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Abstract

The notion of State discretion is a fundamental concept for the determination of powers and the effective functioning of regional and international legal systems. It is an inherently controversial notion in a system such as the European Union, as it implies that a freedom of decision and interpretation is left to Member States. State discretion disturbs and fosters diversity, thereby potentially threatening the coherent development and harmonisation of EU law and policies. Nonetheless, as part of an expanding EU, it becomes increasingly difficult to build consensus among States with varied legal, economic and political traditions. The increasingly pluralist nature of the EU membership and regime often requires patience and compromise. In this context, the notion of State discretion could play an important role in improving the efficiency of EU law and relations between EU Institutions and Member States. This Working Paper envisages State discretion as process which is defined in the *ex ante* legislative phase and the *ex post* judicial phase. As an alternative to the principle of subsidiarity, this paper proposes a different and more comprehensive framework for interpreting relations between Member States and EU Institutions. It is also part of a longer study focusing on several areas of EU Law.

Keywords

Discretion – Margin of Appreciation – EU Administrative Law – European Court of Justice.

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1. Background

The notion of State discretion is a fundamental concept for the determination of powers and the effective functioning of regional and international legal systems. It is an inherently controversial notion in a system such as the European Union (EU), as it implies that a freedom of decision is left to States. The EU's functioning has often been put to the test by the freedom left to its Member States. State discretion disturbs and fosters diversity, thereby potentially threatening the coherent development and harmonisation of EU law and policies. Nonetheless, as part of an expanding EU, it becomes increasingly difficult to build consensus among States with varied legal, economic and political traditions. The last two enlargements have had an important influence on the evolution of the relations between EU institutions and Member States. The increasingly pluralist nature of the EU membership and regime often requires patience and compromise. In this context, the notion of State discretion could play an important role in improving the efficiency of EU law and relations between EU Institutions and Member States.

At the same time, the notion of State discretion is elusive and problematic due to the difficulty of establishing its content and boundaries. It has been accurately pointed out that “discretion is not a precise term of art, with a settled meaning, nor is it a concept which, when found to be present, leads to fixed consequences”¹. Much has been written about discretion from the philosophical and institutional point of view.² There have also been attempts to differentiate between the various types of discretion available.³ As part of the existing state of the art research, there have been important research initiatives carried out from the point of view of State autonomy which provide an important background to the current study. De Witte and Micklitz are about to publish an influential study on the European Court of Justice (ECJ) and the autonomy of States.⁴ As part of his contribution to this volume, Craig has argued that the limits of Member State autonomy can be analysed from a variety of perspectives. The EU has increasingly arrogated power, with the consequent diminution of national autonomy that Member States have been able to resist, and the ECJ is frequently regarded as bearing

¹ Galligan, Denis J., *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Press, Oxford, 1990, p. 54.

² Davis' contribution is of particular interest to this field, as it provides an important framework for discussion. His proposals concentrated on the limitations that should be placed on discretionary power, but recognised at the same time that discretion is necessary. He also differentiated the various phases in the process of determining discretion, namely controlling and structuring discretion. Davis attempted to find the optimal balance between confining, structuring and checking discretion. His research allows to better understand the various components involved in the process of controlling discretion. Davis, Kenneth C., *Discretionary Justice: A Preliminary Inquiry*, University of Louisiana, 1969.

³ See for instance, Rivers, Julian, “Proportionality and discretion in international and European law” in Tsagourias, Nicholas (Ed.) *Transnational Constitutionalism: International And European Perspectives*, Cambridge, Cambridge University Press, 2007, p. 107, where the author differentiates between policy-choice discretion, cultural discretion and evidential discretion. Paul Craig looked at the notion of discretion, in Craig, Paul, *EU Administrative Law*, Oxford University Press, Oxford/New York, 2006, pp. 433–434, albeit from an EU institutional point of view: he distinguished three types of discretion, namely classic discretion, jurisdictional discretion and discretion phrased in mandatory terms. The first type of discretion appears where the relevant Treaty Article, Directive or Regulation or Decision states that where certain conditions exist the Commission may take a certain action. The second type of discretion was used by the Community Courts in relation to situations where there are broadly-framed conditions that have to be established before the power or duty can be exercised at all. Finally, in the third type of situation, there can also be discretion where the Treaty Article, regulation, directive or decision is cast in mandatory terms. Roberto Caranta differentiates in Caranta, Roberto, “On Discretion” in Prechal, Sacha (ed.) *The Coherence of EU Law, The Search for Coherence in Divergent Concepts*, Oxford University Press, p. 194, between discretion linked to the weighing of conflicting private and public interest; discretion involving complex factual evaluations and discretion involving the interpretation of complex and/or unclear legal rules .

