECSC Treaty provisions invoked by the Court in *Meroni* and current Treaty provisions would seem to uphold an affirmative answer. The Treaty article on the basis of which the High Authority had adopted the act contested by Meroni gave literal support to the connection between the self-extended power of the High Authority and the duty to act in a certain way: it explicitly required that the power to authorize the making of financial arrangements “be necessary for the performance of the tasks set out in Article 3 and compatible with this Treaty”.¹⁰³ The Court considered these tasks to be objectives. Article 3 introduced the list as follows: “The institutions of the Community shall, within the limits of their respective powers, in the common interest (...)”.¹⁰⁴ Both the TEU and the TFEU have similar references to the binding nature of the objectives of the Union currently defined in Article 3 TEU.¹⁰⁵ They could then support the conclusion that the powers of the institutions are intrinsically associated to a duty to pursue those objectives. But, at such general level, this statement is self-evident and, hence, uninteresting.

Given the different nature of the Treaty founding the ECSC and the EEC/EC/FEU Treaties, the breadth of the objectives of Article 3 ECSC and Article 3 TEU post-Lisbon is different. The constraining capacity of Article 3 ECSC and that of Article 3 TEU are also fundamentally different. These provisions frame different types of powers. The ECSC Treaty was a *traité-loi*, in which the decision-making powers of the High Authority were mostly bound by the very provisions of the Treaty. The EEC/EC/FEU Treaty (as the TEU) is a *traité-cadre*, in which the executive decision-making powers of the Commission are mostly

¹⁰³ Article 53 ECSC Treaty. See *supra* note 96. In the French version of the Treaty, Article 53 uses “*exécution des missions*” for “performance of tasks” (“*esecuzione dei compiti*” in the Italian version) specified in Article 3 of the Treaty.

¹⁰⁴ Article 3 does not use any specific denomination to refer to the ends that the High Authority needs to pursue: neither tasks, nor objectives. The Court named them as “objectives” in the Italian and French versions (“*obiettivi*” and “*objectifs*”).

¹⁰⁵ See Article 3(6) TEU (“The Union *shall pursue its objectives* by appropriate means commensurate with the competences which are conferred upon it in the Treaties”); Article 13(1) TEU (“The Union shall have an institutional framework which *shall aim to promote its values, advance its objectives, serve its interests*, those of its citizens and those of the Member States”, emphasis added); Article 5(2) TEU (“the Union *shall act* only within the limits of the competences conferred upon it by the Member States in the Treaties *to attain the objectives* set out therein”, emphasis added) and Article 13(2) TEU (“Each institution *shall act* within the limits of the powers conferred on it in the Treaties, and *in conformity with* the procedures, conditions and *objectives* set out in them”, emphasis added).

bound by acts adopted by the Council, originally only with consultation by the European Parliament, nowadays often in co-decision with the Parliament. The objectives of the ECSC Treaty's steered a given course of action by giving specific directions on various aspects of the regulation of the coal and steel industry (e.g. "ensure the establishment of the lowest prices ... while allowing necessary amortization and normal return on invested capital"; "ensure that equitable limits are observed in export pricing"). By contrast, the objectives of the Union, given the very scope of the Union, are much more general and wide (e.g. "combat social exclusion and discrimination, (...) promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child"). They establish the political grounds of the competences found elsewhere in the Treaty (e.g. "The Union shall establish an economic and monetary union whose currency is the euro"). As a result, to claim that the power of the institutions when exercising administrative discretion in the Union post-Lisbon is bounded by the pursuance of the objectives of the Treaty is an inconsequential argument to support the normative conception proposed here. These objectives are so broad that virtually any measure, within a very large range, may be considered to pursue them (the exception is, of course, those measures that would bluntly counter them, such as a measure intended to discriminate between men and women).¹⁰⁶ At this level, the only legal limits that could condition the way the institutions exercise their powers would be the principles of subsidiarity and proportionality, under Articles 5(3) and (4) TEU. But, as enshrined in the Treaty, they are directed at legislative acts, not at administrative acts.¹⁰⁷

The meaning of the analogy is therefore manifestly lost if kept only at the level of the general objectives of the Treaty. One could instead seek to establish the analogy on the basis of the specific policy objectives that are stated or implicit in the various Treaty provisions that establish the Union's competence to act in a given area. They bind the acts of the institutions adopted directly on the basis of the Treaty, including the legislative acts of the

¹⁰⁶ One thing are the Union's objectives, another are its competences. The distinction is crucial, as Article 352 TFEU shows. This Article determines that when the pursuance of the *objectives* of the Union requires an intervention of the Union that is not supported by the *competences* the Treaty defines, the Council may create those competences by unanimity (para 1).

