

DISCRETION, CARE AND PUBLIC INTERESTS IN THE EU ADMINISTRATION: PROBING THE LIMITS OF LAW

JOANA MENDES*

Abstract

Recent high profile judgments of the European Court of Justice (ESMA and Gauweiler) have endorsed the expansion of the EU's executive powers, including of its administration. Once such powers are attributed or judicially endorsed, how far may law reach in structuring the exercise of discretion by EU administrative actors? The article analyses the way the EU courts have reviewed administrative discretion in instances where they have performed a close scrutiny thereof. It argues that the EU courts downplayed the role law ought to have in structuring the exercise of administrative discretion, by overlooking the public interests that ought to be pursued by force of legal norms. By contrast, the control of discretion by the European Ombudsman illustrates a different and normatively more demanding understanding of how law may operate in relation to discretion.

1. Introduction

In recent high profile judgments, the European Court of Justice has endorsed a deferential approach to the significant expansion of the executive powers of the EU institutions and of its agencies. The way the Court interpreted legal bases defining EU competences allowed it to support the legality of attributed powers (in the *ESMA* case) or acquired powers (in the case of *Gauweiler*).¹ Significantly, the manner in which the Court revisited and interpreted the legal controls and principles to which those powers are subject under EU law reinforced this result. Thus, in the *ESMA* case, the Court dismissed the United Kingdom's claim according to which the powers of the European Securities and Markets Authority (ESMA) breached the limits of delegation as defined in previous case law, most notably in *Meroni*. In doing so, it found that the EU legislature may attribute discretionary powers to EU agencies, as long as these are “precisely delineated” and “amenable to judicial review”.² In *Gauweiler*, the Court upheld the legality of the OMT decision to the ECB by, *inter alia*, applying a rather deferential standard of judicial review of the ECB's discretion.³ These judgments are indicative of the scope of powers that EU

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¹Case C-270/12, *United Kingdom v. European Parliament and Council (ESMA)*, EU:C:2014:18; Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:400.

²Case C-270/12, *ESMA*, para 53 (reasoning on paras. 43-52) and para 105. This case was decided in the Grand Chamber, according to Art. 60(1) of the Rules of Procedure of the ECJ and Art. 16(3) of its Statute.

³Case C-62/14, *Gauweiler*, paras. 68-80, esp. para 74. *Gauweiler* was also a Grand Chamber judgment.

executive bodies may have, because of deference to legislative choices (in the case of *ESMA*) and to an expansive view of a Treaty mandate (arguably the case in *Gaunweiler*). While neither case concerns the way discretionary powers of executive bodies may be exercised and reviewed, both judgments raise the question of how far may law reach in structuring the exercise of discretion of the EU executive actors. If the legality of the arguably far-reaching discretionary powers of the ESMA – to endorse here the view defended by the UK – is justified because, given the conditions defined in the enabling act, they are “amenable to judicial review”, how stringent should that judicial review be? If the lenient review of the OMT decision may be explained by the nature of this measure – an incomplete programme announced in a press release, lacking both the degree of specific regulation in a legal act and actual implementation⁴ – how could legal tools operate in structuring the ECB’s discretion if the programme is implemented?

Assessing the way in which the Court would review concrete manifestations of the exercise of discretion by the ESMA and by the ECB in these instances would be an exercise in hypothetical, if not speculative, reasoning. Yet, the more general question of how far legal tools may reach can be addressed drawing on existing case law. This is what this article sets out to do. After highlighting that judicial review of discretion is premised on the idea of limits (section 2), the article moves on to show how the deployment of legal principles and rules may allow the EU courts to control discretionary choices (section 3). The focus will be on two lines of the case law where judicial review of discretion was tighter. The first regards the stringent standard of judicial review of administrative discretion as formulated in a merger control case (*Tetra Laval*) and subsequently applied in other areas of EU law; the second, the scrutiny of compliance with the principle of careful and impartial examination (the hallmark of which is *Technische Universität München*). This case law thus provides a contrasting view to the impression of deference conveyed by *ESMA* (on the powers granted on a permanent basis to the financial agencies, as a result of the euro crisis) and *Gaunweiler* (on the powers exercised by the ECB in exceptional circumstances). The two lines of case law chosen show how far the EU courts went in reviewing administrative discretion in the EU; they also indicate where the courts have not entered. The EU courts have closely scrutinized the way the Commission conducted complex technical assessments, but have arguably refrained from entering public interest appraisals that also form the core of discretionary administrative decisions. This article argues that this emphasis of judicial review on the correctness of complex technical assessments excessively confines the role of law in structuring the exercise of discretion (section 4). By contrast, the role that the European Ombudsman has given to the legal acts that delimit administrative mandates, treating them as a normative yardstick against which administrative discretion should be assessed, highlights a dialectical relationship between complex technical assessments and public interest appraisals. It thereby supports a broader and normatively more demanding understanding of how law may operate in relation to discretion (section 5).

2. Discretion and the limits of law

It is the premise of rule of law systems that law both attributes discretionary powers and delimits the choices administrative actors make in fulfilling their functions. There are different

⁴See Opinion of A.G. Villalón in Case C-62/14, *Gaunweiler*, EU:C:2015:7, para 162.

layers to what law may mean in relation to discretion. Law is comprised of the formal legal texts generated by political processes that define and delimit the mandates of administrative actors (legislative acts and Treaty provisions). Law also has a deeper normative sense that transcends the legislative act. It is a normative order that binds public authority to fundamental political-legal values via constitutional provisions and general principles of law, which inform and limit political processes and which administrative action ought to concretize and respect.⁵ Arguably, this premise ought to apply even in those areas of administrative action where legality is thinner (for instance, various forms of guidance that define the way market operators, citizens and Member States should comply with EU law).

However, even if discretion is a construct of law, in the broad sense indicated above, its exercise depends on factors that stray clearly beyond it. Law delimits the space within which administrative actors need to choose a course of action that best suits the public interest, also in view of the means and resources they are able to mobilize. Arguably, law should have a role within this space, insofar as it defines criteria that ought to guide the decision. Nevertheless, what is the best or better option may have little to do with substantive legal determinations. It is influenced by policy choices that may not be straightforwardly supported by the relevant legislative act, and are rather determined by political directions defined by the top decision-makers; it is governed by expert judgments, on the basis of which complex economic and technical assessments are made; it is fundamentally influenced by bureaucratic motivations, by the moral and ideological preferences of those involved in decision-making, by the specific contexts in which the decisions are made.⁶ Arguably, all these elements come into play when deciding issues such as whether “the possibility of default by any Member State or supra-national issuer” poses a threat to financial stability capable of justifying a prohibition of short-selling activities, or whether a threat to public health is serious enough to justify the suspension of imports of wild birds.⁷ Decisions of this sort are discretionary insofar as they entail a choice, both to define the standards that should guide the final decision, in view of the legal criteria defined, and to determine what that decision will be.⁸

It follows that, as a matter of principle, judicial review of administrative discretion should be limited.⁹ If the role of the Court of Justice is, in essence, to ensure the observance of law (Art. 19(1) TEU) – so the principle goes – then, when faced with instances in which the

⁵On the principle of legality in EU law and on its difficulties, see Azoulai and Clément-Wilz, “Le principe de légalité” in Auby and Dutheil de la Rochère (Eds.), *Traité de Droit Administratif Européen* (Bruylant, 2014), 543-563, pp. 544-55.

⁶Baldwin, *Rules and Government* (Clarendon, 1995), p. 25.

⁷Respectively, Art. 28(1)(a) of Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, O.J. 2012, L 86/1; Art. 24(3)(b) of Commission Delegated Regulation (EU) 918/2012 of 5 July 2012 supplementing Regulation (EU) 236/2012, O.J. 2012, L 274/1; and Art. 18(1) of Council Directive (91/496/EEC) of 15 July 1991 laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC, O.J. 1991, L 268/56.

⁸Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986), p. 21; Mattarella, “Discrezionalità amministrativa” in Cassese et al. (Eds.), *Dizionario di diritto pubblico: Vol. III* (Giuffrè, 2006), 1993-2003, p. 1994, indicating that the specificity of the discretionary choice lies in the way the public interest is pursued; Venezia, *Le pouvoir discrétionnaire* (LGDJ, 1959), pp. 20-22. Cf. Schmidt-Assmann, *La teoria general del derecho administrativo como sistema* (Marcial Pons, 1998), p. 220, emphasizing that discretion concretizes law in view of pre-determined ends.

⁹Although the point is made here in relation to the EU courts, this premise also applies to national courts when applying EU law (and, depending on their national legal systems, to national courts generally).

institutions are given a “wide margin of discretion”, judicial review should be limited to verifying “whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated, and, whether there has been any manifest error of assessment or misuse of powers”.¹⁰ Given both the nature of discretionary powers – enmeshed in complex technical assessments and in policy options (as well as in bureaucratic motivations) – and the institutional role of the EU courts, judicial review ought not curtail the ability of the EU institutions and bodies to assess which solution best serves the public interests at stake, in view of the concrete circumstances in which they need to decide. Judicial review of administrative discretion is thus premised on limits determined by separation of powers: law demarcates a space of discretion but does not command the choices made therein; courts enforce the law, but do not hamper discretionary choices that observe legal determinations.¹¹

However, the premise according to which judicial review of discretionary powers should be limited has not prevented the General Court from reviewing rather stringently the factual basis and the qualification of complex technical assessments, at least in relation to non-legislative acts, nor the Court of Justice from endorsing such stringent review.¹² While arguably such a review may be needed in order to enable a meaningful degree of judicial control over discretionary decisions, it may potentially encroach on the space of decision-making of the institutions that were granted discretionary powers, by, at least, steering it in a certain way. This is, of course, the tension at the heart of judicial review of discretion.

