

EU EXECUTIVE DISCRETION: AGAIN, IN TIMES OF EMERGENCY

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1. Strengthening executive powers¹

The eurozone crisis brought the discretion of the EU executive, in particular that of the European Central Bank (ECB), to the front pages. The discussion on the limits of its mandate has returned in force in 2020, while the EU lives through yet another unprecedented crisis. Early on, in each of their respective fields, both the European Commission and the ECB stressed the flexibility needed to tackle the economic downturn that, in March, was already in the making.² In the exceptional circumstances caused by the Covid pandemic, few disputed the need for an effective reaction. Before the Commission's proposal for a temporary recovery instrument, that arrived in late May, the lack of suitable reaction from the EU was the main criticism heard. At the same time, the concerns regarding the legality of the ECB's pandemic programme – that continues to sustain the shackles of the EU economy³ - spiralled following the German Constitutional Court judgment *Weiss*.⁴

Wherever one may stand in this debate, and however needed executive action may be, the role of law in constraining and steering executive powers is far from a secondary issue. In a system that purports to abide by the rule of law, law ought not to be set aside in the name of 'whatever it takes', not least because measures adopted in situations of emergency can open the path to a further reinforcement of executive powers in situations of normality.⁵ The past has shown as much, and the judgment of the Court of Justice of the European Union (CJEU) in *Weiss* is an example of this dynamic.⁶ Changes to the constitutional and legal framework within which EU executive actors exercise discretion ought to be substantively mediated by

¹ This chapter was finalised on 16 November 2020. A preliminary version was published on EU Law Live, [Weekend Edition No. 15](#), on 2 May 2020.

² See, respectively, [Commission Communication of 13 March 2020](#) 'Coordinated economic response to the COVID-19 Outbreak', COM(2020) 112 final, and [Decision 2020/440 of the ECB](#) of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) (see also ECB, [ECB announces €750 billion Pandemic Emergency Purchase Programme \(PEPP\)](#), press release of 18 March 2020.

³ [ECB signals more easing ahead as Lagarde warns of worsening outlook](#), Financial Times, 29 October 2020.

⁴ BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15. As is well known, the judgment pertains to ECB's Public Sector Purchase Programme (PSPP) programme.

⁵ Bruno de White, *Politics of last resort: governing by emergency in the European Union*, OUP, 2020.

⁶ *Heinrich Weiss and Others v Deutscher Bundestag (C-493/17)*. See, inter alia, Marijn van der Sluis, 'Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss (C-493/17)', 46 *Legal Issues of Economic Integration* 3 (2019), 263.

law, in respect for the democratic premises that the EU Treaties uphold. For this reason, because the EU's reactions to the eurozone crisis essentially revamped executive processes, and because further institutional solutions that the current pandemic may generate are likely to rely on executive powers, the developments in the area of economic and financial law of the past years require a reflection on the relationship between executive discretion and law, on academic approaches to discretion, on the role of judicial review and its limits.

2. Judicial review, law and discretion

The *Gauweiler* and *Weiss* judgments, as well as the very different *Shortselling* judgment before them, have shown that the CJEU is likely to accommodate legal interpretations that favour the capacity of executive bodies to act (the ECB in one case, the ESMA in another) in instances where that implies a significant constitutional change, at least when the EU political institutions have backed up those executive powers.⁷ One may support or criticise this position on several accounts. These judgments have sparked a rich body of commentary, which cannot be usefully summarised here.

What I would like to underline is the conception of discretion of which they are emblematic. A distinction between technical discretion (a matter of cognition) and discretion proper (a matter of volition) pervades the CJEU's case law on administrative discretion, even if often only implicitly. The latter requires balancing the public interests at stake. It is necessarily and inextricably grounded on value judgments. The former entails the deployment of the executive's expertise. It is purportedly devoid of value judgments. This distinction is untenable if we do not acknowledge the many grey areas between these different types of assessment. These occur, in particular, in conditions of uncertainty in which executive bodies act prospectively on the basis of often open-ended (albeit detailed) legal mandates. But it is this very distinction that enables the CJEU to hold that 'nothing more can be required of the European System of Central Banks (ESCB) apart from that it uses its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy', whether in exceptional circumstances or not (*Gauweiler*, paragraph 75, and *Weiss*, paragraph 91). The same understanding of the discretion of the EU financial agencies, as essentially dependent on technical expertise, grounded the reasoning of the same Court when it endorsed the legality of the powers delegated to agencies in the *Shortselling* judgment.⁸

That statement in *Gauweiler* and *Weiss* blissfully elides the deep and undeniable political dimension of the ESCB's exercise of discretion (as the case law often does). We do not need to go farther than the more recent Pandemic Emergency Purchase Programme to understand the fictitious character of such understanding of executive discretion.⁹ Of course, measures such as these require technical expertise that the competent executive body – as any executive body – needs to deploy with 'all care and accuracy', at the risk of breaching procedural principles. But it is also clear that they are often deeply imbued with value judgments, which are far from irrelevant from a legal and constitutional point of view.