¹⁰⁷ See Protocol (no 2) on the Application of the Principles of Subsidiarity and Proportionality, which applies to draft legislative acts.

Council and the Parliament.¹⁰⁸ Arguably, they ought to pervade also the administrative action that the legislative acts of the Union purport, mediated by the specific goals stated therein. However, this line of reasoning still fails to heed the fundamental different nature of the ESCS and the EEC/EC/EU Treaties. Given this difference, the norms that substantively bind the exercise of administrative discretion at a level of specificity possibly similar to that of the ESCS Treaty provisions are found in the legislative acts of the Union and in those EU Treaty and TFEU provisions that directly ground the non-legislative acts of the Commission (or the Council).¹⁰⁹ It is here that one finds the objectives or pre-designated ends that should guide EU administrative decision-making, i.e. the public interests that the EU administration is legally bound to weigh and pursue in defining the content of its decisions. At this level, the *Meroni* statement of the High Authority duty-bounded power applies to the Commission, to the Council when acting in administrative capacity, and to EU bodies, offices and agencies. The way the duty to pursue public interests structures and conditions administrative discretion is illustrated also in other, more recent, Court cases.¹¹⁰

The aspect of *Meroni* highlighted here – neglected in the many discussions this judgment has triggered – is perhaps more relevant than ever. What the Court did in *Meroni* was to bring back into the purview of law (Treaty law, in that case) a decision of the High Authority that, when adopted, appeared to be a decision of administrative management or design that could be perceived to fall outside of the scope of the Treaty. Very much alike a multitude of decisions of institutional nature that fill the everyday implementation of EU law, the decision to delegate a set of tasks to private bodies was not sanctioned by the Treaty, but also not excluded by it. It would have allowed the High Authority to discharge its functions more efficiently, but challenged the ability of the Court to review the decisions that those bodies would have adopted for lack of jurisdiction. What was not explicitly envisaged was certainly not banned, from a legal perspective. The Court was flexible (at least at a minimum level). Bracketing for the moment the Court's possible selfish intent in

¹⁰⁸ E.g. Article 174 TFEU (industry) Article 191 TFEU (environment) Article 194 TFEU (energy).

¹⁰⁹ E.g. Article 107 TFEU (state aids).

¹¹⁰ E.g. Judgment of 3 March 2010, *Artegodan v Commission*, T-429/05, EU:T:2010:60, para 106, where the Court enumerates the consequences that stem from the fact that the Commission, in exercising its discretion in that case, was bound to give preference to the protection of public health; Judgment of 18 December, *Nancy Fern Olivieri v Commission*, T-326/99, EU:T:2003:351, para 73, where the duty to protect public health determines the procedural duties of the Commission in that case.

preserving its own power of review,¹¹¹ the way it brought that decision under the law of the Treaty arguably struck a fine balance between the demands of law and those of practice. From this perspective, by acknowledging the dialectical relationship between fact assessment and pre-determined ends and, importantly its consequences for the exercise of discretion, this judgment may be a useful starting point to analyze how EU governance mechanisms and practices that are part and parcel of what the EU is and does today should relate to law.¹¹²

7. Discretion and law: boundaries and spaces

7.1. Discretion through the lens of interpretation

The sections above have laid down the main premises of the idea of administrative discretion bounded by law. Essentially, they have retrieved a core idea of public law. Law twins administrative discretion with a duty to pursue pre-determined public interests, and in doing so it postulates a duty of regard to those interests. Their identification and balancing is essentially a dialectical assessment made by administrative decision-makers both in view of the circumstances they need to regulate and of their legal mandates. In this process, administrative decision-makers construct the law in a specific institutional context, in view of the tasks they need to perform. This construction guides their substantive choices. In what way tracing this basic idea in EU law helps us getting any closer to grappling with how law structures the discretion of EU administrative bodies?

Recalling this core idea emphasizes that law is part of the equation in the exercise of discretion in ways that the Courts' case law does not reveal or capture. Administrative decision-makers need to determine what is the scope of action they are given, what possible courses of action fit in this space, which criteria for choosing an option they may derive from the goals set in the applicable legal norms. They interpret the laws that both empower and constrain them. This interpretation not only defines the boundaries of their actions but

¹¹¹ One of the main concerns of the Court was that the decision of the High Authority did not subject the powers delegated to the private bodies to the same controls that they would have been subject to if they were adopted by the High Authority directly (namely, judicial review).

