

The Foundations of the Duty to Give Reasons and a Normative Reconstruction

Joana Mendes*

Forthcoming in Fisher, King, Young (eds.) *The Foundations and Future of Public Law*
(Oxford University Press)

1. Introduction

Administrative structures and procedures have been a pivotal feature of EU integration, having both supported the path towards an “ever closer union” quite beyond legislative harmonisation and, at the same time, challenged and transformed some of its constitutional features. The last decade showed prominently again the centrality of the administration in the EU, as the restructuring of financial regulation led to the emergence and progressive reinforcement of the EU financial agencies (ESAs), to the creation of the Single Resolution Board (SRB) and to the attribution of a new role to the European Central Bank (ECB), now in charge of banking supervision, a task which it also shares in various degrees with the competent authorities of the Member States. At the same time, the *Short-selling* judgment may have opened the path for a deeper constitutional change, where EU agencies assume a stronger institutional role than hitherto, both in relation to the European Commission and to the Member States’ administrations.¹ And yet, such increased executive prominence emerges in a period when the teleological ineluctability of the “ever closer union” is more questioned than ever, when the balance between centralisation and the powers of national competent authorities is constitutionally more significant, and when the political and legal salience of financial regulation is greater than in the pre-crisis period. The tensions between technocratic competence and the democratic implications of executive

* Professor of Comparative Administrative Law, University of Luxembourg. I am grateful to the organizers of the Conference “The Foundations and Future of Public Law” organised in Honour of Paul Craig in September 2018 (Oxford University) and to its participants, whose remarks have contributed to improving the quality of the paper. Jacques Ziller reminded me of the work of Paul Reuter, which pointed me to the constitutional foundations of the duty to give reasons. I am grateful too to Paul Craig, for a lengthy discussion, to Liz Fischer and Alison Young, for insightful comments.

¹ Case C-270/12, *United Kingdom v. European Parliament and Council (Short-selling)* [2014]. See also Edoardo Chiti, ‘Is EU Administrative Law Failing in Some of Its Crucial Tasks?’ 22 *European Law Journal* 576 (2016).

empowerment are as present as ever.² Such context, combined with the significance and breadth of the powers of EU financial regulators, make those developments in financial regulation a fertile ground for a more general reflection on the tools of EU public law, and, specifically on the fundamentals of administrative procedural principles. Taking the cue from those who stress the importance of tinkering with administrative procedures in a context of contestation and constitutional change,³ this chapter is a first approach to such analysis, focusing on the duty to give reasons.

Beyond the confines of the EU delegation doctrine, legislative mandates may give constitutive powers to EU agencies (and to other administrative entities) that allow them to give meaning to the law that they implement and, thereby, to define how public interests are realised. These powers may require revisiting and re-assessing the function of the procedural principles that are guarantees of both proper administrative behaviour and legality. Procedural principles should ensure the constitutional embeddedness of the decisions taken in the exercise of constitutive powers. This function may not be only, or primarily, assured via judicial oversight. The chapter contends that procedural principles may have a different content, depending on whether they are approached as norms of conduct in the processes through which executive bodies engage in norm concretisation, or as norms of control deployed by the EU Courts when conducting judicial review (Section 2). Although these are two sides of the same coin, it is useful to distinguish them for analytical purposes. This chapter analyses the different facets of the duty to give reasons from this perspective. It outlines its three-fold function – enabling Member States and citizens to be cognizant of the way the Treaty competences are carried out, support to judicial review, self-regulation of decision-makers (Section 3) – and investigates the origins of the giving-reasons requirement in the context of the European Coal and Steel Community (ECSC), building on a selection of early case law, on the ECSC Treaty provisions, and on early doctrinal accounts thereof. Here, the duty to give reasons was one of the pillars of integration. A legal reflection of the High Authority's political role, reason-giving was systematically linked to legally-binding assigned purposes of public action by force of the Treaty (Section 4). This analysis provides the grounds for a reconstruction of the duty to give reasons and for a clarification of its constitutional function: the duty to give reasons has an action-guiding role that should facilitate public understanding on

² E.g. Ronan McCrea (2017), "Forward of Back: The Future of European Integration and the Impossibility of the Status Quo", 23 *European Law Journal* 66 (2017); Agustín J Menéndez, "The Crisis of Law and the European Crises: From the Social and Democratic *Rechtsstaat* to the Consolidating State of (Pseudo-)technocratic Governance" 44 *Journal of Law and Society* 56 (2017).

³ Carol Harlow, "Editorial: Transparency, Accountability and the Privileges of Power" 22 *European Law Journal* 3 (2016).

how executive action is shaping the public interests that EU executive bodies are mandated to pursue. Such role is both consonant with the current constitutional framework within which EU executive bodies operate, as defined in the Treaty, and prepares the ground to establish it as a norm of conduct, alongside its judicially-assigned role. If the duty needs to provide such a public understanding, reasons for executive action need to reflect how the latter results from compromises, assessments and choices implied in shaping the public interests that EU executive bodies are legally mandated to pursue, within a political system and a legal order equally founded on legal values and on the achievement of political goals (Section 5).

2. The constitutive function of executive actors and its procedural implications

The ESAs, the SRB and the ECB's (ECB-SB) have been given direct powers of market intervention that are relatively novel outside of the limited areas of direct administration that have conventionally been the preserve of the Commission. Even if they rely on intricate schemes of separation of tasks between EU and Member States' bodies, collaboration and participation in composite procedures, these bodies can adopt binding decisions that both condition the powers of national administrations and determine the rights and obligations of private entities.⁴ Thus, for instance, the ESMA may adopt measures that prohibit or impose conditions on short-selling activities 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" and possible measures adopted by national competent authorities "do not adequately address" that threat.⁵ In a similar vein, the ECB-SB may withdraw the license of a bank when it considers that "proper actions necessary to maintain financial stability have not been implemented by national authorities".⁶ The SRB may exercise directly the powers of national competent authorities over private entities when it considers that those authorities have not "properly addressed" its warning on non-compliance with the SRM Regulation or with its own instructions and the consistent application of high resolution standards

⁴ Within each of their functional domains, the powers of each of these bodies differ as do the specific ways in which the articulation between EU and national authorities is conceived. However, for the purposes of this paper, these differences will be mitigated to focus on the functional similarities of the powers they were given.

⁵ Article 28(1) and (2) of Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L 86/1.

