

The Interdependencies between Delegation, Discretion and the Duty of Care

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This chapter looks at the development of a set of interlocking legal principles to hold the delegation of discretionary powers to account: notably the duty of care and the principle of proportionality. The relation between the concepts of delegation, discretion, care and proportionality are not always very clearly established in EU law. Therefore, this chapter seeks to undertake a ‘reconnaissance mission’, trying to explain which principles of review are developing and why. This chapter then seeks to link the developments in an attempt to obtain a clearer view of the overall picture of ensuring effective yet accountable executive decision making in the EU.

This chapter first addresses the role and context of delegation of powers in EU law (section 1) before looking at discretion and its sub-categories as well as at how the Court of Justice of the European Union (CJEU) has approached different instances of discretion (section 2). This chapter then looks at review of discretionary powers (section 3), concentrating on the duty of care and its role in the context of proportionality review in the context of discretionary powers (section 4). Finally, this chapter draws some conclusions and avenues for future research in these complex questions (section 5).

1. *Delegation*

The starting point of the observations to this chapter is that delegation of powers to executive bodies is a necessity in all legal systems. In complex modern societies, effectiveness, flexibility and making choices adapted to future situations is not possible without delegation. The concept of delegation employed here is broad. Under the EU’s concept of conferral of powers within a multi-level structure, any power to be exercised by EU institutions, bodies,

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offices and agencies is delegated to them. Such delegation may take place by Treaty provisions by means of attribution of powers to the executive – essentially a delegation from Member States to individual EU institutions. Other delegations take place by EU legislative act by which the Commission or EU agencies or also Member State bodies grant powers to executive bodies. Finally, delegation may also arise as, what might be called, sub-delegation of powers. Sub-delegation is delegation from one body of the executive to another, e.g. from the Commission to an executive agency of the Union or from an EU agency to a national body. These delegations may cover the full range from the development of specific policies through to the simple implementation of often highly technical regulations for the internal market.²

In general, however, the act of delegating powers must employ some abstract language or terms open to interpretation as well as some description of tasks for which the recipient of delegation can choose the most appropriate means. The terms of delegation of substantive decision-making leeway of the authority concerned can thus be precise or open-ended, or a mix of both. Delegation will thus appear on a spectrum: At one extreme is the idea of completely bound or pre-determined decision-making having no interpretative space. Free, unlimited decision-making discretion is at the other extreme. Between these two extremes we find various shades of more or less constrained decision-making competence which, from an abstract point of view, can be understood to cover various contexts. They can concern the identification of the limits of what has been delegated; they can concern the question which input needs to be taken into account in decision-making; they can define the possibilities of the outcome of decision-making process; or they can consist of a combination of the above listed options.

The first context requires an answer as to what has been delegated. It touches upon the degree of openness and empowerment, which a delegating act contains. Generally, the interpretation of an act delegating powers and thus the definition of the circumscription of powers delegated is subject to full review by Courts. In general, no discretionary power is

² Examples for such far reaching delegation of powers arise from reading the Treaties and legislation but for an example, it suffices to look at the facts underlying the case C-493/17 *Weiss and Others* ECLI:EU:2017:792, which addresses the legality of an ECB spending programme of considerable dimensions.

afforded to the recipient of delegation. However, exceptionally the recipient of delegation has been granted the power in the enabling act, to interpret the extent of their legal mandate. In other cases, it has been acknowledged that the recipient of delegation is required to interpret the conditions of empowerment. The interpretation of the terms of delegation and thus their concretization is then an instance of exercise of powers which are either discretionary in nature or deserve similar treatment to matters of discretion.³

The other three contexts of delegation of open powers can be illustrated with the empowerments of the Commission in the TFEU's provisions on State aids:

- The Treaty has delegated to the Commission powers with respect to the input into decision-making, for example, in Article 107(2) TFEU, which inter alia declares 'aid having a social character . . . provided that such aid is granted without discrimination related to the origin of the products concerned' to be compatible with the internal market. The Commission, in its implementation of Treaty provisions on state aid (under Article 108 TFEU) must evaluate whether any given aid has such social character and is not discriminatory. In such a case, the Commission is then bound to regard such aid as being compatible with the internal market.

- It is equally possible that, under certain specified conditions, the administration will have the freedom to choose from among various possible consequences. For example Article 108(2), second paragraph TFEU states that, where a Member State has not complied with a Commission decision, the Commission 'may . . . refer the matter to the Court of Justice'. In this constellation, the administration has a margin to decide about the outcome, i.e. the output of decision-making. This is the constellation most frequently associated with the notion of discretion.

³ Various legal systems approach such questions quite differently. The case law of the CJEU (as for example German law, for example) submits the question of interpretation of the law to full judicial review combined with the possibility of the judiciary replacing administrative interpretations. Some legal systems (such e.g. outside the EU, US law) require judicial bodies to in principle defer to agency interpretations of legislative empowerments. This is the content of the famous *Chevron* doctrine of the US supreme court (*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 (1984) U.S. 837), which is, however, modified by several more recent cases such as for example *Mead (United States v. Mead Corp.*, 533 (2001) U.S. 218).

- Finally, there are situations where there exists a combination of freedom to interpret the content of the empowering act, to evaluate the facts on the input side of decision-making, or to decide which of various possible consequences are to follow the final decision. For example, Article 107(3) TFEU declares that certain types of aid, for example ‘aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment’, may be considered compatible with the internal market. Here we find a combination of the empowerment of the Commission to first define and then establish the existence of certain specified conditions (‘abnormally low’, ‘serious underemployment’). Once so evaluated, Article 107(3) TFEU requires the Commission to clarify the consequence of making such findings.