¹¹² Namely those mechanisms of dispersion of power that fall under what Sabel and Seitlin have termed "experimentalist governance". See, generally, C. Sabel and J. Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" 14 *European Law Journal*, 271 (2008). See also, J. Scott "In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law", 48 *Common Market Law Review* 329 (2011), stressing the legal problems posed by some of those practices.

also guides the substantive choices they make within those boundaries, in a dialectical process where legal norms operate in tandem with the assessment of the circumstances that administrative actors regulate.¹¹³ Interpreting the law is then a core aspect of what administrators do, but crucially the way they do so is determined by the functions they were empowered to carry out within a specific institutional context, and by their views on what their tasks ought to be in the case before them. Law is one substantive element of the policy choices administrative decision-makers take, rather than merely defining the boundaries of the spaces within which those choices are made. So, for instance, when the Court grounds the legality of the ESMA's powers in their amenability to judicial review in view of pre-defined criteria and objectives, this is only the thin surface of the law's coating of discretion. Beneath it, lay the specific ways through which decision-makers interpret the legal mandate they are bound to pursue and how that interpretation provides them with the criteria that guide their substantive choices. Judicial review – or the possibility thereof – may influence the way administrative decision-makers exercise their discretion. Depending on how stringent the standards of review are, courts may even ultimately define the very extent or existence of that discretion.¹¹⁴ And yet, judicial review only scratches the surface of law's ability to structure administrative discretion.

At the same time, law is merely one part of the equation in the exercise of discretion (and, eventually, even a rather minor part of it). Given the specific tasks of administrators (the definition and pursuance of public interest in the circumstances they regulate), the way they act is conditioned by a variety of non-legal factors. Approaching administrative discretion through the lens of interpretation will arguably shed light on the mix between law and non-law that composes administrative decision-making. It will better situate law in a specific functional and institutional context.¹¹⁵ It will reveal how the public interests abstractly pre-established in legal norms acquire meaning in the process of assessing the real life situations that trigger administrative action, a process that is guided by expertise, politics and bureaucratic considerations. Put differently, it will show how law works in the making of discretionary choices *within* the space of discretion.

¹¹³ See Section 5, in particular the text accompanying footnotes 79 and 81.

¹¹⁴ Ritleng, “Le juge communautaire de la légalité...” *cit.* (supra n. 29), p. 651; Bouveresse, *Pouvoir discrétionnaire*, *cit.* (supra n. 25), p. 10.

¹¹⁵ See, further, the Sub-section 7.2, *infra*.

Understanding how administrative decision-makers interpret and construct the law is helpful for a second reason. It will help determining how far courts should go in assessing whether there was a breach of law without disrupting the administrative process. Defining these boundaries is certainly a vexed issue in any legal system. Attempts to propose boundaries or criteria thereof often cannot aspire to more than drawing lines in the sand. And yet, separation of powers thinking postulates their existence. Administrators and judges have different institutional roles, different means, sources and tools at their disposal to assess given life situations. They also use law differently. The way administrators interpret the law is necessarily informed by their institutional role, which courts cannot take over both for normative and practical reasons. Understanding the specific ways in which administrators construct the law when performing their tasks can provide criteria to define the boundaries between the spaces of administrative discretion and of judicial review.¹¹⁶ They can then serve as a yardstick of normative critique of different degrees of judicial review.¹¹⁷

Courts ought to understand how law operates within the spaces of discretion to be able to perform an adequate review that, to the extent possible, avoids distorting their specific sense, logic and purpose. Arguably, such an understanding, more than statements of reasons, requires being acquainted with methods of legal interpretation that are conditioned by administrative structures (whether hierarchical or not) and processes. When reviewing whether “the law is observed”, courts ought to understand the ways in which the institutional configuration of administrations and the broader contexts of their actions condition and influence the processes through which they interpret law. The knowledge of these processes ought to inform their judgments on whether there was manifest error of assessment, misuse of powers, or ultra vires action. It may indicate the situations in which control over the way administrators use law within the spaces of discretion should not be a task for the courts, in particular in view of the comparative advantages of administrative review or ombudsman oversight. Thus, while the normative construction proposed above

¹¹⁶ See Mashaw “Agency-centered or Court-centered Administrative Law? A dialogue with Richard Pierce on Agency Statutory Interpretation”, 59 *Administrative Law Review* 889 (2007), at p. 904, emphatically defending that “only through [focused attention to how agency interpretation proceeds and how it is justified] can we have a serious conversation about when judicial deference to agency action is appropriate”.