⁶ Council Regulation (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63, Article 14(6); the procedure includes consultations with national competent authorities in which they should be given the opportunity to decide on "the necessary remedial actions" (Article 14(5)), and due process given to the parties concerned (Article 22).

may be at stake.⁷ In other cases, the decisions that they address at private entities do not involve a suitability assessment of national competent authorities' action and an eventual substitution thereof. Thus, the ECB has direct supervisory powers over credit institutions to address "relevant problems" when those entities do not comply or are likely not to comply with EU law and national law, or when supervisory review determines that credit institutions do not ensure sound management;⁸ the SRB may resolve a financial institution when it is "failing or likely to fail", when there is "no reasonable prospect" that private sector measures could prevent that failure in a timely way and when resolution is necessary in the public interest, in the terms further specified in the SRB Regulation.⁹

All these powers are highly regulated, reflecting also the contestation that surrounded their assignment to EU bodies.¹⁰ Their legal mandates delimit the substantive scope of administrative action, identify the conditions that must be fulfilled for their exercise to be lawful, and set out the procedures they must follow, thereby making these powers amenable to judicial review. If one is to use the classification that has left a sharp imprint in EU law, they are "clearly delimited executive powers".¹¹ At the same time, they are goal-oriented, rely on prognostic technical assessments to achieve broadly defined outcomes, and shape continuously and in the long-term the behavior of both public and private entities. That their legal mandates are delimited, in no small part, by undetermined legal concepts such as "threat", "significant investment concerns" and "financial stability" evidences the distinct characteristics of their powers. The meaning of legally defined conditions of executive action that rely on undetermined concepts can hardly be set in abstract. That meaning is given via the action of executive actors, assessing in each case which decision the economic and social circumstances require, whether and why they constitute a "threat", raise "significant investment concerns" or make a financial institution "failing or likely to fail". The verification of threats, investment concerns or risks of failure has normative consequences, as it may impact on the public interests that they need to pursue, while delimiting the scope of legitimate action. Which interests ought to prevail in each specific circumstances for the better fulfillment of the regulatory and supervisory functions entrusted to the executive bodies is a discretionary choice

⁷ Regulation (EU) No 806/2014, of the European Parliament and of the Council, establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund [2014], Article 7(4).

⁸ Regulation No. 1024/2013 (n 6), Article 16(1).

⁹ Regulation No. 806/2014 (n 7), Article 18(1), (4) and (5).

¹⁰ Niamh Moloney, *The Age of ESMA* (Hart, 2018), 243 (on ESMA only).

¹¹ *Short Selling* judgment (n 1).

that, arguably, co-determines the interpretation of undetermined legal concepts.¹² Via their practices and decisions, these bodies define how law is completed and concretised, both filling in legal indeterminacy and defining the way public interests are protected. They have, in this sense, constitutive powers, shaping the polity of which they are agents and the meaning of the legal conditions that delimit its authority to act. No doubt this occurs under the vigilant eye of the Court, but in the end, it may be primarily EU executive actors, rather than the EU Court, defining the meaning of the legal conditions that delimit their authority to act. Courts may choose to defer on matters of legal interpretation, not least because of the expertise involved in determining the content of undetermined legal concepts, or because of the policy choices that legal interpretations may imply.¹³ Indeed, a court's questioning of the law may amount to questioning the strategy of an administrative authority in view of the public interests that they need to fulfil,¹⁴ which, depending on the circumstances of the case, a reviewing court may or not consider legally warranted. Prudential reasons for deference may prevail.¹⁵

The observation that highly constrained legal environments may not prevent the ability of executive actors to act in a constitutive capacity prompts a critical assessment of the role of procedural principles in ensuring the legality of EU administrative action. One should focus on the role of such principles to constitutionally embed the exercise of constitutive powers within the sphere of decision-making that may be left to executive and administrative bodies. Such constitutionally embeddedness is not only ensured via judicial review. In addition to functioning as norms of control – i.e. as norms that enable courts to verify the factual and legal correctness of

¹² Joana Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' 80 *Modern Law Review* 443 (2017).

¹³ For example, the definition of what is a "normal handling or use" for purposes of classification of dangerous substances may result from the combination of guidelines drafted by the Commission's Legal Service and of the assessment of the competent technical committee, which the Court may endorse when assessing whether there were manifest errors of assessment (Case C-15/10, *Etimine v Secretary of State for Work and Pensions* [2011], Opinion AG Bot, para 83 to 87; and, in the judgment, para 71). For the US context, referring to the *Chevron* doctrine, see Jerry L. Mashaw, *Reasoned Administration and Democratic Legitimacy. How Administrative Law Supports Democratic Government* (Cambridge University Press, 2018) 118, arguing that there is a substantial overlap between interpreting the legal provisions that ground the agency's authority to act and choosing policy.

¹⁴ Pablo Ibañez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press, 2018), 74-5.

¹⁵ While the current powers of EU institutions and bodies in financial regulation expand the review of the Court of Justice, they also constitute a challenge to the Court (Pedro G. Teixeira, "Europeanising Prudential Banking Supervision: Legal Foundations and Implications for European Integration" in John E. Fossum and Agustín J. Menéndez (eds) *The European Union in crises or the European Union as crises*, Arena Report N. 2/14 (2014), 527-583, at p. 557).

discretionary assessments¹⁶ - procedural principles function also as norms of conduct, i.e., those through which administrative and executive bodies define legal and non-legal criteria (e.g. economic models and parameters, efficacy, political convenience, non-binding international standards) that concretise the enabling norm by reference to the case that needs to be decided.¹⁷ While norms of conduct ought to include non-legal criteria of decision-making (which may be the prevailing sources of legitimacy of the decision adopted), legal criteria, and in particular those stemming from legally assigned purposes of public action, should also steer executive action when concretising normative programmes. At the end, the ensuing decisions should be justified also by reference to their ability to concretise the constitutional commitments of the legal order which executive bodies are developing. This is what is meant here by constitutional embeddedness. Both the public interests that constitute the purposes of public action and the legal values that found the legal order which frames such action provide normative criteria for assessing EU executive action. Understood in this way, ensuring the constitutional embeddedness of executive action is not only a function of courts, who are bound to preserve a constitutionally assigned sphere of decision-making to administrative bodies, but also of executive and administrative bodies when acting.

Executive and administrative bodies need to comply with the judicially defined standards of legality and fairness. But procedural principles may have additional layers which enable them to steer executive action to ensure the constitutional embeddedness of the constitutive function of EU executive and administrative bodies. The aspects of procedural rules that may matter for a function of judicial control may not be the aspects of procedural rules that may matter for the function of constitutive concretization in which executive bodies engage in. The multifaceted functions of procedural principles are well illustrated by the duty to give reasons, analysed next.

3. The duty to give reasons: constitutional function, norm of control and norm of conduct

¹⁶ This function was perhaps best formulated in the often quoted *Technische Universität München* case (Case C-269/90, *Technische Universität München v Hauptzollamt München-Mitte*, para 14). See also Paul Craig, *EU Administrative Law*, 3rd ed. (Oxford University Press, 2018), Chapter 12.

¹⁷ For this distinction between norms of control and norms of conduct, and respective concepts, see José M. Rodríguez de Santiago, *Metodología del Derecho Administrativo. Reglas de racionalidad para la adopción y el control de la decisión administrativa* (Marcial Pons, 2016), 24-25. See too Eberhard Schmidt-Assmann, *La Teoría General del Derecho Administrativo como Sistema* (Marcial Pons, 2003), 241, pointing out that, in German administrative law, the predominance of judicial review in developing administrative law has downplayed an autonomous function that the administrative procedure may have in ensuring the correctness of administrative action.