Since all administrative powers are based on a delegation, contained either in primary Treaty provisions or in secondary legislation, some sort of legal framework of substantive and procedural principles and rules is always applicable to bind even apparently open-ended and broad delegations. This is not only a premise of a system under the rule of law, but also a result of a more normative requirement that legitimate delegation of administrative powers and its exercise requires moderation and binding of the exercise of public powers to a pre-defined set of constitutional values and rights.⁴ The rules and principles of EU constitutional and administrative law balance the necessary delegation of administrative powers with the requirement of control over its exercise, not only from a procedural but also a substantive point of view.⁵

The development and application of these precepts has been a complex task, mainly undertaken through case law addressing specific problems in single policy areas and through the formulation of general principles of EU (administrative) law. In reality, the issue of the interpretation of the scope and nature of delegations and the consequent extent of substantive

⁴ See Joana Mendes, Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law, in: Herwig C.H. Hofmann and Jacques Ziller (eds.), *Accountability in the EU – The Role of the European Ombudsman*, Elgar Publishing (Cheltenham 2017) 144-177.

⁵ Where the applicable rules and principles are not explicit they will need to be inferred from the purpose and character of both the empowering measure and the empowerment itself.

decision-making power is highly intertwined with practical and theoretical notions of the judicial supervision of administrative activity.⁶

How to ensure that delegation of powers is undertaken in the context of the delegating act is often a question of the forms and degree of oversight. In practical terms, therefore, delegation and discretion cannot really be seen in isolation from supervisory powers. This is well understood and described, in public choice literature, in the context of the analysis of delegation in principle-agent analysis.⁷

However, supervision takes place in the form of judicial supervision but also by means of complex administrative controls and forms of political supervision. Next to courts, therefore, a variety of bodies such as the Ombudsman⁸ and the Court of Auditors review the activity of the EU's administration as to their compliance with the law and the exercise of their powers, including discretionary powers, within the law. Any such supervision thus must ask some key questions: Where is the administration best left to define its own approach, whether interpreting the confines of delegation, on the input or output-side of decision-making? Where should modes of review embark upon controlling the administration's interpretation and application of a legal norm delegating power to it? What is the nature of the review which in fact takes place? The answers to these and related questions will vary according to the extent and nature of the powers delegated.

⁶ Art 19(1) TEU (Art 220 EC) requiring that the CJ and the GC 'shall ensure . . . that the law is observed', gives a mandate for review of legal aspects including limits to delegation. It generally does not give a mandate to review the expediency of a measure against policy considerations. See eg Case C-236/99 *Commission v Belgium* [2000] ECR I-5657, para 28 with reference to Case 209/88 *Commission v Italy* [1990] ECR I-4313, para 16: '[I]t should be pointed out that under the system established by Art. 226 EC the Commission enjoys a discretionary power as to whether it will bring an action for failure to fulfil obligations and it is not for the Court to judge whether that discretion was wisely exercised'.

⁷ For many see eg Jerry L Mashaw, 'Prodelegation: Why Administrators Should Make Political Decisions', *J Law Econ Organ* 1 (1985) 81–100; Mark A Pollack, *The Engines of European Integration* (Oxford: Oxford University Press, 2003).

⁸ See Joana Mendes, Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law, in: Herwig C.H. Hofmann and Jacques Ziller (eds.), *Accountability in the EU – The Role of the European Ombudsman*, Elgar Publishing (Cheltenham 2017) 144-177 at 169.

2. *Discretions and Margins of Appreciation*

This omnipresence of delegation in the EU legal system results in very frequent delegation of discretions. In the case of delegations of powers to the Commission, for example, the delegation of discretionary powers can cover the power whether or not to investigate a case, to start an infringement procedure, to follow up on a complaint, to decide upon which type of act to adopt if there is the choice between various forms of act, to set its priorities in its work-programme, to submit a proposal to a comitology committee and many other more. Other institutions with far reaching delegation of administrative powers and far reaching discretion as to when, how and under which conditions to exercise them is the ECB (European Central Bank).⁹ The CJEU has also explicitly recognised that EU agencies can be the recipient of wide discretion.¹⁰

The case law of the CJEU considers the question of the extent of delegation of discretionary powers, putting less emphasis on assuming the existence of clearly and rigidly delimited, abstract categories of pre-defined types of discretion but applying instead a degree of judicial review adapted to specific constellations of delegation.¹¹ This arises from the CJEU case law which has in the past used varied terminology to describe different types of delegation and to distinguish between certain basic modes of decision-making. Identifying the extent of delegation of discretionary powers and its legal limits in EU law requires careful, contextual analysis of the underlying legal provisions.

⁹ This is brought dramatically to the foreground in cases such as Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400 and the pending case C-493/17 *Weiss and Others* ECLI:EU:2017:792 which addresses a discretionary spending programme of the ECB which the German Constitutional Court in its decision on preliminary reference to the CJEU estimated to be worth 1,8 trillion Euros by the time of its decision in May 2017 and counting. See: Decision of the German Constitutional Court, Bundesverfassungsgericht of 24 May 2017, 2 BvR 859/15, 1651/15, 2006/15 and 980/16.

¹⁰ See cases such as C-534/10 P *Brookfield New Zealand and Elaris v CPVO and Schniga*, EU:C:2012:813, para 51; Case C-546/12 P *Ralf Schröder v Community Plant Variety Office* of 21 May 2015, ECLI:EU:C:2015:332, Para 56: "...the CPVO has a wide discretion concerning annulment of a plant variety right..."