¹¹⁷ Unveiling how law operates within the spaces of discretion through the lens of interpretation does not need to lead to wide and intrusive judicial review.

places the processes of reconciling competing public interests in the purview of law, it neither places them immediately in the purview of courts, nor does it give yet any indication on standards of judicial review.

In sum, understanding the specific ways through which EU administrative decision-makers interpret the law that empowers and constrains them will clarify both how law structures their discretion and the ways courts ought to review such discretion.

7.2. A suitable lens? Interpretation, policy-making and doctrinal distinctions

But is interpretation at all a suitable lens to analyze administrative discretion? Two main objections could be raised at this initial stage. First, even assuming that legal interpretation is part of what administrative decision-makers do when carrying out their functions, viewing the administrator as an interpreter of the law may be amplifying the role of law at the outset. Worse even, it distorts what administration is all about: policy-making rather than legal interpretation. A distorted view of the role of law in structuring administrative discretion has an important, undesirable consequence. It may excessively widen the scope of judicial review given the assumed final authority of courts on matters of law. Second, and from a different perspective, viewing administrative discretion through the lens of interpretation only captures a very small part or one specific facet of administrative discretion, if at all. After all, the thinking of various generations of continental legal scholars on administrative discretion has been shaped by the doctrinal distinction (prevalent in German administrative law, but influential also outside Germany) between the interpretation of undefined or undetermined legal concepts - and the choice that stems thereof - and administrative discretion proper.¹¹⁸ The former would be a matter of legal interpretation (hence, in the pure theoretical construction, a matter in the hands of courts), the latter a matter of normative choice between alternatives that are equally valid under the law (justifying, if at all, limited judicial review).¹¹⁹ Interpretation and discretion would hence be two different concepts entailing

¹¹⁸ In German law, the distinction has been traditionally made between “*Beurteilungsspielraum*” (margin of appreciation stemming from undetermined legal concepts – “*unbestimmte Rechtsbegriffe*”) and “*ermessen*” (discretion). See, e.g., Bouveresse, *Pouvoir discrétionnaire*, *cit.* (supra n. 27), p. 44-63. The author illustrates the difficulties of this distinction in particular in the case law of the EU Court, but she still upholds it.

¹¹⁹ E. García de Enterría and T. Fernández Rodríguez, *Curso Derecho Administrativo I*, 15th ed. (Civitas, 2011), pp. 481-488. At this general level of analysis, this conception has an equivalent in the UK legal system, where there

different intellectual operations (cognition in one case, volition in the other). Approaching discretion as interpretation would equally blur a further analytical distinction that separates administrative discretion proper from discretion stemming from complex technical assessments.¹²⁰ Ignoring such conceptual distinctions – consolidated by refined doctrinal and jurisprudential analyses – would only contribute to, rather than counter, the existing uncertainty regarding the role of the court in reviewing administrative discretion.¹²¹ These two lines of argument will be addressed in turn.

In itself to stress that administrative decision-makers interpret the laws they administer is obvious. If “every administrative decision is a purported application of the statutory grants of power to the facts as found”,¹²² there is inevitably one point in which policy choices converge with legal interpretation.¹²³ It is no news that courts often check decision-makers’ interpretation of those grants of power in reviewing their decisions. The matter only becomes interesting once one asks whether there is (or should be) anything specific about how administrative decision-makers interpret legal norms and how courts should approach their putative specific way of interpreting law.¹²⁴ US administrative law

is a demarcation between judicial review of the interpretation of legal terms (errors of law, regarding which courts are likely to substitute the initial administrative determination) and judicial review of the merits of the decision where the test of reasonableness defines an area where administrative decision-makers can decide between equally valid alternatives (with reflections also in EU law, see Craig, *EU Administrative Law*, *cit.* supra n. 30, p. 466, 536-44). The distinction equally resonates the separation made in US law between judicial review of the interpretation of law and judicial review of policy choices, under the standard of arbitrary and capricious (see *infra* n. 134).

¹²⁰ E.g., Bouveresse, *Pouvoir discrétionnaire*, *cit.* (supra n. 27), p. 63-66, who stresses the difficulty of the distinction. The distinction between administrative discretion and technical discretion (“*discrezionalità tecnica*”) has prevailed in Italian administrative scholarship (see Mattarella, “Discrezionalità Amministrativa”, *cit.* supra n. 56, p. 2000, who nevertheless doubts that there would be consequences in terms of the degree of judicial review given the different views on the value of technical assessments). Administrative discretion (“*discrezionalità amministrativa*”) refers to those choices that stem from assessing and weighing competing public interests that deserve protection in a given instance (Mattarella, “*Discrezionalità Amministrativa*”, *cit.* supra n. 56, p. 1994, 1996), which is different from the application of specialized knowledge to a given factual situation.