⁴ De Witte, Bruna/Micklitz, Hans-Wolfgang, *The European Court of Justice and the Autonomy of States*, Hart Publishing, Oxford, forthcoming in August 2011.

primary responsibility.⁵ Craig argues nonetheless that the Community courts were but one of the four factors responsible for the expansion of EU power over time, and the Member States themselves were equally important. Arguably, the Community courts, driven by the teleological imperative of market and political integration, have been the principal vehicle for the expansion of EU competence over Member State autonomy. Craig suggests nonetheless that the reality is much more complex and it is a result of the symbiotic interaction of four variables, namely “Member State choice as to the scope of EU competence, as expressed in Treaty revisions; Member State, and since the SEA, EP acceptance of legislation that has fleshed out the Treaty articles; the jurisprudence of the Community courts, and decisions taken by the institutions as to how to interpret, deploy and prioritize the power accorded to the EU”⁶. This analysis offers an important insight as to why and how Member States have accepted and contributed to the expansion of EU competence.

The scope of EU competence and the limits on Member State autonomy can also be analysed from the perspective of European federalism. A notable contribution in this field was published in 2009 by Schütze⁷. The author explores two important manifestations of the federal principle that emerged under the names of “dual” and “cooperative” federalism in the constitutional history of the United States of America. Following the American tradition, the European Union is defined as a Federation of States as it stands on the “middle ground” between international and national law. Three arguments are then advanced to show the evolution of the European legal order from dual to cooperative federalism. The first two arguments look at the decline of constitutional exclusivity and the decline of legislative exclusivity on the part of the Member States and the European Union. The third argument describes the “constitutionalisation” of cooperative federalism in the form of the principle of subsidiarity and the idea of complementary competences. The author concludes that cooperative federalism will benefit both levels of government – the Union and the Member States – as the constitutional mechanism of uniform European standards complemented by diverse national standards best expresses the federal idea of “unity in diversity”.

These recent research initiatives shed an important light on the general context of State discretion and demonstrate the general trend in the evolution of balance of powers within the EU. They further indicate that there is a continuous interest in addressing issues dealing with the freedom of States in the context of the EU. The current study focuses on the specific situation of State discretion, which is one of the components of State autonomy. While focusing on this specific issue, the research remains rooted in the general context provided by these studies.

This overarching chapter provides the framework for the research that is carried out as part of this study on State discretion. The second section reviews the notion of administrative discretion as viewed in domestic law and the notion of State margin of appreciation as conceived by the European Court of Human Rights. The third section defines and situates the notion of State discretion in the case law of the ECJ. The fourth section describes the dynamics of State discretion as a process which starts at the very beginning of the legislative chain and continues all the way until the adjudication phase. The section emphasises the multiplicity of actors involved in this process as well as the importance of the role played by the ECJ. The fifth section defines the different types of State discretion by distinguishing between the margin of discretion and the margin of appreciation. The sixth section describes the functional approach taken as part of the research and provides more information on the methodology used. Finally, it is emphasised that State discretion must be recognised under EU law, given its increasing presence in the ECJ case law and the constant need to address State power concerns through new conceptual tools. Finally, the recognition of State discretion would welcome development in the context of growing pluralism among Member States and the increasing constitutionalisation of the EU.

⁵ Craig, Paul, *Competence and Member State Autonomy: Causality, Consequence and Legitimacy*, available at: <http://ssrn.com/abstract=1474325> (last visited 27 May 2011), p. 1.

⁶ *Ibid.*, p. 2.

⁷ Schütze, Robert, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford University Press, 2009.

2. Discretion: Different Shades of Grey

The European Court of Justice has used synonymously various concepts which appear to have the approximate meaning of discretion. Some of the terms used include “margin of appreciation”, “discretion”, “margin of discretion”, “power of discretion”, “discretionary power”, “it is for”, “free to determine” or “latitude”. Many of these terms were used synonymously and the current study of State discretion has taken all the conceptual variations appearing in the case law of the Court. The concept as used by the Court is very wide and will be further specified in the context of this paper. The current study attempts to develop a more comprehensive conceptual approach to State discretion under EU law. It is considered that such an exercise is required given that the notion of State discretion is increasingly used as a tool by the Court to circumscribe or to expand the freedom of decision granted to States. Further, due to the dissatisfaction in practice and at the academic level with the concept of subsidiarity, alternative routes need to be found to address the question of State’s margin of manoeuvre under EU law. While academic literature on domestic administrative discretion is not lacking, there has not been much written about discretion granted to States under EU law.