The duty to give reasons has generally three related functions: it provides an understanding of why public authority has been exercised as expressed in a legal act, it enables courts to assert the legality of public action and those concerned to defend their rights and legally protected interests, and it prompts a thoughtful consideration by the decision-maker of the various legal and policy issues involved in public action. The first function has a specific constitutional significance in the context of EU law: a statement of reasons that shows “clearly and unequivocally the reasoning of the institution which adopted the measure” – to use the standard judicial formula¹⁸ – allows the Member States and “all interested nationals” to be cognizant of how the EU institutions, bodies, offices and agencies are, by effect of their specific decisions, carrying out the tasks assigned to them under the Treaties. This constitutional function justifies that it is, since the 1950s, a Treaty-based duty, now extended to all legal acts of the Union (Article 296(2) TFEU). It comes to the fore, particularly, but not exclusively, on litigation involving institutional disputes or challenges by Member States that dispute the use of, or the lack of reference to, legal bases.¹⁹

The duty’s constitutional function is indissociable from the ability of the Courts to review the legality of the acts of the EU institutions. But, in ensuring that the duty to give reasons is complied with, the Courts also develop it as a norm of control. Because the duty to give reasons straddles the boundaries between procedural and substantive legality (in particular in assessments on the adequacy and consistency of the reasons given), the EU Courts have sought to avoid ‘substantive review in disguise’ that could harm the autonomy of policy processes and restrict discretion.²⁰ In this vein, the EU Courts consistently emphasize that the specific requirements of the duty to give reasons depend on the circumstances of each case, in particular on the substance of the measure, the nature of the reasons given, the interests the persons directly and individually concerned (in addition to the addressees) may have in obtaining explanations, the context of the measure and “all the legal rules governing the matter”.²¹ Such control may mirror the broader

¹⁸ For a random illustration of judgments of different decades, see, e.g. Case C-350/88, *Delacre v Commission* [1990] para 15; Case T-188/98, *Kuijer v Council* [2000], para 36; Case C-521/09 P *Elf Aquitaine v Commission* [2013], para 147; Case T-122/15, *Landeskreditbank v ECB* [2017], para 123.

¹⁹ Case 24/62, *Germany v Commission* [1963]; Case 22/70, *Commission v Council* [1971], para 42; Case C-350/88 *Delacre v Commission* [1990]; Case C-41/93, *France v Commission* [1994], para 34; Case C-233/94, *Germany v European Parliament and Council* [1997] para 25; Case C-370/07, *Commission v Council (CITES)* [2009], para 37.

²⁰ Craig, *EU Administrative Law* (n 16), p. 380-82; Christian Calliess and Matthias Ruffert, *EUV/AEUV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta* (München: Beck, 5th ed, 2016), Art. 296, pt 21. Indicating how the EU Court may perform substantive review when controlling compliance with the duty to give reasons, in connection to the principle of care, see Hanns P. Nehl, *Principles of EC Administrative Law* (Hart Publishing, 1999) p. 143-4. Pointing out how the Court has moved away from that stance, Craig, *EU Administrative Law* (n 16) p. 381.

²¹ E.g. *Landeskreditbank* (n 18) para 124; Case C-15/10, *Etimine v Secretary of State for Work and Pensions* [2011], para 114 and 115.

constitutional function of the duty.²² But, in its guise of norm of control, the duty may become “parasitic” on the rights of the persons concerned by the underlying act and on the necessities of judicial review.²³ Depending on the circumstances of the case, the standard of legality of the duty to give reasons in EU law can be delimited by two core factors: the statement “must show clearly and unequivocally the reasoning of the (...) authority which issued the measure, so as to allow *those concerned* to take cognizance of the justification of the measure adopted and to enable *the Court* to exercise its power of review”.²⁴ This standard enables the Court to proceduralise rationality as determined by the needs of effective judicial protection and by the constraints of litigation.²⁵ It may lead the Court to confine the scope of the duty accordingly. When, for instance, an applicant claims that specific aspects of an act were not sufficiently explained, or that the observations it submitted during the decision-making procedure were not sufficiently considered in the statement of reasons, the Court assesses whether that person could have reasonably understood the reasons given, whether it was in a position to bring a judicial action, whether the Court has sufficient elements to review the measure.²⁶ Such assessment may be coupled with a review of the adequacy of the reasons given, irrespective of the position of the litigant,²⁷ but the duty to give reasons acquires thereby a subjective protective scope insofar as the Court will take into consideration the interests of those directly and individually concerned in obtaining explanations. This protective scope is limited by the caveat that the statement of reasons need not cover all the relevant matters of fact and law, whereby the Court shields the efficiency of decision-making from the demands of potential litigants and defines the boundaries of its reviewing role.²⁸ As a norm of control, the duty to give reasons has a specific ability to constitutionally embed the legal acts of which it is part in its quality of essential procedural requirement. It requires sufficient explanations for the specific purposes of review. But it may not enable an assessment of the extent to which the legal act at stake shapes the public interests it serves and the way they are protected and realized by effect of

²² E.g. Case C-221/09, *AJD Tuna v Direttur tal-Agrikoltura u s-Sajd and Avukat Generali* [2011], para 57 to 67.

²³ The term “parasitic” is used by Jerry L. Mashaw, “Public Reason and Administrative Legitimacy” in John Bell, Mark Elliot, Jason NE Varuhas and Phillip Murray (eds.) *Public Law Adjudication in Common Law Systems. Process and Substance* (Hart, 2016), pp. 11-22, at p. 14, making this observation regarding US administrative law (with a hint at EU law, p. 16).

²⁴ See, e.g., n 18 (emphasis added).

²⁵ Jerry Mashaw uses the term “proceduralised rationality review” to refer to a type of review that, formally, at least strays away from a substantive assessment, given the need to preserve the sphere of policy-making that ought to remain in the purview of the administration (Mashaw, *Reasoned Administration*... n 13, p. 117).

²⁶ E.g. Case T-100/15, *Dextro v Commission* [2016], para 124; *Landeskreditbank* (n 18), para 129.

²⁷ E.g. Case C-269/13 *P Acino v Commission* [2014], para 123 and 124.

²⁸ E.g. Etimine (n 21), para 115; *Dextro* (n 26), para 123 and 124; *Landeskreditbank* (n 18) para 129. See also section 4.1 below.

those acts. That will depend on the specific conditions of litigation. For example, the statement of reasons of a general act may be circumscribed when persons concerned have participated in the procedure (because of the information that they thereby acquire), while still indicating the essential objective of the act.²⁹

The third function of this duty – a self-control mechanism during the decision-making process – is much less elaborated in the case law (if at all), for valid reasons of separation of powers. The sparse literature references to this function in EU law appear to originate in an early reference by AG Roemer in a case concerning the Commission’s competence to set lower tariff quotas for individual Member States. He stressed: “one must not forget the useful function which the obligation to state reasons performs for the purposes of *a logical strengthening of the protection afforded by the law*, in so far as it forces the Executives, when they formulate the statement of reasons for a decision, to *give careful consideration to the conditions giving rise to the decision*”.³⁰ In this formulation, this function of the duty to give reasons mirrors compliance with the principle of careful and impartial examination of the case at hand. If judicially enforced, this combination gives the Court a powerful tool to rein in the exercise of discretion, possibly disrupting the balance that it has sought to maintain in its more recent case law on the duty to give reasons.³¹ But beyond the effect of strengthening judicial protection (the concern underlying AG Roemer’s opinion),³² the duty to give reasons leads the decision-maker to form a more substantiated idea of the concrete circumstances that surround a decision, of its various implications, and of the constraints to which it is subject, as well as of the legal criteria that may be relevant for the decision. This aspect of the duty as a norm of conduct was later picked up by Schwarze as follows: “the duty to give an objectively conclusive statement of reasons forces the competent authority to consider keenly the issues and thus promotes administrative self-regulation”.³³

Given the constitutive role of executive bodies, this third function merits further consideration, in particular, its potential capacity to anchor the constitutional function of the duty to give reasons. The way the EU administrative process is also shaped from “within”, and not only

²⁹ E.g. Etimine (n 21), para 114 to 120.