The question remains, however, which “scope for choice” will Courts possibly restrict when performing a stringent review of complex technical assessments? According to the legal doctrine prevalent in some continental legal systems, technical complex assessments either do not entail discretion *strictu sensu* (or “discretion proper”) – this term would only refer to choices that stem from assessing and weighing competing public interests – or entail a different kind of discretion (“technical discretion”).¹³ Settling the technical aspects of a decision requires specialized technical knowledge. Once the technical questions are solved, they may leave no margin of choice: there may simply be no room for alternative decisions. The outcome is determined by the technical knowledge that the administrative authority has collected (whether produced by its own services or acquired externally). To the extent that technical assessments may entail a choice, because the specific expertise required does not settle the issue, this would leave the administrative authority a “margin of appreciation”, which is not, strictly speaking, the same as the possibility to make a discretionary choice.¹⁴ The term “technical discretion” has been

¹⁰See e.g. Case 42/84, *Remia and Others v. Commission*, EU:C:1985:327, para 34.

¹¹See e.g. Case T-13/99, *Pfizer Animal Health v. Council*, EU:T:2002:209, para 393: “It is not for the Court to assess the merits of either of the scientific points of view argued before it and to substitute its assessment for that of the Community institutions, on which the Treaty confers sole responsibility in that regard... Since the Community institutions could reasonably take the view that they had a proper scientific basis for a possible link, the mere fact that there were scientific indications to the contrary does not establish that they exceeded the bounds of their discretion in finding that there was a risk to human health”.

¹²See *infra* section 3.

¹³The distinction between administrative discretion (“*discrezionalità amministrativa*”) and technical discretion (“*discrezionalità tecnica*”) has prevailed *inter alia* in Italian administrative scholarship and law; see Mattarella, *op. cit. supra* note 8, esp. at 1994, 1996 and 2000.

¹⁴For a reflection of this position in EU legal studies, see Bailey, “Scope of judicial review under Article 81 EC”, 41 *CML Rev.* (2004), 1327-1360, at 1339; Caranta, “On discretion” in Prechal and van Roermund (Eds.), *The Coherence of EU law: The Search for Unity in Divergent Concepts* (OUP, 2008), 185-215, p. 198; Barbier de la Serre and Sibony,

used to refer to this type of choice. What appears to be a mere conceptual nicety may have a normative consequence: in performing a stringent review of complex technical assessments, the Courts would not encroach upon the discretion of the EU administrative actors; they would only verify whether the criteria set by law have been complied with by controlling the factual basis of the decision.¹⁵ This is a matter of technical accuracy, not a matter of choice stemming from the balancing of the competing interests at stake. Although the EU courts do not explicitly differentiate between “discretion proper” and “technical discretion” when reviewing EU discretionary acts, this distinction is influential both in their case law more generally (in particular, regarding the limits of delegation) and in legal commentary on judicial review of discretion.¹⁶ Yet, as will be argued below, its empirical and normative value is doubtful.

The distinction between complex technical assessments and the appraisal of public interests underlying a discretionary choice notably grounds the so-called *Meroni* doctrine, which the Court of Justice revisited and revised in the *ESMA* judgment. Arguably, it could provide support to justify the Court’s position in this case. If the discretion of the ESMA merely stems from the complex technical assessments it needs to perform – if the decisions it needs to adopt are “dictated” by the technical knowledge that it applies – then neither the fact that such discretion is attributed to the ESMA appears normatively problematic, nor would courts restrict its discretion by performing in a future instance a stringent review of those assessments. It is noteworthy that the association between technical assessments relying on “professional considerations” and “clearly defined executive powers” – as distinct from “a wide margin of appreciation” that relies on the “[arbitration] between conflicting public interests” – is made in the allegations of the Parliament and the Commission and is visible in the Court’s reasoning.¹⁷ The same view could also support, for different reasons, the way the Court of Justice approached the ECB’s discretion in *Gauweiler*. If, despite the controversial nature of monetary policy measures, their appropriateness depends essentially on technical assessments, then as long as the necessary expertise is deployed with “care and accuracy”, the fact that there may be competing views on the adequacy of a measure only means that the ECB (and the European System of Central Banks (ESCB)) may make a *technical* choice, one in which, in this case, the Court could not detect a manifest error.¹⁸

Nevertheless, one should strongly doubt whether distinguishing between “technical discretion” and “discretion proper” is empirically possible and normatively desirable. Given the nature of discretionary powers, the two types of assessment may be enmeshed in such a way that holding on to such analytical distinctions would risk twisting the reality of administrative decision-making in a manner that is potentially detrimental to a proper understanding of what

“Expert evidence before the EC courts”, 45 CML Rev. (2008), 941-85, at 956; Bouveresse, *Le pouvoir discrétionnaire dans l'ordre juridique communautaire* (Bruylant, 2010), pp. 63-6, who stresses the difficulty of the distinction.

¹⁵See e.g. Barbier de la Serre and Sibony, op. cit. *supra* note 14, pp. 958 and 984. Cf. Mattarella, op.cit. *supra* note 8, p. 2000, referring to Italian administrative law.

¹⁶See *supra* note 14. Critical of the possibility to transpose this distinction to EU law, because the ECJ has not used it consistently, see Fritzsche, “Discretion, scope of judicial review and institutional balance in European law”, 47 CML Rev. (2010), at 364. See also Bouveresse, op. cit. *supra* note 14, pp. 57-60. Schwarze, writing in 1992, warned that the EU courts’ use of concepts familiar to national jurists could be misleading; see Schwarze, *European Administrative Law* (Sweet & Maxwell, 2006), p. 296 et seq.

¹⁷Case C-270/12, *ESMA*, paras. 35, 40, and 52 (cf. para 53). Cf. the allegations of the UK at paras. 29-30.

¹⁸Case C-62/14, *Gauweiler*, paras. 72-80. See generally Borger, “Outright monetary transactions and the stability mandate of the ECB: *Gauweiler*”, 53 CML Rev. (2016), 139-196.

may be at stake. Returning again to the examples of *ESMA* and *Gauweiler*, denying that ESMA may conduct public interest appraisals in prohibiting or imposing conditions to short-selling activities (even if only in exceptional cases) does not appear realistic - it is noteworthy that the exercise of those powers depends also on the assessment of the possible responses by national authorities. It also seems excessively narrow, in view of the potential effects of its actions, to claim that in substantive terms the only thing one should expect from the ESCB when adopting measures of monetary policy would be to make an accurate and careful use of its technical expertise. Surely, the determination by ESMA of whether a competent national authority has taken measures that “adequately address the threat”, requires technical evaluations but these are also inexorably linked to weighing competing interests and, in this sense, involve policy choices; in this case, the verification of the conditions underlying the exercise of the discretionary power already entails room for choice, given their indeterminacy.¹⁹ The same arguably applies to the ECB when it adopts measures that would guarantee price stability in the EU. In cases such as this, whether discretion emerges from policy judgments or from choices that technical expertise does not preclude (in the sense that such expertise does not provide only one reasonable solution) may be a very thin line.²⁰ Ultimately, the emphasis on the accuracy of technical assessments may belittle the policy choices that such assessments entail. Not only the verification of the conditions that, according to the applicable legal norms, may trigger the power to adopt a discretionary decision, but also the indication of alternative courses of action delimit a space of decision-making where complex technical assessments and policy choices meet and, arguably, become intertwined.

One may question whether policy choices that are now legally attributed to administrative actors should be made by such actors, or rather reserved to the legislature in line with democratic demands, or, still, inquire whether legal mandates should be more demanding in framing room for discretion. Both issues pertain to the relation between legislatures and bureaucracies, and in particular to their respective powers and to the autonomy and legitimacy of these powers. Notwithstanding their importance, this is not a discussion to be held here. This article focuses rather on the life of discretion *after* attribution, on how it relates to law once it has been given to administrative actors. Specifically, it inquires how far legal principles and rules allow the EU courts to go when controlling the discretionary choices of the EU administration. The following section will examine this question by focusing on two lines of case law: the more stringent standard of review that the EU courts have applied when reviewing complex technical assessments, and the way in which they have relied on one procedural guarantee – the principle of careful and impartial examination – as a means to compensate what would, in principle, be a minimal control of substantive matters. Rather than attempting a comprehensive summary account of how the EU courts review discretion (in fact, intense review co-exists with marginal review), the focus on stringent review illustrates the outer limits of the Courts’ control of discretion and, indirectly, how far law may reach in this respect. In addition, the cases analysed

¹⁹The ESMA may only adopt those measures if there is “a threat to the orderly functioning and integrity of the financial markets or to the stability of the financial system of the Union”; see Art. 28(2)(a) of Regulation (EU) 236/2012 of 14 March 2012. What this means was defined by the Commission in a delegated regulation, which specifies that a threat shall *inter alia* mean “any threat of serious financial, monetary or budgetary instability concerning a Member State” or/and “the possibility of default by any Member State or supra-national issuer”; see Art. 24(3) of Regulation 918/2012, cited *supra* note 7.

²⁰See further *infra* section 3.

below single out the importance of the accuracy of complex technical assessments for the correct exercise of discretion. They thereby show how the EU courts may evaluate the way the institutions make inferences (in their use of what some would call “technical discretion”) that ultimately ground discretionary decisions. In this way, they indicate how judicial review may steer the exercise of discretion. Both lines of cases have concerned mostly the administrative discretion of the European Commission, but they are arguably also applicable to other EU administrative actors.