Due to the existence of this concept in the case law of the ECJ, it is appropriate to recognise it as a reality of the Court’s. State discretion is unlikely to disappear from the language of the Court and it is recommended that additional guidelines be provided to make its use more coherent. The fragmentation of this concept appears inevitable, due to the various objectives in the different areas of the EU’s competence. The approach taken in this study is area-specific and aims to reconstruct four areas on the basis of their aims, legal framework, interests, actors and particular issues. It was considered that a cross-cutting or transversal approach to the notion of “State discretion” was not feasible, due to the fact that each area is very specific and functions virtually as an autonomous system. The specificity of each area does not allow for a generalisation of the functioning of this concept on a trans-EU level. The approach taken endeavours to determine with greater precision how the notion of discretion functions in these areas and which purposes it fulfils.

The current study excludes from its scope the notion of institutional or administrative discretion granted to European institutions. It does not, however, exclude the administrative discretion granted to domestic authorities, which is also examined by the ECJ. For the purposes of this research, it is not necessary to take into account a specific theory of discretion, as no such theory appears to have influenced the use of this term. The term ‘discretion’ and its synonyms do not have a dogmatic flavour in the case law of the ECJ. It would be artificial to *ex post* attribute such a meaning to them, as the Court has not relied on any such theoretical model. At most, it is helpful to rely on the German legal doctrine of discretion as a conceptual tool to understand the different shades of this concept. Although it has been argued that the notion of “margin of appreciation” used by the European Court of Human Rights originates from French legal doctrine, the current study relies on German legal doctrine as it introduces more conceptual distinctions in the context of discretion.

The study at hand takes an empirical look at the development of this notion in practice in order to identify where its meaning coalesces and becomes more coherent. State discretion is conceived in very general terms as the margin of manoeuvre left by Member States, EU Institutions and the ECJ to domestic authorities under EU law. While Member States do not have the power to enact EU law, they are responsible for the effective implementation and application at the domestic level. The State margin of manoeuvre is composed of two elements, namely the margin of appreciation and the margin of discretion. The former element involves interpretation and the passing of judgment, whereas the latter relies mostly on action and on the will of the relevant actor. The determination of discretion is a *process* which can be prospectively limited through legislation and retrospectively controlled by the Court. The study attempts to capture the different shades in the meaning of the concept “discretion” in specific areas of the ECJ’s case law. In addition, State discretion is understood in the context of delegation of powers from the State to EU institutions. Member States have thus limited their own competences and discretion under EU law. State discretion is the margin of manoeuvre left once EU competences and discretion have been defined, delegated, interpreted and adjudicated. Finally, the

scope of State discretion is to a large extent an unpredictable process, given that the ECJ acts in this context as a Trustee and its decisions are difficult to anticipate.

In examining State discretion, it must be determined whether the ECJ has been expanding or reducing the margin of manoeuvre attributed to the States following the accession of new Member States and the increasing constitutionalisation of the EU. The adjudication of cases is therefore set against a complex background of paradoxical considerations which do not mutually reinforce each other. As the new Member States have very different legal cultures and traditions from the older Member States, it could be hypothesised that the ECJ would now grant less discretion to States fearing for the loss of unity and primacy of EU law. Due to the expansion of the number of actors in the EU context, there may also be the risk that EU law will be negatively affected by various national institutional divergences. However, the changes initiated by the Lisbon Treaty and the gradual constitutionalisation process reinforce the EU institutional structure. The ECJ may then be more willing to grant more discretion to States in order to preserve its own institutional credibility and to balance the powers between EU Institutions and States.

While the aim of this study is to evaluate State discretion under EU law, it is clearly difficult to isolate this concept from other types of discretion in the context of the EU. The EU system is characterised by a complex institutional set up and a functional collaboration between various powers. Decision-making is a result of the various legitimacies with which the EU Institutions are invested. The principle of institutional balance often combines horizontally several entities for the adoption of a single instrument. This fact has an important bearing on how discretionary power is defined at the EU level. In this context, several discretionary powers compete or cooperate in the context of defining EU norms. While one EU Institution may have a discretionary power, other EU Institutions or domestic authorities may further contribute to defining or framing its use. It is important to remember that the EU does not possess the required competence to proceed to the direct application of EU law in the respective Member States. Thus, domestic authorities are required to take all necessary measures to implement the Treaty provisions. EU law thus further defines State discretion when domestic authorities implement it or when they take measures which fall within its scope of application. Thus, the identification of State discretion cannot completely exclude the institutional and normative context within which it is carried out.