¹²¹ Caranta, “On Discretion”, *cit.* (supra n. 28), at p. 214.

¹²² L. Jaffe, *Judicial Control of Administrative Action* (Little, Brown, 1965), p. 555.

¹²³ J. Mashaw, R. Merrill, P. Shane, *Administrative Law: The American Public Law System. Cases and Materials*, 6th ed. (Thomson, 2009) p. 818, pointing out that “the arguments EPA would make for the permissibility of its statutory “interpretation” would be all but identical to the arguments it would advance to support the rationality of its rule”. See, further, Mashaw “Agency-centered or Court-centered Administrative Law?”, *cit.*, supra n. 116, p. 896-8 on why policy choice is an interpretative task.

¹²⁴ J. Mashaw “Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation”, 57 *Administrative Law Review* 501 (2005).

scholars, in particular, have debated whether there is a difference in the tools administrative decision-makers and judges interpret law. The discussion was sparked by the *Chevron* case.¹²⁵ *Chevron* established what was viewed as a new regime of judicial deference:¹²⁶ in reviewing “an agency’s construction of the statute which it administers”, if the statute is “silent or ambiguous” regarding the precise question at issue, courts should defer to an agency’s “permissible” or “reasonable” interpretation.¹²⁷ *Chevron* thus raised the question of what is a permissible or reasonable interpretation of an ambiguous statutory provision. Yet, the many analyses it triggered focused mainly on when, how and why courts should defer to the interpretation of agencies. They have largely been silent about what, if anything, is specific to this interpretation – what, *from the perspective of agencies*, would make a given interpretation permissible. This silence perplexed some, but it was obvious to others.¹²⁸ If one considers that administrative policymaking does not involve interpretation of statutes, or, at least, that interpretation and policy-making are wholly different operations, and that, where agencies interpret laws, they should use the same tools as courts do, the whole discussion is void to begin with.¹²⁹ But if one takes the contrary view – seconding Mashaw’s argument – agencies’ interpretation of statutes is a prior point to a meaningful discussion on judicial deference. Mashaw has pointed out good reasons in support of this view. First, “the mental operations involved in administrative implementation” are interpretative; second, methods of administrative and judicial interpretation should diverge, because of the different institutional roles of agencies and courts.¹³⁰ Both agencies and courts work with statutes, but they do so via different processes and with different purposes.

¹²⁵ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). When referring to *Chevron* and the ensuing discussion, the US terms ‘agency’ (instead of administrative decision-maker), ‘statute’ (instead of law, in the sense of legislative act) and the related attribute ‘statutory’ will be preferred.

¹²⁶ Critical about the innovative character of *Chevron*, see P. Strauss “Deference’ is Too Confusing - Let’s Call Them ‘Chevron Space’ and ‘Skidmore Weight’” 112 *Columbia Law Review* 1143 (2012) at pp. 1162-3.

¹²⁷ *Chevron*, *cit.*, 842-43, 844 (equating “permissible” and “reasonable”).

¹²⁸ Cf. J. Mashaw “Norms, Practices, and the Paradox of Deference”, and R. Pierce, Jr., “How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss”, 59 *Administrative Law Review* 197 (2007), referring to P. Strauss, “When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History”, 66 *Chi.-Kent Law Review* 321 (1990). Mashaw’s reply to Pierce is Mashaw “Agency-centered or Court-centered Administrative Law?”, *cit. supra* n. 116.

¹²⁹ Pierce, Jr., “How Agencies Should Give Meaning to the Statutes They Administer”, *cit. n. supra*, at p. 199, 202, 204-5.

¹³⁰ Mashaw “Agency-centered or Court-centered Administrative Law?”, *cit. (supra* n. 116), pp. 898, 901-2.