3. Discretion: The empire of technocracy?

3.1. *A stringent standard of review*

The formal standard of judicial review of administrative discretion is well established in the EU courts’ case law. As mentioned above, in an instance where the EU institutions have wide discretion, judicial review is limited to examining whether procedural rules were complied with and whether an act contains a “manifest error or constitutes a misuse of powers, or whether the authority did not clearly exceed the bounds of its discretion”.²¹ While this formula has been relatively stable, it has not prevented, over time and across sectors, a significant variation in the intensity of judicial review, to the point that, in important instances, the EU Courts have departed from the marginal review that the formula suggests.²² In an important tendency, which may be traced back to merger cases (specifically to *Tetra Laval*), the courts have performed a searching review of factual assessments, in a way that may “[potentially neutralize] de facto the very principle of the recognition of a margin of economic assessment”.²³ In *Tetra Laval*, the Court of Justice acknowledged that the applicable legal provisions “[conferred] on the Commission a certain discretion, especially with respect to assessments of an economic nature”.²⁴ However, it considered that the Commission’s margin of discretion with regard to economic matters does not mean that “the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature”. The Court added: “Not only must the Community Courts, 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”.²⁵

²¹For an earlier instance, see e.g. Case 55/75, *Balkan-Import Export GmbH v. Hauptzollamt Berlin-Packhof*, EU:C:1976:8, para 8.

²²On the varying degrees of deference, see Craig, *EU Administrative Law* (OUP, 2012), pp. 409-29. See also Hofmann, Rowe, and Türk, *Administrative Law and Policy of the European Union* (OUP, 2011), pp. 498-9. The creation of the General Court in 1999 marked an important shift in the ECJ’s ability to review factual assessments; see e.g. Fritzsche, op. cit. *supra* note 16, at 378. See also *infra* note 25.

²³A view expressed in the Opinion of A.G. Mengozzi in Case C-382/12 P, *MasterCard Inc. and Others v. Commission*, EU:C:2014:42, para 119. On whether “margin of economic assessment” would amount to discretion, see *supra* section 2.

²⁴Case C-12/03, *Commission v. Tetra Laval*, EU:C:2005:87, para 38.

²⁵Case C-12/03, *Tetra Laval*, para 39 (our emphasis); see also para 43, where the Court indicates that the Commission should reach “the most likely conclusion”. The ECJ upheld the judgment of the General Court (Case T-2/05, *Tetra Laval v. Commission*, EU:T:2002:264), refusing the Commission’s claims that the GC unjustifiably raised the standard of judicial review (thereby abandoning the manifest error of assessment test) and added a condition to

The courts have confirmed this line of reasoning in subsequent judgments, in cases relating to Commission decisions pertaining to the infringement of competition rules²⁶ and in State aids cases,²⁷ as well as cases on Council decisions in the field of anti-dumping.²⁸ They have also reiterated this standard of review in instances where the complexity of the assessment was not related (only or at all) to information of economic nature, as in cases regarding economic and financial sanctions directed at suspects of terrorist association,²⁹ or pertaining to the regulation of risks to public health and the environment.³⁰ The latter also indicates that this standard of review is not exclusive to decisions having a specified addressee or addressees. It may apply to non-legislative acts of general scope or to decisions that, having identified addressees, have nonetheless a general scope of application, as in the case of market authorizations (or the refusal to include particular products in the lists of those that may circulate in the internal market).³¹

Enabling the detection of *manifest* errors of assessment and, thus, avoiding an undue limitation of judicial review, is arguably one reason that may explain a tighter control over complex factual assessments (or, at least, the indication that the courts would be more demanding in this regard). This concern is well illustrated by the considerations of the referring court in *Technische Universität München*, by which it questioned the ECJ's "practice of confining

the requisite standard of proof. Both judgments sparked off a lengthy discussion on whether the *Tetra Laval* type of review still amounted to limited review. Arguing that limited review in competition law after *Tetra Laval* is closer to, but still distinct from comprehensive review, see Wahl, "Standard of review: Comprehensive or limited?" in Ehlermann and Marquis (Eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2011), pp. 285-94. See also Bay and Ruiz Calzado, "*Tetra Laval II*: The coming of age of the judicial review of merger decisions", 28 *World Competition* (2005), 433-453, arguing *inter alia* for the need to go beyond the labels to assess the degree of review actually conducted.

²⁶See e.g. Case C-413/06 P, *Bertelsmann and Sony v. Independent Music Publishers and Labels Association (Impala)*, EU:C:2008:392, paras. 144-150, where the ECJ nevertheless found that the GC had committed errors of law in using this standard of review; Case C-272/09 P, *KME Germany and Others v. Commission*, EU:C:2011:810, paras. 94 and 102; Case C-386/10 P, *Chalkor AE Epexergasias Metallon v. Commission*, EU:C:2011:815, para 62; Case C-382/12 P, *MasterCard Inc and Others v. Commission*, EU:C:2014:2201, paras. 155-160, 167 and 169, considering that the GC had not applied the correct standard of judicial review; Case T-471/11, *Éditions Odile Jacob SAS v. Commission*, EU:T:2014:739, para 136; Case T-90/11, *Ordre national des pharmaciens (ONP) and Others v. Commission*, EU:T:2014:1049, para 57.

²⁷Case C-525/04 P, *Spain v. Commission and Lenzing*, EU:C:2007:698, paras. 56-57; Case T-1/08, *Buczek Automotive v. Commission*, 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; see also Case C-73/11 P, *Frucona Košice v. Commission*, EU:C:2013:32, paras. 73-76.

²⁸Case T-528/09, *Hubei Xinyegang Steel Co. Ltd v. Council*, EU:T:2014:35, para 53.

²⁹Case T-85/09, *Kadi v. Commission*, EU:T:2010:418, para 142, upheld on appeal: Joined Cases C-584, 593 and 595 P, *Commission and others v. Kadi*, EU:C:2013:518, paras. 97, 119 and 124. More recently, see e.g. Joined Cases T-208 & 508/11, *Liberation Tigers of Tamil Eelam (LTTE) v. Council*, EU:T:2014:885, para 163; Case T-348/11, *Safa Nicu Sepahan Co. v. Council*, para 66.

³⁰See Case T-475/07, *Dow AgroSciences Ltd and Others v. Commission*, EU:T:2011:445, paras. 150-153; Case T-257/07, *France v. Commission*, EU:T:2011:444, para 87; C-405/07 P, *Netherlands v. Commission*, EU:C:2008:613, para 55. Where this standard of review applied to a decision of an EU agency, see e.g. Case T-187/06, *Ralf Schröder v. Community Plant Variety Office (CPVO)*, EU:T:2008:511, para 61. In this case, the GC explicitly added that the same standard could apply in cases where the technical complexity stems from "appraisals in other scientific domains, such as botany or genetics" (para 62).

³¹See e.g. a Commission regulation amending the annexes of a legislative act (Case T-257/07, *France v. Commission*); a Commission decision addressed at the Member States concerning the non-inclusion of a given substance in the list of authorized substances (Case T-475/07, *Dow AgroSciences v. Commission*); a Commission decision addressed to a Member State on the basis of Art. 114(5) and (6) TFEU (Case C-405/07 P, *Netherlands v. Commission*).

judicial review to the question whether the Commission's decision was vitiated by a manifest error of fact or law or misuse of power".³² In particular, the national court pointed out:

"Limited review in accordance with the previous case law of the Court of Justice would mean that a legally incorrect decision of the Commission adversely affecting Community citizens would be upheld merely because the mistakes on the part of the Commission were not manifest. The more difficult the technical questions to be decided the more immune from challenge the Commission's decision would be. It is questionable whether such a restriction of the legal protection of Community citizens is compatible with the constitutional principle guaranteeing effective legal protection which is recognized by Community law".³³

The same preoccupation with a meaningful degree of judicial review is also present in the EU case law, where the courts have stressed that they cannot use the Commission's margin of discretion "as a basis for dispensing with the conduct of an in-depth review of the law and of the facts".³⁴

While the *Tetra Laval* standard of review does not cover the spectrum of possibly varying degrees of intensity of judicial scrutiny, it does indicate how far the EU courts may go when applying the test of "manifest error of assessment" to review the merits of discretionary decisions.³⁵ It reveals a quite hands-on judicial approach, which, provided that other legal rules and principles are complied with, nevertheless appears to be restricted to a control over complex assessments that ground the legal qualification of facts and, hence, constitute the basis of discretionary decisions.³⁶ This impression is borne out if one considers also another line of case law, where the Courts assessed whether the EU institutions have complied with the principle of care in exercising discretion.

3.2. *Discretion and care*

³²See Opinion of A.G. Jacobs in Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, EU:C:1991:317, paras. 10-16, regarding the possibility to review decisions of a technical nature. Incidentally, the referring court was of a Member State (Germany) where the idea of a full review of the conditions upon which the exercise of discretion depends was widespread at the time of this reference; see, e.g. Kuhling, "Kontrolle von Ermessungsentscheidungen in Deutschland" in Parisio (Ed.), *Potere discrezionale e controllo giudiziario* (Giuffrè, 1988), 9-21, p. 9 (with translation at p. 17).

³³Opinion in Case C-269/90, *Technische Universität München*, para 11.

³⁴See Case C-389/10 P, *KME Germany and Others v. Commission*, EU:C:2011:816, para 129; Case C-386/10 P, *Chalkor v. Commission*, para 62.

³⁵On whether the *Tetra Laval* type of review still corresponds to the "manifest error of assessment" test, see e.g. the considerations of Wahl, "Standard of review: Comprehensive or limited?" in Ehlermann and Marquis, op. cit. *supra* note 25, and Bay and Ruiz Calzado op. cit. *supra* note 25. The fact that the Court may refer, in the same instance, both to the "broad discretion" that entails marginal review and to the *Tetra Laval* type of review (see e.g. Case T-475/07, *Dow AgroSciences Ltd*, paras. 151 and 153) indicates that, for the Court at least, when it performs this type of review it is still moving within the limits of manifest error of assessment.