⁷ *Gauweiler v Deutscher Bundestag* (C-62/14); *United Kingdom v Parliament and Council* (C-270/12).

⁸ J. Mendes, '[Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU](#)' 80 *Modern Law Review* 3 (2017) 443.

⁹ See footnote 2 above.

The perpetuation of the distinction between technical discretion and ‘discretion proper’ has one function in judicial review: it enables the Court of Justice to adjust its judicial review to different political contexts and, hence, to apply different variations to the standard of ‘manifest error of assessment’ when reviewing instances of discretion. Yet, separating the different components of discretion in distinct categories leads to a fiction that, if maintained on the basis of the Court of Justice’s case law, misrepresents the role that law ought to have in relation to discretion. Law is not only a set of procedural and substantive principles that can assist the Court in determining whether an executive body deployed its expertise in a technically correct way, in conformity with equally technically-informed legal requirements. It is not only a set of tools that the courts can (and should) calibrate depending on the case that they have before it. Law reflects normative programmes and value judgements that political processes have converted into legal norms, in accordance with constitutional determinations and principles. From there emerge legally relevant criteria to the value judgments that executive bodies ought to engage with when exercising their technical discretion, if law is to retain a substantive structuring role. Despite what some formulations in its case law may convey, the EU courts do not ignore this dimension of law and discretion.¹⁰

However, when reality defies the legal framework, there is only so much that legal interpretation and tools of judicial review can do in the hands of courts. There are limits to how far courts can accommodate executive action within unchanged legal frameworks, without depleting the structuring role of substantive law, and of administrative law principles that can compensate for wide discretion, as the German Constitutional Court judgment *Weiss* showed.

Devising a segmented concept of discretion also plays out at another level: the distinction between interpreting indeterminate legal concepts, on the one hand, and exercising discretion, on the other. Indeterminate legal concepts are often part of the factual predicate of a legal norm (for example, ‘if necessary to avoid significant adverse effects on financial stability’). Their interpretation is a matter of law, hence, as a matter of principle, subject to full judicial review of discretion. From here follows the view that determining the meaning of such concepts, as much as they may rely on complex technical assessments or involve policy choices, is not a discretionary power. Yet, once again, a formal categorisation of the different types of choices involved in decision-making – much in line with the tenets of separation of powers – needs to take heed of the many grey areas between interpreting indeterminate legal concepts and exercising discretion. Thus, for instance, defining the meaning to be given to ‘particular circumstances’ under the Single Supervisory Mechanism Regulation, namely those that can determine whether a bank is supervised by the ECB or by national authorities, is a matter of legal interpretation.¹¹ But it also depends on the Court of Justice’s and on the ECB’s view of how well the ECB is placed to pursue the objectives set by the regulation. Interpreting the law is not devoid of policy choices that accommodate competing value-laden assessments and judicial review does not stand alone in determining the meaning of law.

3. Constitutional implications

¹⁰ See H-P. Nehl, ‘Judicial Review of Complex Socio-Economic, Technical, and Scientific Assessments in the European Union’ in J. Mendes (ed), *EU Executive Discretion and the Limits of Law*, OUPD, 2019, pp. 157-197.

¹¹ See *Landeskreditbank Baden-Württemberg - Förderbank v ECB* ([C-450/17 P](#)).