¹¹ The Member States' legal systems' approaches differ widely as to the theoretical and practical approaches to the review of these powers. The literature on substantive control of administrative activity in various jurisdictions is far too voluminous to be cited and explored at this point. This chapter attempts, therefore, to review the background and the developments in EU administrative law only. As Schwarze has pointed out in his comparative work on the EC and some of its Member States, a great variety of approaches to the definition and control of discretion exist. See Jürgen Schwarze, *Europäisches Verwaltungsrecht*, 2nd edn (Baden-Baden: Nomos, 2005) 246–482.

a) *Wide Discretion*

Delegation of far-reaching decision-making powers to the administration is often referred to by the CJEU as ‘wide discretion’. Of fundamental importance here is the decision in *Meroni*¹² where the Court interpreted a ‘wide margin of discretion’ as a delegation which ‘according to the use which is made of it, make possible the execution of actual economic policy’.¹³ In *Meroni*, and maybe even more so in the following early cases, the CJEU, often associated the notion of discretion with the delegation of quasi legislative decision-making powers to executive bodies. In *Meroni*, for example, the Court of Justice differentiated between, on one hand, ‘wide’ discretion and, on the other hand, a more limited ‘margin of appraisal’.¹⁴ In the *Inland Vessels* opinion, the Court distinguished the delegation of, on the one hand, full ‘discretion’ and, on the other hand, powers more clearly circumscribed, making them ‘only executive powers’.¹⁵ Today, the notion of a wide margin of discretion is also often referred to as a ‘broad discretion’.¹⁶

Key to this notion is that the administration is thus granted powers to decide about the substance of a certain policy,¹⁷ also with a view to future situations.¹⁸ A broad discretion may also be granted to the institutions by the Treaties, for example the implicit institutional right to decide upon its own organization.¹⁹ Wide or broad discretion is also respected in areas in which complex economic or socio-economic considerations to be taken into account.²⁰ It is

¹² Case 9/56 *Meroni v ECSC High Authority* [1957/58] ECR English special edition 133. Therein the ECJ defined limitations to the possibility of delegation of administrative tasks to bodies not established by the founding Treaties.

¹³ *Ibid*, at 152 (emphasis added).

¹⁴ Case 9/56 *Meroni v ECSC High Authority* [1957/58] ECR English special edition 133. On the current tensions that this case presently raises, see Moloney in this volume.

¹⁵ Opinion 1/76 *Draft Agreement establishing the European laying-up fund for inland waterway vessels* [1977] ECR 741, para 7.

¹⁶ Eg Case T-54/99 *max.mobil v Commission* [2002] ECR II-313, para 58; Case 69/83 *Lux v Court of Auditors* [1984] ECR 2447.

¹⁷ See eg Case C-180/96 *United Kingdom v Commission (BSE II-case)* [1998] ECR I-2265, para 97; Joined Cases T-481 & 484/93 *Exporteurs in Levende Varkens v Commission* [1995] ECR II-2941, paras 91 and 120 both from the policy area of agriculture.

¹⁸ Eg Case 40/72 *Schröder KG v Germany* [1973] ECR 125, para 28.

¹⁹ See eg Case 69/83 *Lux v Court of Auditors* [1984] ECR 2447: ‘The Community institutions have a broad discretion to organize their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks, on condition however that the staff is assigned in the interests of the service and in conformity with the principle of assignment to an equivalent post’. See also Case 19/70 *Almini v Commission* [1971] ECR 623, para 8.

²⁰ See eg Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, para 145; Case C-284/95 *Safety Hi-Tech v S. & T.* [1998] ECR I-4301, para 37; Case C-86/03 *Greece v Commission* [2005] ECR I-10979, para 88; Case C-120/99

also accepted in fields where EU agencies or the Commission have been granted the power to undertake assessments of complex economic or technical contexts.²¹

Despite its frequent use, the courts have so far not given any express definition of the notion of ‘complexity’.²² However, a review of the case law indicates that this notion is used as a shorthand for the requirement of undertaking a decision balancing up a combination of various factors, of evaluations and prognoses of future factual developments, and of interests and rights.²³ Relying on such shorthand for the definition of the areas of ‘wide discretion’ or ‘wide margin of appreciation’ can be confusing. In fact, ‘complexity’ might be a misnomer. After all, the fact that a matter contains economically or technically complex considerations should not necessarily put it beyond the intellectual reach of a court.²⁴ In fact, as AG Jacobs in *Technische Universität München* pointed out, such approach would risk violating the right to an effective judicial protection.²⁵ Judges are –or should be– capable of reviewing a dossier, and of reconstructing complex situations and conducting a legal assessment of the subject matter.²⁶ What lies behind the usage of considerations of complexity is actually the idea that policy

Italy v Council [2001] ECR I-7997, para 44; Case 113/88 *Leukhardt v Hauptzollamt Reutlingen* [1989] ECR 1991, para 20; Case C-4/96 *NIFPO and Northern Ireland Fishermen’s Federation v Department of Agriculture for Northern Ireland* [1998] ECR I-681, paras 41 and 42; and Case C-179/95 *Spain v Council* [1999] ECR I-6475, para 29.

²¹ With respect to EU agencies, see e.g. Case C-61/15 P *Heli-Flight v European Aviation Safety Agency (EASA)* of 28 January 2016, ECLI:EU:C:2016:59, para 101 and C-270/12 *UK v EP and Council (ESMA Short Selling)* of 22 January 2014, ECLI:EU:C:2014:18, paras 45-47. With respect to the Commission see e.g. case C-399/08 P *Deutsche Post v Commission* EU:C:2010:481, para 97; Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, para 46; Case 42/84 *Remia v Commission* [1985] ECR 2545, para 34; Joined Cases 142 & 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para 62; and Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, para 78 as well as Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, para 185. All with further references.

²² See, further, H-P Nehl in this volume.

²³ See eg Joseph Azizi, ‘The Tension between Member States’ Autonomy and Commission Control in State Aid Matters: Selected Aspects’ in H Kanninen, N Korjus, and A Rosas (eds), *EU Competition Law in Context: Essays in Honour of Virpi Tüli* (Oxford/Portland: Hart, 2009) 307–20; Aude Bouveresse, *Le pouvoir discrétionnaire dans l’ordre juridique communautaire* (Brussels: Bruylant, 2010) 366–9; Dominique Ritleng, ‘Le juge communautaire de la légalité et le pouvoir discrétionnaire des institutions communautaires’, *AJDA* 9 (1999) 645–57 at 650.

²⁴ See, eg, the case law regarding risk assessment and risk management in which despite the necessity of administrations to undertake ‘complex technical and scientific assessments’, judicial review was undertaken in a detailed fashion. See eg Case 14/78 *Denkavit v Commission* [1978] ECR 2497, para 20; Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, paras 154–163.

²⁵ AG Jacobs in Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469 paras. 10–16.