³⁶There are doubts regarding the exact scope of application of the *Tetra Laval* standard. A.G. Mengozzi, in his Opinion in Case C-382/12 P, *MasterCard*, indicates that in competition cases the standard seems to be limited to *facts*, not to their assessment (para 119). Yet, the fact that it refers to the Commission's *interpretation* of factual information indicates that its scope is potentially broader.

The duty of careful and impartial examination has entered EU law as a result of a “dynamic interaction between litigants and the Courts”.³⁷ It has allowed the Courts to achieve a compromise between, on the one hand, meeting the expectations of litigants and national courts about improved judicial protection against discretion of the EU administration, and, on the other hand, leaving enough space to the EU institutions to define issues of economic policy.³⁸ The duty was famously formulated in *Technische Universität München*: “where the [Union] institutions have such a power of appraisal [entailing *complex technical evaluations*], respect for the rights guaranteed by the [Union] legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present”.³⁹

A cursory analysis indicates that the duty of care concerns the process of collecting the information needed to appraise the relevant factual and legal aspects of a given situation, and the manner in which such information is assessed.⁴⁰ The General Court refers to a duty to “examine carefully and impartially *all relevant evidence* in the case in question”,⁴¹ to a “sufficiently thorough analysis of the file”,⁴² to “the duty of the Commission to gather, in a diligent manner, *the factual elements necessary* for the exercise of its broad discretion”,⁴³ to the requirement that the institutions take “account of all the relevant circumstances and [*appraise*] *the facts* of the matter *with all due care*”.⁴⁴ The Court of Justice has confirmed that the duty to conduct a diligent and impartial examination is a means to ensure that “when adopting the final decision, [the Commission has] *the most complete and reliable information possible*”.⁴⁵ These observations seem to apply irrespective of the individual or general scope of the act under review, but all refer to instances where the duty of care either generated an individual right – because of the way it affected the persons concerned – or would have done so but, in the given instance, could not have such an effect.

In fact, as it stands in current case law, the duty of care mainly allows the EU courts to enhance the individual protection of plaintiffs affected by administrative acts that were adopted on the basis of insufficient or inadequate information.⁴⁶ This feature does not mean that the duty applies only to procedures leading up to the adoption of individual decisions, but rather to

³⁷ Nehl, *Principles of Administrative Procedure in EC law* (Hart Publishing, 1999), p. 11.

³⁸ *Ibid.*, p. 105.

³⁹ Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, EU:C:1991:438, para 14.

⁴⁰ For a broader view on the duty of careful and impartial examination and characterizing it as a dimension of good administration, see e.g. Azoulai and Clément-Wilz, “La bonne administration” in Auby and Dutheil de la Rochère (Eds.), *Traité de Droit Administratif Européen* (Bruylant, 2014), 671-697, esp. at pp. 676 et seq. and 683.

⁴¹ Case T-369/03, *Arizona Chemical and Others v. Commission*, EU:T:2005:458, para 85 (emphasis added).

⁴² Case T-210/02, *British Aggregates v. Commission*, EU:T:2006:253, para 178.

⁴³ Case T-333/10, *Animal Trading Company (ATC) BV and Others v. Commission*, EU:T:2013:451, para 84 (emphasis added).

⁴⁴ Case T-443/11, *Gold East Paper and Gold Huasheng Paper v. Council*, EU:T:2014:774, para 164, (emphasis added).

⁴⁵ Case C-290/07 P, *Commission v. Scott*, EU:C:2010:480, para 90, (emphasis added).

⁴⁶ Two hallmark judgments delivered in early 1990s establish the principle of care as standard of procedural legality and individual protection: Case C-16/90, *Eugene Nölle v. Hauptzollamt Bremen-Freihafen*, EU:C:1991:402 (anti-dumping, followed by Case T-167/94, *Nölle v. Council and Commission*, EU:T:1995:169); Case C-269/90, *Technische Universität München* (customs). The same protective dimension of the principle of care applies to Member States: Case T-263/07, *Estonia v. Commission*, EU:T:2009:351, paras. 109-112.

cases where the individual protection of the persons concerned is justified in view of the effects of the acts adopted.⁴⁷

Because of this protective dimension, the EU courts have acknowledged the limits of extending the duty of care beyond the confines of adjudicatory procedures. The General Court has held that, in procedures leading up to acts of general application, “the duty of diligence is essentially an objective procedural guarantee arising from an absolute and unconditional obligation on the [EU] institution relating to the drafting of [the act] and not the exercise of any individual right”.⁴⁸ In this quality, the duty of care is “imposed in the public interest”.⁴⁹ One would concur with this view. The legal protection of individual positions that one may derive from a duty of careful and impartial examination should not operate in the same terms in relation to acts of general application. Irrespective of the way in which they may affect the legal position of the persons concerned, the fact that such acts apply to instances delimited by objective criteria and entail general legal effects (which is also the case in State aids decisions) indicates that public interest considerations ought to prevail when individual protection could hinder the suitable pursuance of the public interests at stake.⁵⁰ Also within adjudicatory procedures the Court has limited the attempts of plaintiffs to extend the reach of the duty of care (in its guise of individual guarantee) in a way that could potentially damage the efficiency of the administrative process. In particular, the General Court has denied that the duty of care could be a procedural guarantee invoked by complainants in State aid procedures, to avoid a situation where the protection of the interests of third parties to the procedure would constrain the discretion of the Commission. In the Court’s view, the diligent and impartial examination of the complaints in the context of the preliminary procedure of Article 108(3) TFEU (ex 88 EC) is carried out “in the interests of sound administration of the fundamental rules of the Treaty relating to State aid”.⁵¹ In a similar vein, Advocate General Poiares Maduro defended in *T-Mobile* that “the requisite diligent and impartial examination is not carried out in relation to [the persons concerned], but first of all by reference to the general interest in sound administration and the proper application of the rules of the Treaty”.⁵² In *T-Mobile*, the Court of Justice overturned the judgment of the General Court, which had annulled a Commission decision refusing to investigate a complaint of breach of State aid law. Thereby, it strongly opposed the view of the General Court that the Commission’s obligation to undertake a diligent and impartial examination of a complaint arises from the “right to sound administration of individual situations”.⁵³

⁴⁷For an instance in which the duty of care applied to a general administrative act (a decision to suspend imports of products in view of a serious threat to health), see Case T-333/10, *ATC and Others v. Commission*, paras. 84-94. This was an action for non-contractual liability where the GC implicitly admitted that the duty of care functioned as an individual procedural guarantee of the companies that had been affected by a general decision addressed at Member States.

⁴⁸Case T-369/03, *Arizona Chemica*, paras. 86 and 89, concerning the adaptation of Directive 67/548 to technical progress.

⁴⁹*Ibid.*, para 88.

⁵⁰The way these considerations ought to play out in relation to procedural rights is a different issue; see Mendes, *Participation in EU Rule-making: A Rights-based Approach* (OUP, 2011), Chs. 4-5.

⁵¹See e.g. Case T-210/02, *British Aggregates v. Commission*, para 177.

⁵²Opinion of A.G. Poiares Maduro in Case C-141/02 P, *Commission v. T-Mobile Austria GmbH*, EU:C:2004:646.

⁵³See para 48 of the judgment at first instance (Case T-54/99, *T-Mobile Austria GmbH v. Commission*, EU:T:2002:20) and para 72 of the judgment in appeal (Case C-141/02 P *Commission v. T-Mobile Austria GmbH*, EU:C:2005:98).

In these cases, while fencing out the protective dimension of the duty of care, the courts have emphasized the objective facet of this duty. Even where it does not generate any individual right, the duty of careful and impartial examination must be observed as part of a proper administrative conduct (sound administration).⁵⁴ In the area of risk regulation, this objective dimension has been translated into the principles of excellence, transparency and independence that ought to guide scientific assessments by the Commission, the breach of which may be invoked in court by individuals directly and individually concerned.⁵⁵ But beyond this precision, in the cases where the courts singled out this objective dimension they did not elaborate further on what care could otherwise mean.⁵⁶

In the cases examined, the duty of care remains, nevertheless, a tool to revise the factual bases of administrative decisions. As the General Court has explicitly recognized, “the obligation for the competent institution to examine carefully and impartially all the relevant elements of the individual case *is a necessary prerequisite* to enable the European Union courts to ascertain whether the elements of fact and of law on which the exercise of ... broad discretion depends were present”.⁵⁷

In the courts’ view, compliance with this duty is all the more important in view of the “limited judicial review of the merits, confined to examining whether a manifest error has been committed”.⁵⁸ Nevertheless, despite the emphasis on limited judicial review, the verification of whether the duty of care has been complied with may lead the courts to ascertain in some detail what the Commission ought to have investigated and did not, in order to be able to take the decision at stake, as well as what the Commission may or may not invoke in support of its decision in view of the factual information it has been able to gauge.⁵⁹ Such an examination may allow the court to conclude for the lack of “specific factual evidence substantiated by sufficient data” as well as lack of enquires that “would have vindicated the [Commission’s] overall approach”.⁶⁰

At this point, and to this extent, the duty of care converges with the line of case law initiated with *Tetra Laval*. Both enable the courts to scrutinize the information on the basis of which the act was adopted, the way the decision-maker has collected and treated that information and to assess the plausibility of the conclusions it took therefrom. On this basis, the reviewing court is capable of assessing the plausibility of the decisions in view of the facts that grounded the choices ultimately made. Whether this control still preserves the space of discretion of administrative actors may be discussed.⁶¹ The judicial inquiries that follow from this case law appear to confine the range of choices available to the decision-maker, or at least, the

⁵⁴Case T-210/02, *British Aggregates*, para 177; Case T-369/03, *Arizona Chemical*, para 88. Arguably, in this quality a sufficiently serious breach of the duty of care is, as such, not capable of sustaining the non-contractual liability of the Union (unlike in cases such as *Nölle*, where the Court emphasized the protective dimension of this duty and, hence, recognized its ability to lead to the award of damages, see Case T-167/94, *Nölle v. Council and Commission*, paras. 78 and 89).