³⁰ Case 24/62, *Germany v Commission* [1963], Opinion of AG Roemer, p. 73, emphasis added. The literature references are Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell, 2006, rev 1st ed.), p. 1401; Craig, *EU Administrative Law* (n 16), p. 370; Calliess and Ruffert, *EUV/AEUV...* (n **Error! Bookmark not defined.**), pt 14.

³¹ See the analyses of Nehl and Craig (footnote **Error! Bookmark not defined.**).

³² This observation is borne out by the original version of its opinion: “eine sinnvolle Verstärkung des Rechtsschutzes”, refers to judicial protection, as evidenced in the translations (“un renforcement raisonnable de la protection juridictionnelle”, “un ragionevole rafforzamento della tutela giurisdizionale”).

³³ Schwarze, *European Administrative Law* (n 30), p. 1401.

via judicial review, is often overlooked,³⁴ or at least, it may be taken as a matter pertaining to the way in which executive bodies organize their procedures internally. This self-regulatory function of the duty to give reasons may, however, have a deeper constitutional significance, ancillary to the protection afforded by “the law” to public interests that decision-makers need to consider, which are normatively relevant insofar as they are the result of constitutional choices. An analysis of the origins of the duty to give reasons in EU law, going back to the text where it was first enshrined – the Treaty establishing the European Coal and Steel Community – will reveal the constitutional foundations of the duty and lay the ground for a richer normative understanding of the duty’s role as a norm of conduct. As will be argued below, a reconsideration of the constitutional foundations of reason-giving is relevant for the current constitutional setting of the EU.³⁵

4. The origins of the duty to give reasons in EU law

4.1. Giving meaning to a novel duty

When the duty to provide reasons was enshrined in the Treaties, it constituted a novelty when compared to the legal orders of the six founding states. None of these acknowledged a general obligation to provide reasons for legal acts, applicable irrespective of the nature or content of the act. Unlike most other procedural rules, its introduction in EU law did not result from case law inspired by general principles common to the legal orders of the Member States. Rather, the innovation brought about by the Treaties provided “an observation field for experimentation”, capable of informing national debates on the desirability of introducing such a general duty in their respective administrative laws.³⁶

From early on, the Court established the main building blocks of this novel duty, which resonate with the above account of its function as a norm of control. Thus, the statement of reasons required “mentioning those facts on which the legal justification for the measure depends, and the considerations which have led it to adopt its decision (...)”, being that “the High Authority [was] not required to discuss all the possible objections which might be raised against the decision”.³⁷ Its content varied according to the nature of the act at stake, in particular, the

³⁴ Carol Harlow and Richard Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), p. 38.

³⁵ Section 5, below.

³⁶ Christian Hen, ‘La Motivation des Actes des Institutions Communautaires’ 1 *Cahiers de Droit Européen* 49 (1977), 50. His assessment was nuanced (p. 89-91).

³⁷ Case 2/56, *Geitling v High Authority* [1957], p. 15

requirements being less stricter for “general decisions having the character of regulations”.³⁸ This scope was justified by the purpose the Court assigned to the duty: it sought “to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty”.³⁹ These remain today the core building blocks of the duty to give reasons. On these grounds, early commentators concluded that the Court had been able to provide coherence to the duty, while adjusting its content to the act at stake, favouring synthesis in the statement of reasons over “excessive analysis”.⁴⁰ Judicial flexibility – explained by the varying degree of review that the Court wished to perform in each case – did not prevent the frequent annulment for breach of the duty to give reasons, having effective legal consequences.⁴¹

While the novelty of the duty called for innovation in defining its legal role, the Court gradually brought it in line with the laws of the Member States. The denser requirement for decisions of individual scope is one example of the gravitational attraction of the Member States’ legal systems in defining the duty’s content. There, the giving of reasons for acts of general scope was absent and reason-giving applied only to administrative acts of individual scope.⁴² This requirement also reflected the subjective function that the duty to give reasons was acquiring in the law of the Community, guaranteeing legal protection to those potentially adversely affected by a legal act. This same rationale led the Court to admit that the content and depth of the reasons given could vary according to the degree of information that interested parties have, admitting even a reasoning by reference to general indications in the applicable legislation, where the addressees of a decision hold important information.⁴³ Where the advocate generals had opposed the relevance of such criterion, they had justified their opposition also on the grounds of procedural protection, instrumental to judicial review: other persons different from the addressees of an act could also have standing to challenge the legality of the act.⁴⁴ The audience of those who

³⁸ Case 18/62, *Barage v High Authority* [1963] p. 280.

³⁹ Case 24/62, *Germany v Commission* [1963] p. 69; Joined Cases 36, 37, 38-59 and 40/59, *Präsident et al. v High Authority* [1960] p. 439.

⁴⁰ Georges Le Tallec and Claus-Dieter Ehlermann, ‘La Motivation des Actes des Communautés Européennes’, 90 *Revue du Marché Commun* 179 (1966), 182 and 185.

⁴¹ Hen, ‘La Motivation des Actes...’ (n 36), 72 and 77, referring to merger cases, where litigation abounded.

⁴² The influence of the Member States’ legal orders was felt also in other respects: when advising the Court on the required content of a reasoned opinion on the putative infringement of a Member State, AG Lagrange specified: “no formalism must be demanded of this document, since ... the reasoned opinion is not an administrative act subject to review by the Court of its legality.” (Case 7-61 *Commission v Italy* [1961], Opinion of AG Lagrange, p. 336).

⁴³ Hen, ‘La Motivation des Actes...’ (n 36), 79-82.

⁴⁴ Hen, ‘La Motivation des Actes...’ (n 36), 79, referring to the Opinion of AG Roemer in Case 24/62, *Germany v Commission*, EU:C:1963:4, p. 73.

needed to be persuaded by reasons coincided, therefore, with those who could have standing to challenge the relative legal act. Tallec and Elhermann were unambiguous regarding the beneficiaries of the duty to give reasons: “interested” or concerned” were the persons who could have standing, or those against whom an act could be invoked.⁴⁵ This position determined not only the function of the duty to give reasons, but also, accordingly, its content. And yet, this judicial development only in part accounted for the constitutional function of the duty to give reasons.

4.2. *The constitutional foundations of the duty to give reasons*

The general duty to give reasons was meant also to enable “Member States and (...) all interested nationals [to ascertain] the circumstances in which the [institutions have] applied the Treaty”.⁴⁶ This function was independent of (even if related to) the need to afford legal protection to those affected via judicial review.⁴⁷ It was justified by the constitutional framing of the powers of the High Authority (in the case of the ECSC), the Commission and the Council (the only two institutions bound by the duty to give reasons in the original version of the Treaty of Rome). Such framing is known all too well: the institutions acted only within the limits of attributed competences (Article 3 ECSC and Article 4(1) EEC); in doing so, the High Authority and the Commission took decisions in the interest of the Communities, independently of national governments, binding the Member States, subjecting them to the Court’s oversight, and thereby conditioning their sovereign powers. This constitutional framing placed those institutions in a radically different position from the State administrations, who were also bound by a duty to give reasons on a limited range of legal acts. The duty to give reasons in Community law had, therefore, a specific constitutional foundation, which made it diverge from the duty as known in the administrative laws of the Member States.