²⁶ Virpi Tüli and Jan Vanhamme, ‘The “Power of Appraisal” (Pouvoir d’Appréciation) of the Commission of the EC vis-à-vis the Powers of Judicial Review of the Communities’ Court of Justice and Court of First Instance’, *Fordham Int. LJ* 22 (1999) 885–901 at 890.

decisions or decisions based on specific, non-legal expertise should be taken by the institutions which have both a competence and a mandate to do.²⁷ This is indeed the fundamental consideration underlying the notion of separation of powers. It lies at the heart of the legitimacy of actions taken and roles played by different institutions and is a result of the CJEU's mandate to ensure under Article 19(1) TEU generally the review of legality of the acts of the institutions and bodies of the Union and not the expediency of their action from a political point of view.²⁸ This already underlay the holding in *Meroni*, where the Court referred to the 'balance of powers which is characteristic of the institutional structure of the community'²⁹—the institutional balance—as a reason for its limitations upon the delegations in question there.

b) Reduced discretion and margins of appreciation or appraisal

Reduced discretion in other cases has been referred to as a 'margin of appreciation' and a 'margin of discretion',³⁰ a 'discretionary margin of appraisal',³¹ a 'discretionary margin',³² as well as 'certain discretion'.³³ The General Court is ready to qualify a delegation of administrative decision-making powers as 'reduced discretion', for example in cases of 'the simple application of the law on the basis of the elements of fact available to the Commission'.³⁴ The varying terminology applied in the case law signals a lack of clear boundaries between the individual concepts and modes.

Therefore, as pointed out, far from being categorically distinct, the various forms of delegation of decision-making powers are distributed along a spectrum ranging from

²⁷ See, eg, Case T-187/06 *Schröder v CPVO* [2008] ECR II-3151, paras 59–63. The case is the first explicitly granting discretionary powers to an agency, potentially in conflict with the *Meroni* doctrine.

²⁸ Article 19(1) TEU empowers the Courts to ensure that 'in the interpretation and application of the Treaties the law is observed'.

²⁹ Case 9/56 *Meroni v ECSC High Authority* [1957/58] ECR English special edition 133 at 152.

³⁰ Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39.

³¹ Case T-22/97 *Kesko v Commission* [1999] ECR II-3775, para 143.

³² Case T-102/96 *Gencor v Commission* [1999] ECR II-753, para 165.

³³ *Ibid*, para 164.

³⁴ Case T-28/03 *Holcim (Deutschland) v Commission* [2005] ECR II-1357, paras 99 and 100, which draw the conclusion that '[i]t follows from those factors that the Commission's discretion was reduced in the present case'. The facts of the case are based on an antitrust decision of the Commission.

completely constrained to completely free. That which can be found between those extremes is indicative of the scope of the interpretative choices of the legislative basis, and of the choices contained in the decision-making parameters specifically defined in such legislation.

c) Bound decisions

Decision-making is bound where the satisfaction of the statutory prerequisites of an administrative decision is the only matter to be determined by the decision-maker. In this situation, the administration must act to comply with the statutorily specified consequence, once such prerequisites have been satisfied.³⁵ There is no opportunity in this decision-making mode to bring together relevant considerations and weigh them up in the light of statutory goals. The decision-maker must (merely) establish that certain legally established elements—typically, the existence of certain kinds of facts or circumstances—are present.³⁶ The determination of what exactly the statutory prerequisites are (and what they mean) will often, nevertheless, require the interpretation of unclear statutory terms. Even where no discretion has been conferred on an administration, the content and meaning of a delegating provision may need to be determined by interpretation—often in light of facts, the existence of which must be established by the decision-maker. An example of this exists in state aid cases, concerning the definition of an aid under Article 107 TFEU. The European courts have held that the concept of aid is objective, the test being whether a state measure confers an advantage on one or more particular undertakings.³⁷ Here, the Commission assesses situations in applying the law without enjoying a discretion, ‘save for particular circumstances owing to the complex nature of the State intervention in question’.³⁸

³⁵ Christian König, ‘Haftung der Europäischen Gemeinschaft gem. Art. 288 Abs. 2 EG wegen rechtswidriger Kommissionsentscheidungen in Beihilfesachen’, *EuZW* 7 (2005) 202–6 at 204.

³⁶ However, in certain circumstances factual analysis will be submitted to the margin of appreciation category, see the above discussed Case 42/84 *Remia v Commission* [1985] ECR 2545, para 34.

³⁷ Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, para 25; Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, para 95; Case T-98/00 *Linde v Commission* [2002] ECR II-3961, para 40.

³⁸ Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, paras 52–53; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para 71; Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paras 10–11. These particular circumstances have been found by the case law, eg in areas in which the Commission, in order to determine whether investment by the public authorities in the capital of an undertaking, constitutes State aid within the meaning of Art 107 TFEU, considers the so-called ‘private investor test’. See Case C-56/93 *Belgium v Commission* [1996] ECR I-723,

In the result, even where no delegation of discretionary powers has been conferred on an administrative actor, interpretations of the delegating act, the determination of the facts, and the ultimate holding that the statutory prerequisites have been met, or not, will normally be submitted to full judicial review, underlining the point that what is involved here is a matter of objective determination and not expedient judgement, weighing up, or evaluation. The fact that a delegation of administrative tasks does not contain discretionary powers does not mean that the institution or body applying the law cannot make decisions of its own. It means merely that these are submitted to full review, and that mistakes can incur liability for damages. Also, this type of decision-making can be delegated to bodies not provided for in the Treaties, such as agencies, as long as they are supervised.