⁵⁵See e.g. Case T-369/03, *Arizona Chemical*, para 88.

⁵⁶At least not in the cases analysed in this article.

⁵⁷Case T-333/10, *ATC and Others v. Commission*, para 84.

⁵⁸*Ibid.*, para 84.

⁵⁹*Ibid.*, paras. 90 and 92.

⁶⁰*Ibid.*, para 91.

⁶¹Such an assessment will at least in part depend on the concept of discretion that one endorses (see *supra* section 2).

spectrum of what could be considered reasonable or plausible choices in view of the filters that the courts apply. In this sense, at least, they narrow down the scope of discretion. While the courts do not always perform or endorse such a searching review, the above indicates the possibility of a potentially far-reaching control of discretion. It indicates also an approach to judicial review that structures the exercise of discretion in a specific way, as will be explained next.

3.3. *The reach of judicial review vs. the reach of law*

The picture that emerges from the above account is one in which the courts may go quite far in controlling the exercise of discretion. But just how far do the EU courts go? The *Tetra Laval* standard of review and the case law on the duty of careful and impartial examination both indicate that the courts have not shunned examining in detail the way the EU institutions have conducted complex technical assessments and the ways in which they collect the information that bases such assessments.⁶² Both lines of case law refer to the assessment of facts. The standard of review defined in *Tetra Laval* applies to the review of “the Commission’s interpretation of information of economic [or other] nature”, to evidence that must be “factually accurate, reliable[,] consistent”, complete and “capable of substantiating the conclusions drawn from it”.⁶³ The duty of care has the same focus on factual assessments.⁶⁴ Within that space of decision-making that relies on policy considerations and complex technical assessments - insofar as these cannot be fully disentangled - the courts thus seem to isolate the latter, in fact, attempting to untie these two dimensions of discretion. Both lines of case law seem to have a similar purpose: by controlling the factual basis of the decisions, the courts allegedly do not interfere with policy choices (whether only apparently is another matter). Thus, the duty of care limited to complex factual assessments ensures a meaningful review (that is, one that is capable of detecting *manifest* errors of assessment) without risking a too far-reaching incursion in the space of *choice* of the EU decision-makers. Of course, verification of compliance with the duty of care enables an additional step in assessing the correct exercise of discretion. But this step would still be about verifying the correctness of the factual basis of the discretionary decisions and ensuring that all steps were taken to that end – not, arguably, the correctness of the decisions themselves. The stress placed on the objective dimension of the duty of care, which emerged to limit the potential reach of the individual protection that litigants sought when invoking it, did not change the core of this duty: as applied by the courts in these cases, it is a legal tool to review the factual assessments underlying decisions of the EU administration. The “sound administration of the fundamental rules of the Treaty” thus seems to be ensured by full reliance on technical accuracy and completeness of the information that grounds the exercise of discretion.

Both the *Tetra Laval* standard of review and the principle of care seem to filter out considerations of public interest. They enable the courts to scrutinize those choices that follow logically from factual assessments – as a matter of cognition – not the choices that stem from

⁶²The General Court does so while examining the facts before it, the ECJ when reviewing on appeal the GC’s assessment regarding compliance with the duty of care (e.g. Case C-290/07 P, *Commission v. Scott*, para 62).

⁶³See *supra* notes 25 and 36.

⁶⁴See *supra* notes 41-45.

balancing the public interests that ought to be pursued against those that may be forfeited in the given circumstances – a matter of volition. The scrutiny of such choices remains outside the scope of these two techniques. It would fall within the realm of proportionality, which is often invoked to review whether discretion was exercised in a proper manner within its respective legal limits. But also a proportionality review – and, with it, the review of public interest appraisals – may be done through the filter of the accuracy of technical assessments. When assessing whether the decision adopted is proportional, the courts may simply rely on the careful and impartial examination of the facts (or lack thereof) to determine whether the decision-maker proved that all relevant matters were taken into account and whether there were less restrictive measures available.⁶⁵ This was the stance the Court took in *Gauweiler*, where “care and accuracy” were considered the attributes of technical assessments necessary and sufficient not only to safeguard the ESCB against manifest errors of assessment but also to judge the appropriateness of the OMT decision.⁶⁶

This approach arguably reinforces the technocratic thinking underlying EU regulation. This effect may be reinforced by the likely impact of judicial review on the way the EU administrative bodies exercise discretion. The courts’ approach, as revealed by the above case law, appears to convey a particular message. As long as the decision-maker is able to demonstrate that, first, it relied on factually accurate, reliable and consistent information, covering all the facts that must be taken into account, secondly, that all these elements were examined carefully and impartially, and thirdly, that this information substantiates the conclusions drawn from it in a reasoned way, the discretionary choice will most likely be considered lawful (provided, of course, that other applicable legal rules and principles have been complied with).⁶⁷ The discussion that would typically follow such an assessment of judicial review of discretion would focus on whether the courts are thereby excessively constraining discretion, potentially overstepping the boundaries of judicial review or, on the contrary, imply going as far as needed to ensure effective judicial protection. Such a discussion, however, misses an important point: the way in which the courts shape the role of law (in its broader sense of a normative legal order that bears fundamental political-legal values) in structuring discretion. It is to this aspect that the following analysis turns to. The argument made is that the case law analysed enables increased judicial review in a way that narrows down the reach of law in the exercise of discretion, insofar as it explicitly avoids any judgment on the specific composition of possibly competing public interests that the decision entails. It relinquishes one of the essential functions of law in relation to discretionary powers: the granting of authority by reference to the pursuance of public interests. One should critically reflect on whether these are the terms in which law – in the broader sense of a normative order that binds public authority to legal-political values – ought to structure the exercise of discretion.

⁶⁵Case T-333/10, *ATC and Others v. Commission*, para 103, where the Court relies on the same reasoning as compliance with the duty of care, concluding that no compliance with care means no compliance with proportionality.

⁶⁶Case C-62/14, *Gauweiler*, paras. 74-80, esp. para 75.

⁶⁷Case T-257/07, *France v. Commission*, para 88, where the General Court explicitly brings together the standard of review established in *Tetra Laval* and the duty of careful and impartial examination. In this case, these tools served to assess whether the Commission was entitled to consider that a given level of risk did not exceed the level of risk deemed acceptable for society – clearly, a political decision.

4. Discretion, care and law: A public interest perspective

The courts' focus on complex technical assessments – and, as a result, possibly also their focus on those of the Commission as the main institution thus far concerned by the case law mentioned – arguably neglects an important feature of discretionary decision-making. The processes of collecting the information that is needed to assess the relevant factual and legal aspects of a given situation are guided by a specific purpose: the pursuit of the public interests that decision-makers are bound to fulfil under their legal mandate. Administrative decision-makers do not choose these public interests. They are identified in the applicable legal norms, even if at a high level of generality – e.g. the protection of public health, the international competitiveness of a given industry, financial stability, etc. This observation does not imply that the pursuit of public interests may be reduced to a matter of what is defined in legal norms and of how legal actors interpret and implement legislative mandates. Yet, the indication of public interests in both Treaty and legislative norms is the result of a political compromise, which determines the mandates attributed to EU administrative actors, albeit with various degrees of detail and abstractness. They ought to remain a core reference point for EU administrative actors in the processes of implementation (which are often distinctly political) and for the EU courts when reviewing the legality of their discretionary decisions.⁶⁸ It is in line with such political compromise that legal norms also define the conditions that, once verified, can trigger the exercise of discretion. Such conditions both delimit the scope of discretion and concretize the public interests that decision-makers ought to be pursuing when making discretionary decisions.⁶⁹ Thus, for example, when defining the power of the ESMA to temporarily prohibit or restrict short-selling activities, the legislature indicates that those measures are adopted to ensure the “orderly functioning and integrity of financial markets” and financial stability within the EU; it also indicates that, when adopting such measures, the ESMA needs to consider, *inter alia*, the efficiency of financial markets and the certainty of market participants.⁷⁰ These are the public interests that the ESMA needs to balance, protect and pursue. They have arguably a broader relevance than the one the Court of Justice stressed in its judgment: being more than just one of the factors that circumscribe the powers of the ESMA,⁷¹ they constitute the yardstick against which the decisions of the ESMA should be assessed, as explained next.

The public interests thus incorporated in a legal mandate define not only the purpose of the granting of discretion but also its scope; they ought, as such, to guide the exercise of discretion. In this sense, complex technical assessments cannot be – or, at least, should not be –

⁶⁸This observation may qualify the argument that purposive EU competences repress conflicts of interest; see Davies, “Democracy and legitimacy in the shadow of purposive competence”, 21 *ELJ* (2015), 2-22, at 5-6. At least, it points out that the prior definition of public interests in a legal mandate does not necessarily hinder a political process by which different competing interests are weighed (although it does limit the range of public interests that might be considered). Defending the argument that process-oriented judicial review may contribute to align political decisions with their legal framework, *inter alia* by ensuring that the institutions take all relevant interests into account, see Lenaerts, “The European Court of Justice and process-oriented review” 31 *YEL* (2012), at 3-16.

⁶⁹Soares, *Interesse público, legalidade e mérito* (Atlântida, 1955), p. 150, according to whom the conditions of action defined by the legislature guide the decision-maker in identifying the public interests at stake in each given situation.

⁷⁰Art. 9(5) of Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority, O.J. 2010, L 331/84 and Art. 28(3)(a) and (c) of Regulation (EU) 236/2012 of 14 March 2012.