Building on this premise, to approach administrative discretion from the viewpoint of interpretation is not a misconception of the activity of the administrative decision-makers. If the assumption is that the specific institutional role of the latter requires them to use tools of interpretation different from those that courts use, this way of approaching administrative activity does not “merge the institutional roles of courts and of [administrative decision-makers]”.¹³¹ It does not imply that what the latter do is merely to give a proper meaning to legal norms – one that courts may eventually uphold. To the contrary, it highlights the specific ways in which administrations approach the law. Their function, processes, and organization condition the way they relate to law. For this reason, unveiling the processes through which administrations interpret the law, other than being a starting point to adequate explanations and critique of judicial deference – the point made by Mashaw¹³² – is also a suitable lens to determining how law structures discretion *within* the administrative decision-making process. Taking administrative interpretation of law as a specific process, allows assessing how law is intertwined in policy choices that may only partially be influenced by law, but that law should ultimately support. Certainly not everything will be a question of law, but questions of law may be enmeshed in questions of fact, and vice-versa.¹³³ They will be enmeshed in politics (be it political direction from the top or political influence via input received by lobbyists), expert judgments and bureaucratic motivations. In this sense, the interpretation of law should also not be seen as a step that is logically separate and prior to the exercise of discretion.¹³⁴ As defended above, the interpretation of the

¹³¹ Voicing this criticism, see E. Foote, “Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters”, 59 *Administrative Law Review* 673 (2007), at p. 678, p. 691. Foote takes statutory interpretation by agencies to connote “a disinterested body parsing statutory text in search of a fixed meaning about the intent of a prior, enacting Congress” (p. 692), which is, arguably, a restrictive view of the process of interpretation in any case.

¹³² Mashaw “Agency-centered or Court-centered Administrative Law?”, *cit.* (supra n. 116).

¹³³ The distinction between questions of fact and questions of law may be difficult to make in practice, but may be rules mandated by the formal rules of judicial review – e.g. in the US, §706 APA (“To the extent necessary to decision and *when presented*, the reviewing court shall decide *all relevant questions of law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action”, emphasis added). This issue will be further developed at a later stage of this work.

¹³⁴ This view is defended in the US scholarship in discussions on *Chevron*. *Chevron* is typically seen as entailing a two-step process. In step one, the court determines whether “Congress has directly spoken to the precise question at issue”; if that is not the case, in a second step, the court enquires whether the “agency’s answer is based on a permissible construction of statute”, in which case the court should defer to the agency’s reasonable interpretation. In one view, when the court checks whether the interpretation of the agency is reasonable, it is

abstract scheme of the law and the assessment of real-life situations should be seen as elements of a dialectical process that conditions substantive choices.¹³⁵

This brings us to the second point raised above: one thing is the choice inherent in the interpretation of law by administrative decision-makers, quite another is the choice stemming from the exercise of administrative discretion proper. Margin of appreciation and discretion would be two separate realities. This conceptual distinction stems from a court-centric approach to discretion that treats discretion as what is left after judicial review.¹³⁶ At the same time, there are limits to judicial review. The distinction between interpretation of law and administrative discretion then conveys the basic dividing line between legality – the realm of courts – and correctness of the decision – the realm of the administration. It does so in more sophisticated terms, in an attempt to bring us farther in defining the spaces of judicial review and of administrative discretion. Thus, for instance, García de Enterría and Fernandez Rodriguez make a compelling argument in favor of the distinction between interpretation of undetermined legal concepts and discretion. They highlight that:

“Given that the application of legally undetermined concepts is a matter of application and interpretation of the law that created the concept, the judge can control such application, assessing whether the solution to which it led was the only just solution that the law allows. The judge’s assessment starts from a given factual situation, which is supported by evidence, but he conducts his legal appraisal on the basis of the legal concept; this is, therefore, an instance of law application. By contrast, the judge cannot control the core of the discretionary decision, given that, whichever direction [this decision] may have taken, it was made within the limits of the legal referral to administrative assessments (...); it is necessarily just (as the contrary solution would be)”¹³⁷

checking whether the agency acted arbitrarily and capriciously, controlling, inter alia, whether the agency assessed the relevant factors and gave a satisfactory explanation that does not contradict the facts as found (*Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co. et al.*, 463 US 29, 43 (1983)). Be that as it may, one thing is to determine judicially the scope of the agency’s authority in view of the possible meaning of the applicable legal provisions, another is to control whether that authority was exercised reasonably. The respective tests of judicial review are different (see, e.g., Strauss “Deference’ is Too Confusing...”, *cit.* (supra n. 126), 1160). They apply to two different operations: the determination of the legal boundaries, which logically precedes the assessment of how agencies make discretionary choices within the legally assigned space of decision-making.

¹³⁵ Section 5 supra.

¹³⁶ Mattarella reminds us that this idea is entrenched in the historical origins of the concept of administrative discretion. This concept was born in the French legal order in the 19th century to indicate the acts of the administration that, in view of separation of powers, ought not be subject to judicial review (B. Mattarella, “L’Attività” in S. Cassese (ed.) *Trattato di Diritto Amministrativo*, pp. 629-703, at p. 669).