Discretionary and non-discretionary decision-making can of course be present in the same administrative procedure. As an example, one can refer to risk assessment and risk management issues. In modern regulatory regimes the ‘technical’ fact-finding associated with risk assessment is often a task delegated to specific bodies, such as the European Food Safety Agency, the Medicines Authority, or the European Chemicals Agency (REACH). Such a body will, on the basis of a legal definition, establish the extent of a risk and in certain instances suggest policy approaches to address it. On the other hand, risk management decisions—decisions regarding the balancing of rights and interests—are generally reserved to the Commission.³⁹ This approach is problematic though because both the distinction between risk assessment and risk management as well as, in a wider sense, the distinction between technical aspects of a decision-making procedure and the political, rights-related ones, are inherently woolly.

para 10; Joined Cases T-126/96 and T-127/96 *Breda Fucine Meridionali and Others v Commission* [1998] ECR II-3437, para 5; T-296/97 *Alitalia v Commission* [2000] ECR II-3871, para 105; T-301/01, *Alitalia v Commission* [2008] ECR II-1753, para 185; T-196/04, *Ryanair v Commission* [2008] ECR II-3643, para 41.

³⁹ See, eg, the underlying facts and the legal assessment of the CFI in *Pfizer Health (Case T-13/99 Pfizer Animal Health v Council* [2002] ECR II-3305). There the medical agency had not been delegated discretionary decision-making powers. Discretion is maintained by the Commission. That discretion by the Commission is then limited by the obligation to state reasons in case the Commission decides to divert from the proposals for risk management made by an agency.

3. *Review of Discretion*

The exercise of the discretionary powers delegated to executive actors is circumscribed by legal criteria in the enabling norm identifying the purpose of the exercise and the public interest to be pursued, the general principles and values of EU law as well as the rights of individuals. Probably the most important consequence of the European courts' finding of the existence of a discretion is that they will then generally exercise only marginal judicial review.⁴⁰ The courts, when finding that there has been a delegation of broad discretionary powers, tend to limit review to, under the *Remia* formula: 'verifying whether the relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers'.⁴¹

Reduced judicial review under the *Remia* formula should, however, be more of an exception than the rule, since it has potentially limiting factors on the legality review required under Article 19(1) TEU.⁴² Accordingly, a tendency can be observed in the more recent case law of the past years of the CJEU of limiting cases of where it accepts administrative 'wide discretion'.⁴³ The principle-exception relation stems also from the fact that, where the delegation of policy choices is contemplated, a legislative act or a Treaty provision must clearly - explicitly or implicitly - state or indicate that is the case.⁴⁴ As a consequence, in cases held not to fall within

⁴⁰ For further explanation of the French origins of these concepts developed by the case law, see Dominique Ritleng, 'Le juge communautaire de la légalité et le pouvoir discrétionnaire des institutions communautaires', *AJDA* 9 (1999) 645–57 at 656.

⁴¹ See, eg, Case 42/84 *Remia v Commission* [1985] ECR 2545, para 34.

⁴² See, also H-P., Nehl in this volume.

⁴³ In *Holcim* the General Court was exceptionally explicit in that it hinted at the fact that 'it is *only* where it reviews complex economic appraisals' that the General Court applies the criteria of marginal review through its formula of reducing control to only 'manifest error or appraisal or misuse of powers' Case T-28/03 *Holcim (Deutschland) v Commission* [2005] ECR II-1357, para 95 (emphasis added) with reference to Case 42/84 *Remia v Commission* [1985] ECR 2545, para 34, and Case C-7/95 P *Deere v Commission* [1998] ECR I-3111, para 34. See with further discussion A Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *CMLRev.* 47 (2010) 361–403.

⁴⁴ According to the ECJ, an explicit delegation exists, eg, in cases of decision-making by the Commission in combination with a comitology procedure. See, eg, Joined Cases C-154 & 155/04 *Alliance for Natural Health and others* [2005] ECR I-6451, para 90 in which the Court held that 'when the legislature wishes to delegate its powers to amend aspects of the legislative act at issue, it must ensure that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria'.

the category of wide or broad discretion, the courts are generally inclined to raise the intensity of the review of legality to a level higher than that undertaken in applying the ‘manifest error’ test, used for cases of wide discretion. For example, where a delegating act confers only reduced discretion, judicial review with respect to annulment will be more thorough, and damages may be the consequence of the mere infringement of European law.⁴⁵

Also Article 261 TFEU clarifies that the CJEU will exercise ‘unlimited jurisdiction with regard to the penalties provided for in such regulations’.⁴⁶ In these cases, despite the Commission’s endowment with a delegation for the making of a discretionary decision establishing an adequate penalty for a violation of a legal provision, such penalties may be subject to full review resulting even in a *de novo* decision by the reviewing court exercising full review.

In view of the problem of the apparent lack of a clear and precise distinction along the spectrum of the different categories of wide discretion, discretion, and reduced discretion which arises from the great range of possibilities in the delegation of administrative powers, the case law has approached the possible distinctions of the degree of review in various policy areas with great pragmatism and with great variation of the terminology used, albeit, it must be said, at the cost of a certain lack of clarity and coherence in relation to the underlying problems.

⁴⁵ This is explicitly confirmed, eg, with respect to EU liability for damages under Art 340 TFEU. In *Antillean Rice* (Case C-390/95 P *Antillean Rice Mills and others* [1999] ECR I-769, para 58) and *Bergaderm* (Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paras 43 and 44 with reference to Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)* [1996] ECR I-2553, para 28). There the CJEU held that, where a Member State or an EU institution enjoys a discretion, a breach of the institution’s obligations will lead to the obligation to make good damages where ‘the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion’. On the other hand, it found, that ‘where the Member State or the institution in question has only considerably reduced, or even no, discretion the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach’.

⁴⁶ Florian Schmidt, *Die Befugnis des Gemeinschaftsrichters zu unbeschränkter Ermessensnachprüfung* (Baden-Baden: Nomos, 2004) 19.

4. *Fine-tuning the degree of review of discretionary powers and respect for procedural guarantees*

Generally speaking, the common denominator of instances where the courts find a simple or reduced discretion, as opposed to a more broad discretion, seems to be that they will more fully exercise their powers to review decision-making both with respect to their interpretation of a rule-making mandate as well as, where applicable, single-case decision-making. However, although there appears to be a tendency to protect individual rights in the increased intensity of such review, this will often become visible not through the initial wording of the criteria as such. Rather, the true test is the intensity by which courts review compliance with principles such as the ‘duty of care’ by probing whether full and impartial analysis of all relevant facts of the case has taken place. Also, an in-depth probing into the exercise of the principle of proportionality, especially the balancing of several possible regulatory approaches in view of the least onerous choice..