⁷¹Case C-270/12, *ESMA*, paras. 47-48.

isolated or dissociated from the pursuance of the public interests that are, at the same time, the core and goal of administrative decision-making. More deeply, there is a dialectical relationship between the assessment of facts and the appraisal of public interests that discretionary decisions presuppose.⁷² It is during the process of assessing the circumstances that may require administrative action that the public interests envisaged in the abstract scheme of the enabling legal norms acquire significance: those circumstances unveil the interests that need to be protected. Should the efficiency of financial markets be disrupted by an administrative decision intended to counter a threat to financial stability, within the limits legally defined? What does the protection of financial stability require? These are questions that can only be answered in view of the factual circumstances that the decision-maker confronts. Otherwise it is difficult to indicate, in substantive terms, what the powers of the ESMA to ensure financial stability may mean. In addition, one only knows the type of measures that should be adopted – to the extent that the legislature provides a choice – after a factual assessment of those circumstances. Should it be a notification, an order of disclosure, a prohibition, or the imposition of conditions to given financial transactions?⁷³ At the same time, this process occurs in relation to, and is hence co-determined by, the legal provisions that defined the interests the administration ought to be pursuing in the first place (in this case, the functioning and integrity of financial markets, financial stability, the efficiency of financial markets, but also the interests of Member States and of the various financial markets participants).⁷⁴ Arguably, it is this assessment of the circumstances (possibly, complex technical assessments) in relation to the interpretation – and construction – of the public interests envisaged by law that ought to guide the substantive choices of the administrative decision-maker.⁷⁵

The dialectical link between complex technical assessment and public interest appraisals may be obvious. Nevertheless, the Court ignores it in some instances. Thus, in the *ESMA* judgment, despite referring to the public interests that ESMA needs to take into consideration, the Court preferred to single out the limb of technical factual assessments to set aside the UK's claim that the Regulation actually attributed wide discretionary powers entailing an appraisal of competing interests and, hence, policy choices.⁷⁶ Arguably, the Court's concern – and yardstick – was its ability to perform judicial review, which “precisely delineated” powers would enable, while an acknowledgment of the discretionary nature of some of the conditions that delineate ESMA's powers (e.g. whether a national measure significantly addresses a threat to the orderly functioning of the market) would make this less obvious. In addition, the dialectical link pointed out entails two consequences that the case law examined above overlooks. Firstly, the duty of careful and impartial examination of *factual information* is not self-standing; rather, it is intertwined

⁷²See also Mendes, “Law, public interest and interpretation: Prolegomena of a normative framework on administrative discretion in the EU”, *Yale Law & Economics Research Paper* No. 519 (2014), at 26-28, available at <www.ssrn.com/abstract=2539068> (all websites last visited 14 Oct. 2015).

⁷³Art. 28(1) of Regulation (EU) 236/2012 of 14 March 2012.

⁷⁴Soares, *op. cit. supra* note 69, refers to “circular inter-relations”. On the example, see *supra* note 70 and recital 11 of Regulation (EU) 1095/2010 of 24 Nov. 2010.

⁷⁵There 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”.

⁷⁶Case C-270/12, *ESMA*, paras. 45 and 52 (cf. para 29 for the UK's plea).

with a duty to pursue public interests and to carefully balance competing public interests. While the duty of care may function as an individual procedural guarantee of legally affected persons, when placed in this perspective, its centre of gravity ought to lie elsewhere: in the objective dimension that has remained relatively silenced or unclear in the courts' case law. Secondly, the processes through which the EU decision-makers collect information and conduct complex technical assessments shape, directly, the weighing of competing public interests that are involved in the exercise of discretion. In this sense, they are also political.

The duty of care, in the broader normative sense proposed, is a legal duty that derives from the attribution of administrative discretion to act in a certain way. A duty of care that serves the "sound administration of the rules of the Treaty" would require discretionary decisions to be – apart from technically accurate – inclusive and fair, insofar as they should reflect a balanced composition of the protected interests that, by law, ought to be part of the assessments that lead to their adoption. This duty is therefore grounded in the respective enabling legal norms and in the normative legal order of which they are part.⁷⁷ Undoubtedly, 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 complex technical assessments, which ought to be grounded on a careful and impartial examination of facts. But in view of the dialectical relationship stressed above, these can hardly be analytically dissected from the accommodation of competing public interests that a discretionary choice also entails. It is the intertwining of expertise and policy choices that will ultimately determine the adequacy and propriety of the course of action chosen in view of the public interests that the legislature determined ought to be fulfilled in that instance. The processes through which EU decision-makers make public interest appraisals is only partially captured by legal reasoning, general principles of law and legal norms. Nevertheless, normatively, the public interests defined by law remain the source of the authority of administrative decision-makers and the source of their duty to pursue them. They form, together with the factual technical assessments, the yardsticks to assess a correct – and lawful – exercise of discretion.

At the same time, as indicated, the processes and structures that ensure the accuracy, completeness and sufficiently thorough analysis of the facts condition, by their very configuration, the public interest appraisals that are eventually made. They determine the type of public interest considerations that weigh on the final assessments, even if they are set up to ensure the impartiality and quality of the specialized knowledge used in EU decision-making without which the ensuing decisions would lack credibility and legitimacy. The most obvious example is perhaps the composition of expert groups.⁷⁸ But many others could be invoked. Comitology committees, in addition to expertise, enable the consideration of the possible competing interests of Member States and shape the final decision accordingly. Also the way in which procedures are designed is influential. The bilateral structure of competition law procedures – in essence opposing the Commission and the undertakings investigated – places the economic interests of consumers, arguably one of the public interests that competition law

⁷⁷Soares, op. cit. *supra* note 69, p. 200.

⁷⁸See, in this regard, the issues raised in the European Ombudsman's own-initiative inquiry OI/6/2014/NF concerning the composition of Commission expert groups; O'Reilly, "Letter to the European Commission requesting an opinion in the European Ombudsman's own-initiative inquiry OI/6/2014/NF concerning the composition of Commission expert groups", available at <www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58861/html.bookmark>.

protects, in a secondary place in the public enforcement of competition law.⁷⁹ From this perspective, stressing the accuracy, completeness and reliability of the information gathered and the thoroughness and diligence of the assessments made both endorses and reinforces an objectivity that, depending on the way in which the underlying processes and structures were designed and implemented, may only be apparent. More strongly, it may dress with the veneer of legality decisions that, *because* they are technically accurate, favour a composition of public interests that is actually to the detriment of other interests that, by force of law, should have been taken into consideration and may have been excluded from the deliberations that underlay the choice ultimately made. The discretionary decision may be considered rational and objective while falling short of ensuring an inclusive and fair treatment of the competing public interests involved, the balance and pursuit of which law would require. The duty of care should arguably embody and ensure the normative demands of law, which are not exhausted in the verification of the technical soundness and accuracy of a decision. Those normative demands entail fairness in the way administrative actors assess and balance legally protected public interests, as a means to ensure the concretization of political, economic, social and cultural values that the EU legal order protects.⁸⁰ If authority is granted to pursue public interests, the exercise of discretion postulates a duty to act in a way that ensures, in substance, the realization of those interests, and the consideration of those that, in a given normative legal order, ought to be protected. This legal duty – in addition to other non-legal considerations – ought to structure the policy choices that derive from weighing competing public interests.

5. Public interests and law in judicial and non-judicial fora

5.1. *Probing the limits of judicial review of discretion*

Understanding care in the broader normative sense proposed would require that discretionary decisions, apart from being technically accurate, ought also be informed by, and ultimately concretize, the values and principles of the legal order that ground and bind the authority to adopt them. In this sense, a discretionary decision that would overcome the “manifest error” test would be not only one which is reasonable by technically rational patterns (because it is well supported by all the relevant elements of fact), but also the one that stems from a balanced consideration of the competing legally protected public interests – a decision that, in this way, would be valid by *legally* rational patterns. The judicial endorsement of this broader meaning of the legal duty of care, which contrasts with the one the case law conveys, may ultimately risk breaching the fragile balance that the courts may have sought to achieve by restricting the duty of care to a requirement of diligent and impartial examination of facts. While criticizable from the normative view defended here, both the *Tetra Laval* standard of review and the duty of care, as established by the courts, have arguably sought to preserve the autonomy of the EU institutions and bodies to make policy choices.⁸¹ There is often only a very fine line between

⁷⁹Cseres and Mendes, “Consumers’ access to EU competition law procedures: Outer and inner limits”, 51 CML Rev. (2014), 483-521, at 489-91 and 520.

⁸⁰On the mutual intertwinement between form and matter, see Gomes Canotilho, *Direito constitucional e teoria da constituição*, 7th ed. (Almedina, 2003), at 243-44.

⁸¹In this sense, on the duty of care, see Nehl, *op. cit. supra* note 37, p. 105.

reviewing the way decisions are made and the merits of the decisions at stake. Verification of compliance with the duty of care stands in this fine line.⁸² Importantly, it is also a means to ensure the very possibility of judicial review, as the EU courts have stressed. The duty of care shares these characteristics with the duty to give reasons. Broadening the meaning of care, in the sense indicated above, and assuming that this duty would be justiciable, could potentially annul the discretionary space that, in view of the allocation of powers under the Treaty, ought to be preserved. Such a risk may explain (but not justify, from the perspective adopted here) why the objective dimension of the principle of care has remained, in general, rather elusive in the case law.