But, in the case of the ECSC, that foundation had deeper roots. It was intrinsically linked to the very functions of the Community. Article 5 ECSC outlined such functions, serving as a “guide and reference point for the application of the other Treaty provisions”.⁴⁸ It determined,

⁴⁵ Tallec and Elhermann, ‘La Motivation des Actes...’ (n 40), 187.

⁴⁶ *Germany v Commission*, (n 39), p. 69; *Präsident et al. v High Authority* (n 39) p. 439.

⁴⁷ Originally, as enshrined in the European Coal and Steel Treaty, the duty to give reasons extended to the opinions of the High Authority (Article 15 ECSC), which were not reviewable acts (Article 33 ECSC). The High Authority later restricted the scope of application of this article with the purpose of aligning Article 15 ECSC with Article 190 EEC, which excluded opinions (and recommendations) from the scope of the duty to give reasons (Hen, ‘La Motivation des Actes...’ (n 36), 65-66, referring to Decision 22/60 of 7 September 1960 on the implementation of Article 15 of the Treaty OJ 61, 29.9.1960, p. 1248-1249).

⁴⁸ Robert Kovar, *Le Pouvoir Réglementaire de la Communauté Européenne du Charbon et de l’Acier* (LGDJ, 1964), 178; Rolando Quadri, Riccardo Monaco, Alberto Trabucchi (eds.), *Trattato Istitutivo della Comunità Europea del Carbone e dell’Acciaio. Commentario*, Vol I, Art 1-45 (Giuffrè, 1970), 109.

inter alia, that the Community ought to “publish the reasons for its actions” (Article 5, 4th indent ECSC). The duty to give reasons enshrined in Article 15 ECSC in relation to the acts of the High Authority concretised this norm.⁴⁹ Such concretisation was justified by the need to avoid the “hidden actions” of an institution that “too easily could be perceived as a ‘technocratic’ body”.⁵⁰ Early case law confirms this systematic reading of Articles 5 and 15 ECSC, referring to both provisions combined when adjudicating claims related to the duty to give reasons.⁵¹ This link is significant. According to Paul Reuter, Article 5, 4th indent ECSC embodied a general principle that underlied all the economic rules established in the Treaty, which he expressed as follows: “we can say without exaggeration that, according to the Treaty, the common market should be a ‘glass house’”.⁵² Fulfilling this principle was more than just a matter of giving reasons that could allow Member States and interested parties to ascertain whether the High Authority had lawfully used its conferred powers.

4.3. *Making the common market a “glass house”: political significance and legal implications*

The duty to give reasons was one of the constitutional pillars of the ECSC. A short excursus is needed to clarify this point. Article 5 ECSC was inserted in Part I of the Treaty, its general part, together with the provisions that defined the economic ends of the Community (Article 2), the objectives that guided its actions (Article 3) and the notion of common market (Article 4).⁵³ Combined, these were the pegs that held together the other, more operational, provisions of the Treaty; these often included crossed references to Articles 2 to 5 ECSC. In articulation with the rest of the Treaty, these provisions of Part I both directed a course of action and defined the limits of what the Community could do.⁵⁴ Despite the general terms in which they were drafted, the Court was clear regarding the legally binding character of Articles 2 to 5 ECSC: “Those provisions are binding and must be read together if they are to be properly applied. These provisions can

⁴⁹ Despite the different formulation in Article 5 ECSC (“publish reasons” – “rends public les motifs”, in the French version) and in Article 15 ECSC (“state the reasons” – “les décisions... sont motivés”), the substance of the obligation appears to be the same (in the former case, a task of the Community, in the later, a duty of the High Authority). There is, nevertheless, a difference in scope between the two provisions: Article 5 encompassed legal acts of the High Authority that were outside of the scope of Article 15 ECSC.

⁵⁰ Quadri and others, *Trattato Istitutivo...* (n 48), 112 (see also n 70 below).

⁵¹ Case 6/54, *Netherlands v High Authority* [1955] 111; Case 2/56 *Mining undertakings of the Ruhr Basin v High Authority* [1957]; Joined Cases 1/57 and 14/57, *Société des Usines à Tubes de la Sarre v High Authority* [1957], 112.

⁵² Paul Reuter, *La Communauté Européenne du Charbon et de l’Acier* (LGDJ, 1953), p. 76.

⁵³ A final Article 6 on the legal personality of the Community, its legal capacity and representation (and an introductory Article 1 establishing the Community) completed this Part I.

⁵⁴ Quadri and others, *Trattato Istitutivo...* (n 48), 40. Reuter, however, excluded Article 5 ECSC from the Treaty provisions of constitutional relevance (Reuter, *La Communauté...* n 52, 45).

stand by themselves and accordingly, in so far as they have not been adopted in any other provision of the Treaty, they are directly applicable.”⁵⁵ The Court also confirmed the need for a systematic interpretation: “If [those general norms] ... are governed by other provisions of the Treaty[,] words relating to the same provision must be considered as a whole and applied together.”⁵⁶

In this reading, the duty to give reasons enshrined in the ECSC Treaty was more than a general rule justified by the limited competences of the Community and the ‘supranational’ powers of the High Authority, as it could result from Article 15 ECSC. As a manifestation of a Community function – “to publish the reasons for its action” (Article 5 ECSC) – the duty was one of the foundational blocks of the integration process. Politically, it fulfilled a core function: it enabled the High Authority to create allegiances with the Member States and the natural and legal persons subject to its decisions, by assuring that substantively its decisions reflected the purposes of integration defined in the Treaty and, thereby, persuading through reasons. It was a means of ensuring the acceptance and cooperation of the states (without which the Community would fail) and of the persons who were the direct object of the Communities decisions.⁵⁷

From this viewpoint, the systematic reading between the duty to publish reasons, on the one hand, and the provisions of the Treaty that defined the overall aim of the Community, its concrete goals, and the common market, on the other – supported by judicial interpretation⁵⁸ – was, arguably, the legal reflection of that political function. The Treaty-defined purpose or purposes were binding. According to the Court, they needed to “be appraised as a whole and pursued exclusively in the common interest”, which not only “[considerably exceeds] the sum of the individual interests of [each person] subject to the jurisdiction of the Community”, but also ought to be “defined in relation to the general aims [of integration]”.⁵⁹ Such was the legal relevance of the objectives set out in Article 3 ECSC. By connecting them to the underlying ends of integration, the Court was stressing the deeply political role of the powers of the High Authority, which gave it, *inter alia*, the possibility to “exercise a broad influence on the market in coal and

⁵⁵ Case 8/57, *Groupement des Hauts Fourneaux et Aciéries Belges v High Authority* [1958], p. 253, adding that: “The exercise of powers ... conferred upon the High Authority is subject to the conditions set out in Articles 2 to 5 concerning the establishment, administration and guidance of the Common Market” (*idem*, p. 254).

⁵⁶ *Aciéries Belges* (n 55) p. 253.