The CJEU has developed its *Remia* formula stressing, since its seminal case in *Technische Universität München*, that where an institution has been granted a power of appraisal, ‘respect for the rights guaranteed by the Community [now Union] legal order in administrative procedures is of even more fundamental importance.’⁴⁷ The reason for this development is linked to the heightened awareness of the CJEU as to the necessity of the protection of individual rights under EU law. Not only EU law, but also public law concepts in general, applied throughout constitutional systems, have evolved in the past sixty years since the pronouncements in *Meroni* and others. Two factors will be analysed to greater detail in the following. One is the developing relation between facts and law and the review of scientific input versus legal analysis which is now crystallising in the ‘duty of care’ (a). Another is the role of the proportionality principle, whose relation with the notion of discretion is fraught with difficulties (b).

⁴⁷ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469.

a) Duty of Care and the Notion of Facts

Since the early nineties of the last century, not coincidentally during a phase of great expansion of the administrative law and practice of the EU, the CJEU has been developing its case law on the notion of facts and the review of these in the context of executive action under the so called duty of care.

The concept of facts, which led to a certain degree of expansion of judicial review, was developed with respect to the classification of non-legal theories such as economic theory as facts in the case law of the CJEU. Thereby, the scope of the matters subject only to limited review has become more circumscribed than in earlier case law.⁴⁸ The first wave of cases where economic theory and its conclusions as well as technical assessments were subject to the same review as facts was in the early 2000s in *max.mobil*,⁴⁹ *Airtours*,⁵⁰ *Tetra Laval*,⁵¹ and also *Schneider*.⁵² In *max.mobil*, a single-case administrative decision on the application of competition law, the GC had distinguished the facts subject to full review and the law. The material accuracy of the facts relied on must be thoroughly examined by the Court, whereas the prima facie appraisal of those facts and, more so, the decision whether it is necessary to take action are subject to limited review by the Court.⁵³

Later, in *Tetra Laval*, the Court of Justice clarified the degree of review of broadly understood facts by holding that ‘not only must the Community Courts, inter alia, establish

⁴⁸ It has not done so, however, in the context of decision-making of more legislative character. Here, the courts have been rather broad with respect to including factual concerns in the notion of discretion. Eg in *Agraz* (Case T-285/03 *Agraz and others v Commission* [2005] ECR II-1063, para 73 with reference to Case 138/79 *Roquette v Council* [1980] ECR 3333, para 25; Case C-243/05 P *Agraz and others v Commission* [2006] ECR I-10833, para 34) the CFI and the ECJ were called upon to define the degree of discretion enjoyed by the Commission in fixing the amount of an aid to tomato growers in application of the EC Treaty. It was therein confirmed that in legislative contexts, ‘when evaluating a complex economic situation, the Commission’s discretion also applies to the finding of the basic facts’.

⁴⁹ Case T-54/99 *max.mobil v Commission* [2002] ECR II-313.

⁵⁰ Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

⁵¹ Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381 upheld on appeal in Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987.

⁵² Case T-351/03 *Schneider Electric v Commission* [2007] ECR II-2237. On this development, see also H-P. Nehl in this volume.

⁵³ Case T-54/99 *max.mobil v Commission* [2002] ECR II-313, para 59. The ECJ on appeal found that the case before the CFI had been inadmissible, thus not further reviewing the reasoning of the CFI in substance including the cited passage in para 59. See Case C-141/02 P *Commission v max.mobil* [2005] ECR I-1283.

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.⁵⁴

The distinction between law and fact, despite being important, is—not surprisingly but unfortunately—fraught with difficulty, not just in EU law but also in many legal systems.⁵⁵ In some legal systems of the EU Member States this distinction had also direct effect on the notions of judicial review of discretionary powers.⁵⁶ Nonetheless, the CJEU found an elegant way around the distinctions by declaring most factors relevant as input to decision making, to be included in the notion of fact, subject to review. This was established and developed in the case law on the duty of care.⁵⁷

The duty of care goes back to cases of 1991 including the seminal case *Technische Universität München*.⁵⁸ The CJEU began introducing its review of a discretionary decision in the context of a customs decision with a restatement of the *Remia* formula under which where the institutions have discretionary powers or powers of appraisal and thus the manifest error test is to be applied, ‘respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance’. It continued to state that ‘those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person

⁵⁴ Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39.

⁵⁵ See Denys Simon, ‘Une théorie de l’intensité du contrôle juridictionnel est-elle possible?’, *Europe* 12 (2005) 3–5; Paul Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006) Chapter 12, ‘Law, Fact and Discretion’; Dominique Ritleng, ‘Le juge communautaire de la légalité et le pouvoir discrétionnaire des institutions communautaires’, *AJDA* 9 (1999) 645–57 at 648; all with further examples.

⁵⁶ See e.g. the distinction in Italian law between technical discretion (*discrezionlità tecnica*) and administrative discretion (*discrezionlità amministrativa*) and in German law between the more complete review of factual input into decision making (*Beurteilungsspielraum*) and the more marginal review of output related discretion (*Ermessen*).

⁵⁷ The duty of care was first explicitly identified as a principle of EU law in the case law of the CJEU by van Gerven AG and adopted by the Court in *Nölle* an anti-dumping case. Opinion of Advocate General van Gerven in Case C-16/90 *Nölle v Hauptzollamt Bremen-Freibafen* [1991] ECR I-5163.

⁵⁸ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469.

concerned to make his views known and to have an adequately reasoned decisions.⁵⁹ Violation of this principle would lead to the annulment of the decision.

Ever since, it has been established that an administrative decision-maker, even when granted wide discretion, must therefore make the decision after considering all the relevant factors, including special circumstances affecting the instant matter. What factors may or may not be taken into account may be either expressly listed—sometimes exhaustively—in the statute or may be inferred from the statutory goals, or both. These factors will include both technical aspects, knowledge and also public and private interests to be balanced.