Distinctions between decisions resulting from the interpretation of indeterminate legal concepts, decisions entailing complex factual assessments and policy decisions stemming from weighing competing interests, allow us to dissect the different segments of the exercise of discretion with a view to determining what can be the scope and limits of judicial review.¹² They dissect the legal aspects of decision-making that can be subject to full review from the others that should remain the responsibility of administrative decision-makers, subject, possibly, to limited judicial review. These categories have been created from a perspective of separation of powers that tends to ignore that the way law develops depends also on how administrative and executive actors develop their legal mandates, by interpreting legal provisions *and* exercising discretion. They also tend to ignore that, as much as the standard of ‘manifest error of assessment’, also the tenet that matters of law are subject to full review may tell us little about the degree of judicial review over the administrative interpretation of legal terms. The Court of Justice’s deference on issues of law may be justified for different reasons: the expertise involved in determining the content of undetermined legal concepts, the policy choices that legal interpretations may imply, the circumstances of the specific case and the context in which the judgment is issued. For this reason, but also because courts may not be called upon to adjudicate on the legality of the myriad of administrative interpretations that executive actors take on a daily basis, the categorical distinction between the exercise of discretion and the interpretation of indeterminate legal concepts does not preclude a situation in which the executive decision-maker defines, itself, the meaning of the legal conditions that delimit its authority to act (for example whether there are ‘significant adverse effects on financial stability’, as in the example above). They do not exclude situations in which executive actors themselves define the boundaries of their mandates, at least when backed by the relevant political actors.¹³

Of course, deference in matters of legal interpretation does not invalidate the constitutional principle that the EU Courts say what the law is (Article 19 TEU). As a matter of EU law, the Court of Justice can always overrule the interpretation of the administrative authority, even if we were to accept that interpretation may involve discretionary choices. But this is only one side of the story. Courts react to administrative interpretations and how they do so will also depend on how administrative interpretations and practices influence how law is evolving, through the complex interaction between different types of choices and assessments.

Judicial review – even in times of normality – may give us a perhaps false sense of reassurance on the capacity of law to steer the exercise of executive discretion as an external constraint. Judicial review may not be effective in structuring the discretion that stems from the complex interaction between interpretation, policy choices and technical assessments. That was the case in *Gauweiler*, without doubt an exceptional judgment, but nevertheless telling in what concerns how the tools of judicial review may be used and their limits.¹⁴ It is much less clear why *Weiss* could be decided on the same grounds and following the same reasoning, given

¹² S. Lefèvre and M. Prek, ‘Administrative Discretion, “Power of Appraisal” and “Margin of Appraisal” in Judicial Review Proceedings Before The General Court’, 56 *Common Market Law Review* 2 (2019) p. 339.

¹³ Such is the current situation of the ECB, as the German Constitutional Court rightly pointed out in its *Weiss* ruling. The irony of that judgment, however, is the belief that law, via judicial review, can bring the ECB back to its original track. *Weiss* shows, rather, the limits of law in taming the actions of the ECB (see See Marco Dani et al (2020), “‘It’s the political economy..!’ A moment of truth for the eurozone and the EU”, forthcoming.)

¹⁴ V. Borger, ‘Central Bank Independence, Discretion and Judicial Review’ in Joana Mendes (ed), *EU Executive Discretion and the Limits of Law*, OUP, 2019, pp. 118-131.

that the exceptionality that had justified the programme under scrutiny in *Gauweiler* was absent in this case.¹⁵

4. Depleting or strengthening the structuring role of law?

Discretion is an essential part of the function of executive bodies and should remain so. But what we ought to require from executive bodies when exercising discretion must be more than just a careful and accurate use of their 'expertise and [of] the necessary technical means at [their] disposal to carry out [their assessments]' within the boundaries of a legality that they help shaping. Executive bodies (and not only the more politically salient central banks) may have a constitutive role in shaping the socially desirable goals of public action and the legal relationships that fall under their mandates. Whether or not through judicial review, the law they develop must be constrained by the legal normative and democratic premises that underpin the legal system of which they are part.

The need to investigate the role of law in relation to discretion is more present than ever at a time of emergency in which, at the state level, legal constraints are relaxed, and in which the EU executive pledges to make full use of the flexibility that EU law allows for. We may be empowering the EU executive without having the means to make law one of its external constraints. If law becomes merely a set of tools to determine whether the executive's technical assessments are correct, its ethical dimension is lost as much as the democratic foundations on which it ought to stand. No matter how technical the ECB's emergency programme is, how much flexibility the ECB must be able to retain to address the uncertainty stemming from the current unprecedented situation, or how much legal engineering and complex imbrications between the Commission and Member States' governments are required to set up and implement a much desired a EU recovery fund; whether law will just be a vehicle for the discretionary decisions of executive bodies, or steer them in an attempt to create the conditions for the realisation of justice, of social and individual rights, through processes subject to democratic oversight, is a question that both transcends and depends on law's relationship to discretion and may hold the key to the future of the EU as a legal order and as a polity.

¹⁵ See references in footnote 6.