⁵⁷ This was the core integrational challenge (see Mauro Cappelletti, Monica Seccombe, Joseph Weiler, ‘Integration Through Law: Europe and the American Federal Experience. A General Introduction’, in Cappelletti, Seccombe and Weiler (eds), *Integration Through Law. A Political, Legal and Economic Overview* (De Gruyter, 1985), 3-68, at 26).

⁵⁸ See fn 51.

⁵⁹ *Aciéries Belges* (n 55), p. 258. Article 3 introduced the objectives of the Community as follows: “The institutions of the Community shall, within the limits of their respective powers, in the common interest (...)”

steel”.⁶⁰ The Court was, at the same time, embedding them constitutionally: the legal acts of the High Authority needed to be a concretisation of the public interests related to the purposes of integration, pursued within the limits of the Treaty. Those objectives constituted, thereby, a substantive yardstick to assess the legality of Community acts. The statement of reasons was essential insofar as it enabled a judgment on whether and how those purposes were being fulfilled. The duty to give reasons was there not only to ensure the legal protection of affected parties and to facilitate judicial review, but also – and perhaps fundamentally – to enable “Member States and (...) all interested nationals [to ascertain] the circumstances in which the [institutions have] applied the Treaty”,⁶¹ that is, to assess whether they exercised their competences in a way that allowed them to pursue the fundamental goals for which those competences were attributed. Legally, it followed that reason-giving was “not only required by Articles 5 and 15 and [by specific Treaty provisions] but [it was] an essential, indeed constituent element of [the] act, with the result that in the absence of the statement of reasons the act [could not] exist”.⁶²

4.4. Public understanding in the shade of judicial review

AG Lagrange in an early case pertaining to a High Authority decision on cartel arrangements went as far as a member of the Court ever did in spelling out the constitutional significance of the duty to give reasons beyond the legal protection of those affected. The duty to give reasons incumbent upon the High Authority had a dual role:

First, it constitutes, from the point of view of public opinion, a guarantee against arbitrary action, by enabling the public to understand and investigate the actions of the executive invested with important powers. This is necessary, in particular, for the Assembly. It is this which explains and justifies the fact that reasons must be stated for all decisions of the High Authority, even those which would appear to be primary imputable to the exercise of discretionary power.⁶³

By this last observation, AG Lagrange was pointing out that the scope of the duty to give reasons did not coincide with the scope of judicial review. In fact, Article 33 ECSC excluded from the Court’s jurisdiction “the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its

⁶⁰ *Aciéries Belges* (n 55), p. 253 (this case concerned the powers of the High Authority under Article 53 ECSC to define the financial arrangements needed to pursue the objectives of Article 3 ECSC, specifically its decision to equalize the prices of ferrous scrap).

⁶¹ *Germany v Commission* (n. 39) p. 69; *Präsident et al. v High Authority* (n 39), p. 439.

⁶² *Société des Usines à Tubes* (n 51), 112-3. See, further, Tallec and Ehlermann, ‘La Motivation des Actes...’ (n 40), 185.

⁶³ Joined Cases 36, 37, 38-59 and 40-59, *Präsident et al. v High Authority* [1960], Opinion AG Lagrange, at 451.

recommendations” (except in situations of misuse of powers or of manifest illegality).⁶⁴ The second role AG Lagrange identified was its ancillary function to judicial review: “the duty to give reasons is also necessary to enable the decisions to be subjected to legal review *should they be contested before the Court*” (timewise, a subsidiary function).⁶⁵ The Court, in its judgment, did not echo the AG’s opinion on that first function of the duty to give reasons, stressing instead the importance of the duty to give reasons in enabling the interested parties – “and, in the event of legal proceedings, the Court” – to assess the factual and legal correctness of a decision in cases where the Court’s jurisdiction is limited.⁶⁶

AG Lagrange’s reference to the *public* understanding of High Authority’s decisions on cartel arrangements remained an isolated reference in the case law, but it is worth expounding it here. The purpose was not only one of transparency – enabling the public to understand – but also one of control – enabling the public to investigate – as the original French version makes clearer (“contrôler” is the term translated as “investigate”). The weak role of the parliamentary assembly in the institutional context of the ECSC was an important consideration in the AG’s opinion and, at the same time, revealed the constitutional significance of the duty to give reasons beyond considerations of judicial review. As Hen suggested, “the role of information that in internal law is fulfilled by the discussion of laws before the parliament is implemented here by the careful and detailed justification of the acts”.⁶⁷ At the same time, the recipients of such information were not only the assembly, but also the public concerned by the legal acts, regarding whom the “bodies of the Community need to make the reasons for their action clear”.⁶⁸

Given the subject matter of the decisions of the High Authority, “the public” mentioned by AG Lagrange was the informed public capable of understanding the logical path of decision-making that reason-giving ought to clarify. But not necessarily the range of those who, being directly and individually concerned, would have standing before the courts. The audience of the duty to give reasons was potentially broader, as the processes through which it could manifest its support or opposition to the acts of the Authority were not restricted to judicial review. That public should be able to check both the purpose with which the High Authority had acted (relevant

⁶⁴ Article 33 ECSC.

⁶⁵ Opinion AG Lagrange (n 63), at 451, emphasis added.

⁶⁶ *Präsident et al. v High Authority* (n 39), p. 439. In a later case, in the context of the EEC, AG Roemer would refer to this judgment to argue that “it is precisely those decisions which are based upon an evaluation of the economic situation as a whole which require a very full statement of reasons” (Case C-24/62, *Germany v Commission*, [1963], Opinion of AG Roemer, p. 73). In his view, “the novelty of the subject matter with which the executives of the EEC have to deal” required a strengthened obligation to state reasons (*ibid.*).

⁶⁷ Hen, ‘La Motivation des Actes...’ (n 36), 54.

⁶⁸ *Ibid.*

also for judicial assessments of misuse of powers) and whether it had made use of its intervention powers in a limited way, as Article 5 ECSC also determined.⁶⁹ Arguably, if seen in the light of the systematic link between Article 3 ECSC (objectives of the Community) and Articles 5/15 ECSC (duty to give reasons), the public understanding that the statement of reasons ought to facilitate would allow the High Authority to avert the “hostility of certain milieus[,] [those who] had expressed an accusation all the more formidable as obscure of ‘technocracy’, evoking the intervention of tenebrous powers, which in the modern political mythology have replaced the ancient gods”.⁷⁰

5. From constitutional foundations to reconstruction

This excursus on the origins of the duty to give reasons and on its constitutional foundations provides a basis to reconstruct the meaning of the duty to give reasons in relation to the action of the EU executive. The constitutive function that EU executive bodies now perform in the area of financial regulation and the constitutional context in which EU executive actors exercise their competences⁷¹ justify a reconstruction of the duty to give reasons that enables it to fulfil the constitutional function for which it was originally conceived, that is, to enable a judgment on whether and how the purposes of integration are being fulfilled, and thereby justify the exercise of authority by the EU, irrespective of - and without prejudice to – how it is judicially enforced.

As much as the High Authority was an independent technocratic body, whose distinctive constitutional position derived from its ability to “break with power politics” in a specific policy field and to “pursue objectives and interests that are different from those of each of the participating nations”,⁷² so the EU financial agencies, the Single Resolution Board and the European Central Bank – notwithstanding their respective institutional differences – owe their existence to their technical competence and independence in the pursuance of public interests that transcend those of the Member States. In the 1950s, the powers of the High Authority were unprecedented in the way they limited Member States’ action to create a Community; in the 2010s, the powers of the EU financial agencies and of the ECB in the context of the banking union amounted to “the more drastic rearrangement of competences” in these fields to sever the links

⁶⁹ Kovar, *Le Pouvoir Réglementaire...* (n 48), 178.