¹³⁷ E. García de Enterría and T. Fernandez Rodriguez, *Curso Derecho Administrativo*, *cit.* supra n. 119, at p. 484 (my translation)

This distinction raises two main problems. First, it may be indiscernible in practice, leaving at the end the definition of the spaces of review and discretion to the courts. Pescatore, writing about the Court of Justice in a commentary to then Article 164 of the EEC Treaty, noted 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.”¹³⁸ Without excluding the possibility of reaching “a posteriori” a typology of justiciable and non-justiciable issues, the better approach, he concluded, seemed to be to avoid premature judgments. Later analyses of judicial review of administrative discretion by the EU Courts confirm this pragmatism.¹³⁹ But they also reveal the strong hold that the distinction between margin of appreciation and discretion retains in EU legal scholarship.¹⁴⁰ In some cases, it is taken as an ideal of coherence that the Courts should strive for. neat conceptual distinctions are incapable of explaining reality, they may obscure – rather than unveil – the shifting dividing lines between the spaces of judicial review and administrative discretion.¹⁴¹ Both judicial flexibility and conceptual distinctions may thus elude the possibility of informed critique on the way courts approach judicial review of administrative discretion.

Secondly, the court-centric conceptual distinction between interpretation and discretion too readily assumes that law is a matter for the courts. It ignores the specific functional and institutional settings that determine the ways administrations work with law.

¹³⁸ Pescatore, “Commentaire de l’article 164”, *cit. supra* n. 37, at pp. 969-70. It may come as no surprise that Pescatore advocated judicial flexibility to decide cases in context. After all, he was a judge at the Court for almost two decades (between 1967 and 1985).

¹³⁹ See Section 3 *supra*.

¹⁴⁰ Bouveresse, *Pouvoir discrétionnaire*, *cit. supra* n. 27), pp. 57-60, Bouveresse defends that the fact that the Court uses the terms interchangeably is not sufficient to put the distinction at stake and prefers to stress “conceptual interferences” (p. 60). See also Fritzsche, “Discretion, Scope of Judicial Review...”, *cit.*, (*supra* n. 30) p. 364, Hofmann et al, *cit. supra* n. 11), p. 498. Schwarze, writing in 1992, warned that the EU Courts’ use of concepts familiar to national jurists could be deluding (*European Administrative Law*, *cit. supra* n. 12, p. 296-7), thus framing the issue as a matter of comparative law.

¹⁴¹ For a critique of “axiomatic principles” of judicial review in English law that condense “complex constitutional choices into user-friendly slogans”, see Lord Irvine of Lairg, “Judges and decision makers: the theory and practice of Wednesbury review”, *Public Law* 59 (1996), 60. He stresses that “it says much about the misleading nature of the aphorisms of public law that they are as widely accepted now as they were 50 years ago, yet the range of circumstances in which decisions may be struck down has been extended beyond recognition” (*idem*). A similar critique can be made in EU law, see Craig, *EU Administrative Law*, *cit. supra* n. 30), at p. 436. See also Section 3 *supra*.

The fact that the judge ought not replace discretionary decisions with its own opinion on the merits of the case does not mean that law is not one of the factors that conditions the substantive choices administrations make. A space free from judicial review is not a space free from law. The conceptual distinction between interpretation and discretion leaves one fundamental question open: How should the substantive values that law conveys be endorsed in the areas where the administrative discretionary decisions are made?

8. Law, public interest and interpretation

The fundamental changes that the Union has been witnessing roughly in the past five years have shown the little grip law may have in structuring policy processes and choices. The way law relates to administrative discretion is another dimension of the same issue, one that stays below the radar of the more conspicuous constitutional changes. Although it is not clear how current institutional developments will affect administrative structures, they prompt one to revisit the axioms about the way law relates to administrative discretion and also about the way courts review discretionary decisions. Such axioms – widely accepted by EU public lawyers – condense the main tenets of rule of law and separation of powers thinking, but they also risk hiding the complex institutional dynamics that ultimately define the role of law in administrative decision-making procedures. They therefore prevent a normative critique of how administrations make discretionary choices and of how courts review them.

The main argument of this paper is that a suitable understanding of these axioms and of the institutional boundaries they should define between EU courts and administrators requires looking into how law operates within the spaces of administrative discretion, both from a normative and empirical perspective. If the claim holds that administrative decisions are ultimately subject to substantive legal boundaries, law is arguably one element that ought to shape the choices that administrators make within their spaces of discretion, one among others. We should then ask ‘how’. Specifically, we should know how administrative officials interpret and construct the legal norms that provide substantive criteria that, in principle, ought to guide their discretionary choices.