The very fundamental nature of this obligation makes it applicable across various forms of administrative action in the EU – from single case decision making to the adoption of acts of general application.⁶⁰ Importantly full and impartial assessment of all relevant facts is necessary regarding any type of discretionary powers conferred on an institution or body. The facts to be taken into account in such decision making may arise from all sources of EU administrative law applicable to the case: specific legislative or non-legislative acts, general principles of law, or Treaty provisions. This includes non-policy specific ‘horizontal clauses’.⁶¹

The duty of care to be satisfied by EU institutions thus requires the analysis of technical facts as well as interests - both public and private. It exists towards individuals, as well as

⁵⁹ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469.

⁶⁰ See e.g. C-62/14 *Gauweiler and Others v Deutscher Bundestag* of 16 June 2015, ECLI:EU:C:2015:400, para 69 (regarding an ECB purchase programme to be implemented by individual acts under Article 18 of the ESCB Statutes); Case T-333/10 *Animal Trading Company (ATC) and Others v Commission* ECLI:EU:C:2013:451, paras 84-94 (concerning a general decision by the Commission addressed at the Member States which had negative effects on the plaintiffs). Joana Mendes, *Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law*, in: Herwig C.H. Hofmann and Jacques Ziller (eds.), *Accountability in the EU – The Role of the European Ombudsman*, Elgar Publishing (Cheltenham 2017) 156.

⁶¹ See e.g. Article 11 TFEU which requires that ‘environmental protection requirements . . . be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development’, or Article 168(1), first paragraph TFEU which requires that ‘a high level of human health protection . . . be ensured in the definition and implementation of all Union policies and activities’. In that respect the General Court has held, eg, in Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, para 158 that ‘[t]he duty imposed on the Community institutions by the first subparagraph of Article 129(1) of the Treaty to ensure a high level of human health protection means that they must ensure that their decisions are taken in the light of the best scientific information available and that they are based on the most recent results of international research, as the Commission has itself emphasised in the Communication on Consumer Health and Food Safety’.

towards Member States.⁶² However, it also needs to be pointed out that case law developments rarely being linear, and there are examples in which principle of care does not have the power to act as limiting factor to discretionary powers. For example, in *Staelen*, the Court of Justice submitted the very compliance with the principle of care to the standard of whether an act of an institution was sufficiently serious to cause a damage to be covered.⁶³

b) Discretionary powers and the principle of proportionality – care to the rescue

As a general principle of EU administrative law, proportionality has developed an important - yet not always well-understood - role when it comes to identifying the degree of judicial review conducted with respect to discretionary cases.⁶⁴ The principle of proportionality with its balancing requirements is specifically capable of addressing the question of whether public interests and private interests have been balanced. But the limited review in discretionary cases was often understood, such as in *Association Kokopelli*, to allow for testing only if a measure is manifestly inappropriate in relation to the objective which the competent institution seeks to pursue. This approach makes for a particularly limited reading of the criteria for review of proportionality.⁶⁵ In this context, AG Kokott's in *SPCM* criticised that the relation between proportionality review and controlling margins of discretion "is not always clear in the case-law."⁶⁶ She reminds the Court that statements which limit proportionality review to manifest inappropriateness à la *Association Kokopelli*, "...are liable to be misunderstood".⁶⁷

⁶² See e.g. C-362/14 *Schrems v DPC* of 6 October 2015, ECLI:EU:C:2015:650, para 63.

⁶³ C-337/15 P (Grand Chamber) *European Ombudsman v Claire Staelen* of 4 April 2017 ECLI:EU:C:2017:256, para 41. In *Dyson* the General Court had made the review of the duty of care subject to the same manifest error test of the exercise of discretion, thereby misunderstanding the very purpose of the duty of care (Case T-544/13 *Dyson Ltd v Commission* of 11 November 2015, paras 38, 39.) However, upon appeal, the Court of Justice corrected that approach. It stated that actually, that no other than the General Court itself had 'manifestly distorted' positions of the plaintiff and the facts of the case (Case C-44/16 P *Dyson v Commission* of 17 May 2017, ECLI:EU:C:2017:357, para 49, 50).

⁶⁴ See also Kosta, in this volume.

⁶⁵ See C-59/11 *Association Kokopelli* EU:C:2012:447, para 38. *Kokopelli* concerned a dispute between two seed dealing companies and the question whether seeds varieties not officially registered could be marketed. *Kokopelli* must be considered particularly narrow since the case actually affected rights of individuals which needed to be balanced.

⁶⁶ Kokott AG in Case C-558/07 *SPCM and others* [2009] ECR I-5783, para 73.

⁶⁷ Kokott AG in Case C-558/07 *SPCM and others* [2009] ECR I-5783, paras 73–77.

“If there are clearly less oppressive measures available which are equally effective, or if the measures adopted are obviously out of proportion to the aims pursued, the persons affected must be given judicial protection. Otherwise the principle of proportionality, which is part of primary law, would be deprived of its practical effect.”⁶⁸

AG Kokott accordingly points to cases in which the Court also examines in particular whether there are obviously less intrusive measures or even whether the burdens are proportionate to the aims pursued as models of good practice.”⁶⁹ AG Kokott’s statements strictly made with respect to legislative acts are however also relevant to the review of non-legislative activity of executive actors.

The exercise of the proportionality test requires in all matters, first, that there is a full analysis of the consequences of the limitation of a right and, second, an analysis of the various consequences of different regulatory approaches to achieve the public policy goals associated with the limitation of rights. This is where the duty of care is a valuable tool to review whether the various factors which need to be balanced in the context of proportionality have been properly analysed to be taken into account. The combination of criteria of review arising from the principle of care and from the principle of proportionality then allows for combining both a far-reaching proportionality review and a certain degree of restraint when it comes to discretionary powers.