⁷⁰ Reuter, *La Communauté ...* n 52, 52 (my translation), referring to objections that had been raised during the negotiations of the Treaty, ultimately leading to the creation of an Assembly not initially envisaged in the Schuman plan.

⁷¹ Sections 1 and 2.

⁷² Luuk van Middelaar, *The Passage to Europe. How a Continent became a Union* (Yale University Press, 2013) 15-16, citing Robert Schuman.

between financial institutions and states,⁷³ and, thereby, ensure financial stability in the Union. As much as the powers of the High Authority needed to be circumscribed by a duty to make public the reasons for its decisions, showing and accounting for how it was pursuing the Treaty objectives, so the EU financial agencies, the Single Resolution Board and the ECB are bound by a general duty to give reasons for their actions, rooted in Article 296(2) TFEU.

But in the decades in which the Coal and Steel Community slowly and discreetly died out, the legal relevance of the duty to give reasons as a constitutional norm linking public action to the founding objectives, instrumental to a public understanding of Community action (and presupposing a specific articulation of how the decision-maker gave meaning to the legally established purposes of public action), also faded in (then) Community law. As the Court progressively defined the legal content of the duty to give reasons, two reasons, at least, may explain that the systematic link between the objectives pursued and the reasons given weakened. On the one hand, the programmatic norms where such objectives are formulated tend to have an open-ended nature, hindering their weight in judicial arguments. On the other, the most immediate legal consequence of such systematic link is, arguably, the establishment of a misuse of power; but, not only this imperfectly expresses the constitutional significance of the duty (it implies a negative assessment, i.e. that a legal measure pursued an objective other than the one stated, thereby deviating from the legally established criteria), but also it is difficult to establish.⁷⁴ In fact, even those stressing in the context of the ECSC the legally binding nature of the objectives set in Article 3 ECSC, acknowledged the difficulties of determining how such objectives could condition the validity of legal acts. Paul Reuter alerted that it would be a mistake not to “attach great importance to provisions whose generality somewhat irritates their strength” and forcefully argued that Article 3 conditioned the validity of the acts of the institutions.⁷⁵ But could one “rebuke the High Authority for having achieved an inequitable compromise” between contradictory objectives?⁷⁶

Such possibility would appear to be a logical consequence of the binding nature of that provision combined with the constitutional function of the duty to give reasons as ensuring a

⁷³ Marco Lamandini and others, “The European Central Bank (ECB) as a catalyst for change in EU law. Part 1, The ECB’s mandates” 23 *Columbia Journal of European Law* 1 (2016) 22. Stripping banks of their ‘nationality’ was one of the purposes of the Single Supervisory Mechanism (Teixeira, “Europeanising Prudential Banking Supervision...” n 15, at p. 557).

⁷⁴ Agustín Gracia Ureta, “Misuse of powers as a ground for the annulment of Community acts: a case law approach”, 3-4 *Rivista italiana di diritto pubblico comunitario* (2003), 775-810, stressing the limitations in invoking misuse of powers as a ground of annulment.

⁷⁵ Reuter, *La Communauté* ... n 52, 91, 178 (my translation).

⁷⁶ Reuter, *La Communauté* ... n 52, 91 (my translation).

public understanding of the decisions of the High Authority.⁷⁷ Such public understanding presupposed an articulation of how public action was constituting public interests. If it were to fulfil its constitutional function, the duty to give reasons should enable a judgment of the compromise achieved between competing public interests, of the choices made by the decision-maker when defining a specific course of action, defined in articulation with the legally defined purposes. This was a legal consequence of the way the duty had been enshrined in the Treaty, stemming in particular from the systematic links between the duty to give and publish reasons (Article 5, 4th indent ECSC) and the objectives to be pursued (Article 3 ECSC), as an expression of the general aims of integration (Article 2 ECSC) and of its object (Article 4 ECSC). Whether it was up to the Court to pass that judgment is another matter.

The way the Treaty frames today the duty to give reasons and, generally, the public action of the Union's institutions bodies, offices and agencies, justifies recovering these constitutional foundations. Unlike the preceding revisions of the norm originally enshrined in the Treaty of Rome, Article 296(2) TFEU broadened the scope of the duty to give reasons to "legal acts" without specification, and is now inserted in a provision that delimits the way the EU institutions are bound in their choice of legal act. Much more than a formality, these modifications are manifestations of a larger reform process of the Union intended to establish a "more institutionally solid, democratic and citizen-oriented foundation".⁷⁸ This evolution has normative implications for the way in which executive bodies approach their decision-making procedures. Against this background, the constitutional function of the duty to give reasons, according to which it ought to inform the Member States, its citizens, residents and registered legal persons, as well as its administrative bodies, of the way in which the EU institutions, bodies, offices and agencies are applying, concretizing, and developing the Treaties, acquires a thicker dimension. It should be interpreted as requiring that EU actors show how, within each's specific role, they are ensuring the social, economic and political integration as envisaged in the Treaties, within the limits specified therein and in the ensuing legal acts. The public interests established in secondary legislation as the ends that EU executive actors ought to pursue have arguably a legal value that is analogous to that of the objectives that Article 3 ECSC had set for the High Authority. Despite their generality, when EU legislation determines that protecting stability and effectiveness of financial markets

⁷⁷ Above n 63.

⁷⁸ Calliess and Ruffert, *EUV/AEUV...* (n **Error! Bookmark not defined.**), pt 4. They stress also the reference in Article 296(1) TFEU to the principle of proportionality. By linking the duty to give reasons to Art. 5 (4) TEU – and to the protocol on proportionality and subsidiarity – they connect the transformative function of the duty to give reasons mostly with regard to legislative acts (points 7 and 10 of the commentary). On the relevant constitutional modifications introduced by the Lisbon Treaty, see Paul Craig, *The Lisbon Treaty. Law, Politics and Treaty Reform* (Oxford University Press, 2010) pp. 71-77 and 247.

(inter alia by ensuring proper regulation and supervision of the taking of investments, credit and risks related to insurance, reinsurance and occupational pensions activities) are the goals to be pursued by the financial agencies; or that the continuation of critical functions and the protection of public funds, depositors and client funds and assets are among those that the SRB needs to attain via its resolution decisions; or that safety and soundness of credit institutions and financial stability those that define the purpose of the new powers of the ECB in the context of the SSM – EU legislation is defining the substantive benchmarks against which the legal actions of these bodies should be normatively assessed in legal and political terms.⁷⁹

Similarly to the objectives that bounded the powers of the High Authority, pursuing the public interests that define the function of the EU executive bodies in the area of financial regulation, requires “permanent reconciliation”, which, on the whole and progressively, ought to enable the attainment of the common interest, as it can be asserted on the basis of the pertinent aims now set out in Article 3 TEU.⁸⁰ The exercise of their powers, however dependent on the deployment of technical expertise and however limited to a specific field, ought to be constitutionally embedded, when striking delicate balances between intervention and non-intervention and between national or EU action, within the boundaries of each legal regime and of the EU constitutional principles. Those are often the type of balances involved when EU executive actors make choices that define how the public interests that they are mandated to pursue are, as a result, defined in our societies. These are the type of normative choices enmeshed with their technical competence. It is the constitutional function of the duty to give reasons to show how those public interests are being concretised, how EU executive actors reconcile the conflicts among them, the priorities they set in view of the economic facts or circumstances in the light of which they adopt legal acts, and the substantive implications of such balancing and priorities.⁸¹ Nevertheless, failure to do so may not lead to a judicial finding of a breach of the duty to give reasons as that could lead to excessively intrusive review. This function of the duty to give reasons transcends the control function of the Court.⁸² It is a guarantee against arbitrariness which, in addition to judicial review, should enable various constituencies to understand how executive decisions are constituting public interests and shaping social relationships accordingly – i.e. how

⁷⁹See respectively Articles 1(5) of Regulation 1095/2010, 1(6) of Regulation 1094/2010, 1(5) of Regulation 1093/2010; Article 14(2) of Regulation 806/2014 (see also its Article 6(2) and (3)); Article 1 of Regulation 1024/2013.