The risk exists. It is a dimension of the tension between ensuring meaningful judicial review and preserving discretion. The assertion of the risk could lead us to depart from the normative conception of care defended here, or, rather, to reject it as non-judicial. In this view, there would seem to be little point in stressing the dialectical relationship between, on the one hand, care in conducting an investigation that grounds complex technical assessments and, on the other, care in duly regarding the competing public interests that, in light of the applicable legal norms, should be accommodated in a given instance. The argument would be that such a view would unnecessarily mingle and confuse two different operations: the assessment of facts, governed by a duty of careful and impartial examination, as established in the case law; and the appraisal of public interests, which, institutionally, is a matter where the courts ought not enter (except via the principle of proportionality). Blurring the already difficult borderline between reviewing factual assessments and controlling the balancing of interests would potentially enable the Court to enter squarely in the domain of discretion, so it would be claimed. Admittedly, the argument would prima facie be supported by separation of powers considerations: in ensuring that the law is observed, the courts should not stray beyond legality. In a mechanical view of this postulate, one could defend the argument that, when assessing facts, the courts are checking whether the basis for exercising a legally attributed power are fulfilled; when assessing the way public interest have been balanced, they could be entering the core of discretion. If by now it is fairly established in the case law that “the technical nature of a case should not cause [the Court] to forsake its duty ... to ensure that the law is observed”,⁸³ the Court cannot transgress the limit of substituting the decision of the administrative decision-maker with its own opinion. Such could be the effect of the normative conception of care defended here. Ultimately, if still convinced by the public interest perspective on discretion, one would at least conclude that institutional reasons could justify a “twist” in what would otherwise be a “normatively desirable account of discretion and the role of law within it via a more demanding conception of care. The legal categories with which courts (and public lawyers) work would distort, for institutional reasons of separation of powers, the role that law ought to have in structuring the exercise of discretion.

Instead, it is contended here that, even if treading a fine line, the proposed view on care would not necessarily lead the courts to replace the substantive choices of the EU administration made in the use of their discretionary powers. Pointing out the dialectical link between complex

⁸²See Tiili and Vanhamme, “The ‘power of appraisal’ (pouvoir d'appréciation) of the Commission of the European Communities vis-à-vis the powers of judicial review of the Communities' Court of Justice and Court of First Instance”, 22 *Fordham International Law Journal* (1999), 885-901, suggesting that the Commission's obligation to investigate must be separated from its assessments, at 895.

⁸³Opinion of A.G. Jacobs in Case C-269/90, *Technische Universität München*, para 11.

technical assessments and public interest appraisals, with the ensuing consequences indicated above, would rather elicit the legal element of discretion. The above conception of the duty of care has the merit of underlining that the spaces of discretion that the legal order attributes to the decision-maker are spaces within which choices are made not only in view of what is *technically* sound or of what may be *politically* determined. Discretionary choices are also guided by *legal* criteria. These are found in the enabling legal norms, in the general mandate of the decision-maker and in the values and principles which underpin the EU legal order and which administrative decision-makers ought to concretize when exercising their authority. Beyond the generally accepted postulate that discretionary decisions ought to respect general principles of law as well as fundamental rights – which often delimit the space of judicial review – what the proposed duty of care underlines is also the legal nature of discretion. This perspective highlights that, also from a legal point of view, technically accurate decisions should not be legally valid if they favour certain public interests to the detriment of others as a result of a process which was not inclusive insofar as not all relevant legally protected public interests were duly considered. This effect may be caused not by lack of care in collecting the necessary information, but rather by the way in which the structures of collecting information have been conceived or by administrative processes that may escape judicial review. In essence, the broader duty of care endorsed above contradicts the conclusion that “nothing more can be required” of the holder of discretion other than that “it use its ... expertise and the necessary technical means at its disposal to carry out [a reasonable] analysis with all care and accuracy”.⁸⁴ The political or otherwise potentially controversial character of the measures adopted by the EU institutions and bodies is not outside the reach of law, more specifically of the legal duty to pursue and duly consider legally protected public interests. Arguably, it is also not outside the reach of judicial review, as the courts acknowledge in other instances.⁸⁵ In particular when the executive powers of the EU institutions have been extended in an unprecedented way, it is important to stress this broader reach of law – and, potentially, of judicial review – which the case law of the EU courts on judicial review of discretion currently hides (if not denies).

5.2. *Law in a non-judicial forum: The Ombudsman*

While the intrinsic links between complex assessments and public interest appraisals may reveal an uneasy space for courts, the Ombudsman would *prima facie* not face the same constraints. The Ombudsman’s mandate, institutional position and means of action stress the distinct complementary role that the Ombudsman may have in ensuring the legality of discretionary decisions. The mandate of the Ombudsman to act upon instances of maladministration extends beyond legality, understood as compliance both with legal provisions and with general principles of law.⁸⁶ This mandate facilitates a broader understanding of discretion, insofar as the Ombudsman’s decisions are not *a priori* formatted to set apart the legal from the non-legal aspects of a given decision. More importantly, for our purposes, the Ombudsman has a specific

⁸⁴Case C-62/14, *Gauweiler*, para 75.

⁸⁵See e.g. Lenaerts, *op. cit. supra* note 68.

⁸⁶See e.g. the speech by the European Ombudsman, Diamandouros “Legality and good administration: Is there a difference?”, Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on “Rethinking good administration in the European Union”, 15 Oct. 2007, at 4, available at <www.ombudsman.europa.eu/speeches/en/2007-10-15.htm>.

institutional position quite different from that of the courts, given its constitutive link to the European Parliament and the possibility to report directly to the Parliament on instances of maladministration.⁸⁷ In addition, and accordingly, the Ombudsman also has tools and means of action that enable inquiries not specifically directed at controlling whether the EU institution has complied with the law and with general legal principles, or at determining what the rights of the complainant are and whether they have been respected.⁸⁸ The setting of a friendly dispute resolution could be better suited to address questions on the pursuance of public interests – e.g. whether all relevant considerations are being taken into account in view of the public interests that should be pursued – than a judicial setting, where the issue of whether the institution behaved legally (and, hence, the binary logic of legality/illegality) necessarily frames the dispute, and where the understanding of legality may not encompass the dimensions of law pointed out in the previous section.⁸⁹

Notwithstanding these differences, when reviewing administrative discretion the Ombudsman has not sought to demarcate its role from that of the courts: the “general limits” of the conferred authority are those “established by the jurisprudence of the Court of Justice”.⁹⁰ Yet, in the dialogue that the Ombudsman establishes (and mediates) between the EU institutions and the citizens, it has been able to identify ways in which competing public interests should be adequately regarded in the making of discretionary decisions, explicitly addressing the link between the processes of collection of information that underlie and influence policy choices, on the one hand, and the public interests that ought to be pursued, on the other.

A decision concerning the information structures that underlie the Commission’s policy choices in the area of biofuels illustrates the distinctive contribution of the European Ombudsman in structuring the administrative discretion of the EU institutions along the lines defended in this article.⁹¹ Reacting against the predominance of commercial interests in an advisory group – the European Biofuels Technology Platform – in particular from the automotive and oil industries, the complainant claimed that the public interests of “environmental sustainability” and the “human rights of local communities of agro-fuel producing countries” were not sufficiently taken into account in the Commission’s energy policy, thus jeopardizing the objectivity of the advice given and the impartiality of the Commission’s decisions, from the level of policy definition to its implementation.

In his assessment, the Ombudsman started by recalling that, *according to the applicable directive*, decisions regarding the desirability to promote the use of biofuels should be based on “a

⁸⁷Art. 228 TFEU (ex 195 EC), Art. 3(4), (7), (8) and Art. 6(1) of the Statute. See Harden, “When Europeans complain: The work of the European Ombudsman”, 3 CYELS (2000), 199-237, at 209-14; Tsadiras, “Unravelling Ariadne’s thread: The European Ombudsman’s investigative powers”, 45 CML Rev. (2008), at 758-9. This “symbiotic link” can be problematic regarding the powers of the Ombudsman *vis-à-vis* acts of Parliament (see Tsadiras, *ibid.* at 770).

⁸⁸See Harlow and Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), pp. 80-84; Tsadiras, *op. cit. supra* note 87, at 757-70.

⁸⁹Cf. Diamandouros, *op. cit. supra* note 86, at 4, *in fine*.

⁹⁰Annual Report, 1997, at 26, according to which “The Ombudsman does not seek to question discretionary administrative decisions, provided that the institution or body concerned has acted within the limits of its legal authority”. Harden, *op. cit. supra* note 87, at 224, explicitly indicates that “the Ombudsman is not an appellate tribunal” that could review the merits of discretionary decisions.

⁹¹Decision of the European Ombudsman closing its inquiry into complaint 1151/2008/(DK)ANA against the European Commission, 9 July 2013 (“Biofuels Decision”).

detailed analysis” of environmental, economic and social impacts.⁹² In his view, an assessment of the objectivity of the decisions at issue required considering the “technical content and quality of the output and *the basis on which it is formulated*”.⁹³ While the Commission should ensure the plurality of sources of advice, representing different interests, it was within its discretion to decide “how to achieve the necessary overall balance”.⁹⁴ In line with the boundaries that, in his view, the Directive placed to the Commission’s discretion, and prompted by the complainant’s dissatisfaction with the first explanations of the Commission, the Ombudsman suggested that the Commission should specifically indicate, firstly, whether there are any mechanisms that ensure the objectivity of the opinions on which the Commission relies to make policy choices; secondly, whether the public consultations and advisory groups are “intended to, and actually [do] ensure that sufficient attention is given to the issues of public interest raised by the complainant”; and, thirdly, the extent to which the Commission takes into account various external inputs into decision-making.⁹⁵ In doing so, the Ombudsman arguably did not interfere with the Commission’s discretion on how to ensure plurality in the information-gathering structures that underlie its decisions. At the same time, safeguarding the Commission’s discretion in this regard did not prevent him from addressing possible biases, which could deny the values that the EU legal order protects, as explicitly indicated in the applicable Directive. He did so by simply asking the Commission to explain in a detailed manner how it ensures the proper consideration of the public interests that, according to the Directive, ought to be balanced in the Commission’s decisions.