In the EU, as in many national legal systems, the discussion on how far law ought to structure decisions adopted within the spaces of discretion has predominantly focused on

one aspect: judicial review of administrative action. An overview of the case law of the Court of Justice and of the General Court, complemented by doctrinal analyses thereof, reveals the complexity of the matter: hard lines, conceptual categories, and even the factors that could explain variation of judicial approaches are difficult to establish (Section 3). Judicial review of administrative discretion seems to challenge lawyers' typical quest for clarity and certainty. The analytical use of established formula (such as "manifest error of assessment") is limited: they conceal various degrees of judicial review. The principle of institutional balance is also often invoked as being capable of delimiting the respective powers of the EU institutions, including the suitable spaces of discretion and judicial control. But, in itself, it has little normative value: it mostly refers to existing institutional arrangements that both institutional practice and judicial interpretation modify potentially in a fundamental manner, in ways that are still perceived as complying with that principle. All this favors the pragmatism of the EU Courts when it comes to reviewing discretionary choices.

The Courts' case law only imperfectly provides a clearer understanding of the extent to which law is capable of structuring administrative decisions (both from an empirical and a normative perspective). Yet, such an understanding is needed in view of the powers that the EU exercises today, in areas that have a deep impact on the societies of the Member States and daily life. It could ground normative critique of the Courts' pragmatism in reviewing the discretionary decisions of the EU administration. Such critique becomes arguably imperative when the possibility of judicial review is presented as the ultimate limit of legality of the attribution of power to administrative actors (as held in the *ESMA* case). While hard boundaries are virtually impossible to define, one would still need a normative view on the role of law heedful of the institutional context to which it applies to ground normative critique.

This paper proposed that, in order to gain a better understanding of what lies behind public law aphorisms on how law relates to discretion, one should take a step back from judicial review of administrative discretion and search for a deeper understanding of how law operates (and how it should operate) within the spaces of discretion. It drew on doctrinal constructions found in national legal systems to propose a normative conception of how law should substantively condition administrative discretion (Section 5). It acknowledged that legal norms are far from being the main elements capable of structuring administrative

discretion. Law defines the boundaries within which decisions are made on the basis of considerations that may be wholly oblivious to law. But, arguably, law does more than that. Because legal norms define, albeit in abstract, the public interests that are the ends of administrative action, they postulate a duty of regard to competing public interests. The link between power and duty, which law thus generates, is consequential: a dialectical relationship between abstract legal considerations and factual assessments should guide the substantive choices made by administrators, in a process that is far from being a matter of logical deduction. It is shaped by policy choices, expert judgment and bureaucratic constraints and motivations. But it is also shaped by law (or so it should), even if legal norms and principles may not be the main matter of which the decision is made. Because substantive legality implies a duty of regard to competing public interests, law provides then a yardstick of critique of the decisions that administrative officials adopt within their spaces of discretion. This normative conception can be suitably transposed to EU law. The analysis of *Meroni* showed that this judgment incorporates the main elements of the normative construction proposed (Section 6). Despite the different nature of the European Coal and Steel Community – to which the judgment in *Meroni* referred – and the current EU, the *Meroni* recognition of a duty-bounded power applies to the EU administrative actors when implementing Treaty norms or EU legislation.

This construction invites us to inquire into the specific ways through which EU administrative decision-makers interpret the law, specifically, to analyze how interpretation of the legal provisions under which they act allows them to construct substantive criteria that should guide their discretionary choices. This proposal draws inspiration from the academic debate between US administrative law scholars on the specificity (or lack thereof) of agency interpretation of statutes. However, the argument made here is not that American law solutions should be transposed to EU law. Rather, the proposal the paper puts forward draws particularly on one distinctive claim – the function, processes and organization of administrative decision-makers conditions the way they use the law. Therefore, analyzing the ways in which decision-makers interpret legal norms in their specific institutional and functional contexts will shed light on how law is intertwined with policy considerations, expert judgment and bureaucratic considerations that inform discretionary choices, and hence, on how law structures these choices. Approaching discretion through the lens of

interpretation also sheds critical light on the use of doctrinal distinctions – namely, the distinction between interpretation of legally undermined concepts and discretion – that have informed the way administrative lawyers in Europe, in particular those influenced by German law, approach administrative discretion also in EU law.

These are the prolegomena of a normative framework of a broader research project. They need to be refined, but point the way towards acquiring, first, a better understanding of how law, as a tool in the hands of administrations, grounds and bounds their discretionary decisions and, secondly, a yardstick of critique of how far courts should review these decisions.