⁸⁰ *Acéries Belges v High Authority* (n 55), p. 254-5 and p. 258.

⁸¹ This formulation on the function of executive actors draws *Acéries Belges v High Authority* (n 55), p. 255 (an almost identical formulation is found in Case 9/56, *Meroni v High Authority* [1958], p. 151-2).

⁸² Contrarily, Calliess and Ruffert, *EUV/AEUV...* (n **Error! Bookmark not defined.**), pt 11 and 12, who rather stress that the “transparency-aimed, informative function of the duty to state reasons” is instrumental to judicial review.

they are exercising their constitutive powers and developing specific narratives of EU integration, vested with authority that has its ultimate foundation in the EU Treaties.

It is against such normative understanding that one should construct the self-regulatory role of the duty to give reasons, as a guarantee of the good functioning of the administration: the duty enables the decision-maker to make a substantiated judgment of the conditions, criteria and implications of the acts it adopts, in articulation with the purposes of legal action as defined in the enabling norms. These constitute core criteria of executive action. In that function – as a norm of conduct – the duty to give reasons ought to reflect a decision-making process that makes each legal act “a plausible instance of rational collective action”, in relation to the substantive yardsticks that the applicable norms define.⁸³

The public understanding of the actions of the executive that a statement of reasons enables should be a reflection thereof. In a polity in which “every citizen” has the right to participate in its “democratic life” (Article 10(3) TEU), the citizen – both the “market citizen” and the static citizen, since the way executive decisions pervade Member State action makes their effects transcend the scope of transboundary activity – emerges as a person entitled to understand, contest or accept the way in which the institutions of that polity pursue collective goals, albeit in highly specialized fields. This requirement applies also to the EU executive and administrative institutions, bodies, offices and agencies, as entities provided with public authority. Beyond the technocratic competence that grounds their decisions – and, to a great extent, justifies their creation – and the efficacy thereof to pursue the goals supporting their legal mandates, their decisions ought to be reasoned in a way that shows how they are contributing to shape the polity of which they are agents. The value judgments that underlie their decisions, the political reasons that, being supported by the relevant legal criteria (whether or not of constitutional nature), underlie and are enmeshed with the deployment of their (independent) expertise, should be brought to the forefront. As Jerry Mashaw pointed out, in an analysis of US administrative law, “forcing the policymaking conversation into a technocratic mold may short-circuit meaningful conversation and debate about policy choices that are necessarily value-laden”.⁸⁴ In this understanding, an assessment of how the decisions of the EU executive are an expression of the constitutional commitments of the EU presupposes a debate about how EU executive bodies are defining the meaning of the public interests that they are mandated to pursue. The way this

⁸³ Mashaw, “Public Reason...” (n **Error! Bookmark not defined.**), p. 17. See too Mashaw, *Reasoned Administration...* (n 13), 158-9, arguing that political reasons ought to be given by administrators in connection both to statutorily defined criteria of judgment and other legal sources of public values (such as the Constitution).

⁸⁴ Mashaw, *Reasoned Administration...* (n 13), 159.

desideratum ought then to shape the specific content of the duty to give reasons as a norm of conduct may depend on the type of executive action at stake, on the availability of legally established criteria therefor, on the status of independence of the decision-maker or, possibly, on the way the acts at stake are defined by the combined intervention of national and EU decision-makers. It may, in addition, require the redefinition of administrative processes that support executive decision-making to channel and facilitate the development of this function of the duty to give reasons, outside the setting of judicial procedures.

6. Conclusion

In one of his ground-breaking works, Paul Craig argued: “Lawyers have a tendency to emphasize the judicial role as being central in attaining the preferred constitutional vision. This is too narrow a focus. (...) [It] tends to place too much importance upon the power of the judiciary to orient society in a particular direction.”⁸⁵ Following this cue, this chapter placed its focus on the power of the executive to orient society. Drawing on the powers of direct market intervention that the EU financial agencies, the SRB and the ECB acquired in the last decade, it argued that such powers enable them to give meaning to the legal conditions and criteria of their decisions, by interpreting undetermined legal concepts and defining how the public interests are realized in our societies. Those powers justify revisiting the role of procedural principles as criteria that should shape executive action when concretizing its constitutive function. As norms of conduct, procedural principles may have layers and dimensions that may not come to the fore in judicial review, but that are equally important to ensure the constitutional embeddedness of executive action, making them an expression of the constitutional commitments that underpin the EU legal order.

The analysis of the duty to give reasons illustrated the multifaceted nature of procedural principles. The legal content of the duty to give reasons, as it currently binds the EU executive action, was defined early on by the Court, fleshing out a duty that constituted a novelty at the time it was inserted in the Communities’ founding Treaties. The Court set the meaning and scope of the duty by reference to its reviewing role, considering also the legal protection that the duty affords to those who are directly and individually concerned. Both early commentators and today’s scholars agree that the Court successfully struck a difficult balance between the needs of judicial protection and the autonomy of executive decision-makers in fulfilling their constitutionally assigned role. Without disputing this position, this chapter argued that the fulfilment of the duty’s constitutional function also depends on how executive actors, prompted to consider

⁸⁵ Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990), p. 7.

conscientiously the concrete circumstances and normative implications of public action, ensure a public understanding of how their action concretizes the constitutional commitments by which they are bound. The decision-maker's assessment of the conditions, criteria and implications of the acts it adopts when performing its constitutive functions should be made against the public interests that they are mandated to pursue. These are guiding criteria of the duty to give reasons, in its function of self-regulatory mechanism. The policy and value-laden considerations that determined the legal action ought then to be reflected in the statement of reasons, enabling the public understanding for which it was originally conceived, when first enshrined in the Treaty establishing the European Coal and Steel Community, and, thereby, a judgment on the content of the compromises achieved. The difficulties of this proposition are clear if one considers the Court as the institution policing compliance with the duty to give reasons reconstructed in this way. Other paths will need to be trodden to explore how to make decision-makers comply with the duty to give reasons as a norm of conduct. The possible difficulties ahead may challenge the denser constitutional meaning of the duty to give reasons as a norm of conduct, as proposed in this chapter, but, as such, they do not deny or rule out at the outset the important role that this duty should have in embedding the constitutive powers of EU executive actors.