The Ombudsman thus brought to the fore the dialectic link between the factual assessments of a given matter – for which the Commission relies, at least in part, on the input of an external expert group – and the public interests that ought to be pursued in this instance, as determined in the applicable directive. The connection, in his view, is clear: by force of the applicable law, “every choice in the field of research policy, however technical in nature or narrow in scope, cannot be dissociated from numerous other environmental, social and economic considerations”.⁹⁶ Without questioning the discretion of the Commission to organize the decision-making structures (i.e. to choose from various “input sources” in the process of collecting information), the Ombudsman thus recalled the public interests that, *by legal determination*, needed to be pursued in this field.⁹⁷ In his view, the public interest appraisals that necessarily underlay technical choices prevented the Commission from downplaying the political importance of the decisions at stake by invoking the lack of “technological bias”. Specifically, “[F]or the Platform’s recommendations to meet the objectivity requirement in the areas of research and technological development policy, to which it has a direct input, *the Platform must take into account all relevant considerations*. If the Commission measures the objectivity of the

⁹²Ibid., at 27.

⁹³Ibid., at 30, emphasis added.

⁹⁴Ibid., at 34, in line with other cases. Discretion, in this instance, did not refer to the merits of given decisions but to the basis of the Commission’s substantive choices.

⁹⁵Ibid., at 40.

⁹⁶Ibid., at 78, building on pt. 36, where the Ombudsman referred to the recital of the Directive that indicated the importance of taking into account “environmental, social and economic considerations”.

⁹⁷Ibid., at 36.

Platform's recommendations in the field of biofuels research policy by the lack of technological bias, then it adopts too narrow a perspective".⁹⁸

As mentioned, the Ombudsman anchored this observation in the applicable legal provisions identifying the legally protected public interests relevant in this case. This was explicitly the yardstick used to determine which considerations were "relevant" for the exercise of discretion, not the soundness of a complex technical assessment in view of the conclusions reached (dependent mainly, in the *Tetra Laval* formula, on factually accurate, reliable, consistent and *complete* evidence, i.e. evidence that "contains all the information which must be taken into account in order to assess a complex situation").⁹⁹ The Commission eventually agreed that it should enhance the objectivity of the Platform's recommendations accordingly and committed to doing so.¹⁰⁰

This case was not about whether a specific decision was biased or whether it properly considered the broader range of public interests at stake. It was about the structures on the basis of which the Commission makes substantive discretionary choices, which may decisively influence the direction these take. It illustrates how the Ombudsman may pierce the veil of the Commission's informal practices and structures that underlie its technical assessments, and link them back to the political considerations that, in view of the applicable legislation, should inform the exercise of discretion. As mentioned, the institutional setting in which the Ombudsman operates may facilitate this way of structuring discretion by reference to public interests that the EU administration must pursue. Unlike judicial review, the control performed does not need to be translated into a binding binary result of legality/illegality. The Ombudsman may point out that what is not legally imposed is "not legally barred", and may be followed as a matter of care in ensuring the proper consideration of competing legally protected interests (public and private) when conducting factual assessments.¹⁰¹ In addition, the Ombudsman's constitutive link to the European Parliament arguably entails fewer institutional constraints when recalling and acting upon the range of public interests that ought to be considered in decision-making. Still, it is by reference to legal norms that the Ombudsman decided this dispute, arguably aligning technical and political decisions with the legal framework within which discretion ought to be exercised. Within the procedural limits of court actions, such a way of structuring discretion is also within the reach of the EU courts.

6. Conclusion

In cases in which the EU courts went further in the review of administrative discretion, they made the lawfulness of the exercise of discretion depend mostly on the accuracy, reliability, consistency and completeness of the information gathered and the thoroughness and diligence

⁹⁸Ibid., at 78 (emphasis added).

⁹⁹In *Tetra Laval*, at stake was the assessment of the circumstances that are relevant for a merger to produce an anti-competitive effect, which in the ECJ's view implied examining various possible scenarios; Case C-12/03, *Tetra Laval*, paras. 39, 40 and 43. What the General Court had examined was whether the evidence was *inter alia* incomplete and thus incapable of sustaining the point the Commission had made.

¹⁰⁰Biofuels Decision, cited *supra* note 91, at 112.

¹⁰¹Decision of the European Ombudsman closing his inquiry into complaint 846/2010/PB against the European Commission, at 78-79.

of the complex assessments that the Commission, as other executive bodies, need to make in the performance of their functions. Such an approach seems to confine the role of law in structuring discretion to issues that are (or appear to be) procedural in nature, while still performing a meaningful degree of review. By way of two principles of law – effective judicial protection, and careful and impartial examination – the EU courts have been able to check the legality of decisions that ultimately rely on “questions that only [an expert] can answer”.¹⁰² Some would argue that this is as much as one may expect from courts, for institutional and material reasons. Separation of powers arguably recommends judicial restraint over political choices, in particular if these concern controversial matters. While courts may compensate (at least in part) their lack of technical expertise via various procedural means, their role is not to second-guess choices that should be autonomously defined by an administrative body within the limits of law. In addition, the stringent way in which the EU courts have reviewed administrative discretion following the two lines of case law analysed in this article would placate concerns regarding the role of law in controlling the exercise of the powers attributed to the ESMA or those announced by the ECB in its OMT decision, should they ever be concretized and subject to judicial challenge.

Yet, beyond the discussion on the allocation of powers between the executive and the courts, it is important to reflect on the way the EU courts shape the role of law in structuring discretion. This article argued that the EU courts have sought to strike the balance between the need to preserve a room for choice (the essence of discretionary powers) and a sufficient judicial control in a specific way. They have cut off technical complex assessments (which they review) from public interest appraisals (which they tend to leave outside the scope of review). There are normative consequences to this approach, which should be critically assessed. Namely, such an approach emphasizes the technical nature of the acts under review, potentially leading to label as “technical” decisions that are far from being only that, and reinforcing the correctness of technical assessments as the prevalent criterion to assess discretion and its exercise. This effect is well illustrated by the Court’s rulings in *ESMA*, where the Court implicitly downplayed the policy considerations entailed in the powers of ESMA, or in *Gauweiler*, where it emphatically stressed, when reviewing the proportionality of the OMT decision, that “nothing more can be required of the ESCB apart from that it use its ... expertise and the necessary technical means at its disposal to carry out [a reasonable] analysis with all care and accuracy”.¹⁰³

This article contended that, in general, by focusing judicial review of discretion on whether the EU executive has acted competently – i.e. whether it collected all the information needed and carefully examined it – the EU courts fail to assess the legality of discretionary decisions against a fundamental normative yardstick: they do not examine whether the decisions have sufficiently considered public interests that by force of legal norms should be pursued in a given instance. Given that the authority of administrative decision-makers to make discretionary decisions is delimited by reference to such public interests, how these are weighed in a given instance is an important aspect of the legal legitimacy of administrative action that the EU courts seem to relinquish when they review discretion entailed in complex technical assessments. Straying this far may lead the courts to venture into areas where institutional and material reasons

¹⁰²Opinion of A.G. Jacobs in Case C-269/90, *Technische Universität München*, para 15 (see also para 13: “the technical nature of a case should not cause the Court to forsake its duty ... to ensure that the law is observed. The Court cannot shy away from technical questions”).

¹⁰³Case C-62/14, *Gauweiler*, para 75.

would recommend restraint. Nevertheless, the limits of judicial review of discretion as currently defined in the EU courts' case law ought not obscure the dialectical link between complex assessments and public interest appraisals, which discretionary decisions entail. These two aspects can only with great difficulty be analytically separated, as appears to be done in the case law analysed. The intertwining of the two aspects postulates a duty of care, which is broader and normatively more demanding than the one enshrined in the EU courts' case law. From a public interest perspective, care requires, in addition to factually accurate assessments, the due consideration *in these assessments* of the legally protected public interests that, by force of law, ought to be balanced, protected and pursued. Care would postulate fairness and inclusiveness in such public interest appraisals. As a result, law would then validate discretionary decisions that, apart from being technically accurate, also respect and concretize the political, economic, social and cultural values that the EU legal order protects. The duty of care, in this sense, unveils the broader role of law in structuring discretion, which judicial review on discretion currently hides. Importantly, the enforcement of this broader duty of care would be grounded in the legal determination of which public interests ought to be pursued within a given legal framework. To the extent that such a legal determination is the reflection of a political compromise, the possible judicial enforcement of this duty would enable the courts to verify that administrative decisions do not deny the policy choices that such legal rules enshrine.

The way the European Ombudsman has acted upon complaints of lack of objectivity and impartiality illustrates this broader role of law. It confirms that it is still by reference to legal norms that such a broader way of reviewing complex technical assessments may be implemented. Without prejudice to a different judicial approach to the review of discretion, which the duty of care (in the broader sense defended here) would suggest, the specific characteristics of the Ombudsman's office arguably facilitate the type of control proposed here. Because of its institutional role, mandate and means of action to assess the soundness of administrative processes, the Ombudsman seems to be particularly well placed to structure the exercise of discretion in a way that stresses the intrinsic link between pursuing public interests and making accurate and careful factual assessments. For instance, the setting of friendly dispute resolution may, in given instances, be more heedful of the space of discretion that administrative actors should preserve, while still both controlling and enabling change in the way discretion is exercised. Such institutional and procedural characteristics enable the scrutiny of aspects that, if controlled by the courts, could generally be perceived as overstepping the limits of their jurisdiction – for instance the question whether the very structures of gathering information are fashioned in such a way as to ensure a suitable balancing of the public interests that, by legal determination, ought to be considered in each instance. Unlike the courts, the Ombudsman may suggest *ways* in which the public interests that the EU institutions should pursue, by force of the applicable legislation, could be adequately balanced in an inclusive and fair way.