Prominently, in *Gauweiler* the CJEU linked the duty of care and the principle of proportionality using a joint set of tests capable of reviewing the exercise of very broadly defined discretionary powers. *Gauweiler* is a case in which the ECB exercised broad

⁶⁸ Kokott AG in Case C-558/07 *SPCM and others* [2009] ECR I-5783, paras 73–77.

⁶⁹ AG Kokott makes reference Case C-280/93 *Germany v Council* [1994] ECR I-4973, para 94 et seq; Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755, para 58 et seq; Case C-233/94 *Germany v Parliament and Council (deposit guarantee schemes)* [1997] ECR I-2405, para 54 et seq; Case C-17/98 *Emesa Sugar* [2000] ECR I-675, para 53 et seq; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras 123, 126, 128 et seq, 132, 139, and 140; Joined Cases C-453/03, C-11, 12 & 194/04 *ABNA v Secretary of State for Health* [2005] ECR I-10423, paras 69 and 83; Case C-127/07 *Arcelor Atlantique and Lorraine and others* [2008] ECR I-9895, para 59, the latter case on the examination of the principle of proportionality in connection with the justification of different treatment. For reference to a case of whether burdens are proportionate to the aims pursued see eg Case C-344/04 *LATA and ELFAA* [2006] ECR I-403, paras 88 and 89.

discretionary powers in making of monetary policy, which required large quantities of statistical information and economic expertise.⁷⁰ This type of highly technical, very complex and information intensive activity is, consequently, very difficult to monitor through ‘traditional’ legal means of a framework of powers and judicial review. In *Gauweiler*, the CJEU held that the institution or body exercising its broad discretion is required “to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions”. The careful and impartial examination, aka compliance with the principle of care, emerges as a key concept in review of whether the ECB had complied with its obligations under the principle of proportionality.⁷¹

Linking care and proportionality review in cases of review of discretionary powers was however not invented in *Gauweiler*. The case law pre-dating *Gauweiler* had long begun the process of proceduralisation of review criteria by placing discretion and proportionality in the context of the principle of sound administration.⁷² The latter requires examination of “all the relevant particulars of a case with care and impartiality and gather all the factual and legal information necessary to exercise their discretion.”⁷³ Thereby, “an institution must base its decision-making on the “most complete and reliable information possible”.⁷⁴

⁷⁰ Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400. *Gauweiler* was the first ever preliminary reference procedure initiated by the German Constitutional Court (GCC), the Bundesverfassungsgericht (Request for a preliminary ruling from the Bundesverfassungsgericht (Germany) lodged on 10 February 2014 – Peter Gauweiler and Others, GCC, 2 BvR 1390/12 of 17.12.2013, http://www.GCC.de/entscheidungen/rs20131217_2bvr139012.html). In it the GCC challenged the legality of the decision of the Governing Board of the European Central Bank (ECB) of September 2012 on so called ‘Outright Monetary Transactions’ (OMT). A follow up case C-493/17 Weiss and Others ECLI:EU:2017:792, pending at the time of writing of this chapter, will further test the CJEU’s approaches in this matter. , Weiss and Others addresses the legality of an ECB spending programme to be estimated of about € 2 trillion by the end of 2017

⁷¹ Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015 ECLI:EU:C:2015:400, paras 66-69.

⁷² C-556/14 P *Holcim (Romania) SA, v Commission* ECLI:EU:C:2016:207, para 80; C-534/10 P *Brookefield New Zealand and Elaris v CPVO and Schniga*, EU:C:2012:813, para 51; C-47/07 P *Masdar (UK) v Commission* of 16 December 2008, EU:C:2008:726, paras 92 and 93.

⁷³ C-556/14 P *Holcim (Romania) SA, v Commission* ECLI:EU:C:2016:207, para 80.

⁷⁴ Case C-290/07 P *Commission v Scott* EU:C:2010:480, para 90.

5. *Conclusions and Outlook*

The concepts discussed within this chapter are highly interrelated. Delegation and discretion as well as the principle of care (the obligation to full and impartial assessment of all relevant facts of decision making) have been developed within the EU legal system in the context of far reaching delegation of powers to executive bodies. Holding the latter to account in view of the conferral of far reaching powers is the *raison d'être* of these concepts and the reason for their development. Delegation can confer a great variety of powers on the recipient of delegation. First, delegation can confer the possibility to interpret the conditions of delegation. Second, it can allow the recipient of delegation to establish which factors to be taken into account to decision making and give lee-way in assessing such factors. Third, delegation can allow the development of practice or rules on how to conduct fact finding and analysis. Fourth, delegation can confer powers to decide on the appropriate outcome of decisions on the basis of facts as well as the weighting of the input with respect to the value decisions and the balancing between public and private interests in decision making. Not all of these powers are generally conferred on executive actors in one and the same act of delegation but several might be cumulated. In general, the conferral of such powers, under EU law, are considered as some form of discretionary powers. In that context, the question of control and supervision of the exercise of such discretionary powers is essential for accountability of the EU's institutions and bodies.

The CJEU has determined that it will in principle conduct only marginal review of discretion limiting itself to assessing whether in the discharge of duties an institution or body has committed any manifest errors. However, the more limited substantive review can be undertaken, the more important the CJEU's review of procedure. Where no procedural rules are formulated in positive law, either in – yet to be created - general EU regulation on administrative procedure, or in policy specific acts, the institutions and bodies which receive delegation of powers also have the powers to adopt the procedural rules. Therefore, the criteria for review have been developed by the case law in a set of principles such as the duty of care and the principle of proportionality. This chapter had set out to analyse the interrelations and

the interdependencies of these principles in the quest to ensure compliance with the obligation to ensure an effective judicial review in the EU whilst respecting considerations of an adequate separation of powers – the so called ‘institutional balance’. It is clear that the case law is in full development and the concepts are developing under our view. The principle of care is becoming the central hub for ensuring review of discretionary powers, not least because amongst the specificities of the EU’s legal order is the fact that delegations are ubiquitous and that it is impossible to imagine a delegation which has not a component of openness for decision-making by the recipient of delegation.