The study puts an important emphasis on the definition of State discretion through case law of the ECJ. More than in any other system, the case law of the ECJ has been fundamental for the creation and survival of the EU new legal order. The ECJ has supported and contributed to the creation of the EU legal order. Due to the generality of Treaty Articles, it had to further specify the respective legal rules which would support the process of integration. The ECJ became the driving force behind European integration. As part of its influential case law, it has resolved disputes between EU Institutions and Member States and thus allocated competences between them. The ECJ has contributed in an important manner to the expansion of EU power at the expense of Member States.

3. Domestic and Regional Notions of Discretion

The domestic notions of discretion concern the administrative or institutional margin granted to domestic authorities. These domestic notions of discretion thus differ from the discretion that will be examined as part of this study. While the ECJ may in some specific cases have been influenced by domestic administrative law⁸, this does not appear to have been the case with institutional and State discretion. Although this study focuses on State discretion, it is a useful exercise to expose the conceptual divergences existing at the domestic level, as they reveal the complexity and multifaceted nature of determining the discretion granted to an entity. While it is difficult to draw an analogy between the practice of domestic courts or the ECtHR due to the difference in aims of the respective legal regimes and the actors involved, it remains that the conceptual categories used in these contexts

⁸ See for instance Nolte, Georg, "General Principles of European and Administrative Law: A Comparison in Historical Perspective," 57 (2) *Modern Law Review* 191 (1994).

may provide additional tools to analyse the practice of the ECJ. These doctrines have not had a direct influence on the ECJ's use of the terms "margin of discretion" and "margin of appreciation", but they are important attempts at defining the margin of manoeuvre left to competent authorities in decision-making.

3.1. German legal doctrine

Germany has arguably one of the most complex and in-depth principles of discretion.⁹ The breadth of discretion granted to the administration is significantly narrower than in other European countries. The distrust of administrative discretion has its origins in Nazi history, dominated by executive and administrative authorities. The idea of *Rechtsstaat* emerged in the post-war period, with a strong emphasis on judicial review and a narrower scope for administrative discretion. Unlike other European counterparts, German law recognises administrative discretion only when it is explicitly granted by legislation. In other European countries, the courts recognise discretion not only when it is expressly provided for but also where certain general and imprecise norms are at issue whose application requires expert knowledge or demands the assessment of complex sets of facts or the prognosis of future developments. The courts in Germany, except in certain specific circumstances, recognise administrative discretion only when it is expressly granted, namely when the law provides that the administrative authority 'may' take a certain course of action or uses other similar language. When the law does not use such language, the prevailing doctrine is that there is, as a general rule, only one correct solution to any given question, no matter how imprecise or indeterminate a legal concept may be.¹⁰

German law draws a distinction between the various types of administrative actions, that is *Tatbestand* (constituent elements of a provision), *Subsumtion* (the application of the interpreted concepts to concrete facts) and *Rechtsfolge* (the appraisal and determination of a certain legal effect). The administrative discretion intervenes at the last stage of administrative action. In addition there are different types of discretion recognised under German law. An administrative agent is given a certain margin of discretion (*Ermessenspielraum*)¹¹, in deciding whether to take a certain action (*Entscheidungsermessen*) and in choosing one of the many lawful decisions suitable for achieving the same legal consequence (*Auswahlermessen*). German law also provides for a notion of margin of appraisal or evaluation (*Beurteilungspielraum*), which is a concept similar to *Ermessenspielraum*. The legislature can confer upon the administrative authorities certain freedom in determining the meaning and scope of indefinite legal concepts (*unbestimmte Rechtsbegriffe*). The normative authorisation theory (*normative Ermächtigungstheorie*)¹² seeks to restrict the application of the *Beurteilungspielraum* only to cases where the respective law either explicitly or implicitly allows room for appraisal. In comparison to other domestic legal systems, the notion of administrative discretion is much more strict and the standard of judicial review much more expansive than in other countries.

3.2. French legal doctrine

In French Administrative law, the legality principle (*principe de légalité*) has historically been an expression of the distrust of the Executive and the trust granted to Parliament. It legitimates Parliament to oversee Administrative actions and to limit administrative discretion through rules and legal principles.¹³ Pursuant to this principle, administrative authorities are not free to act and are subject to a

⁹ Arai-Takahashi, Yutaka, "Discretion in German Administrative Law: Doctrinal Discourse Revisited", 6 (1) *European Public Law* 69 (2000).

¹⁰ Notle, G., note 8 supra, p. 196.

¹¹ Arai-Takahashi, note 9 supra; Frowein, Jochen, (ed.) *Die Kontrollrechte bei der gerichtlicher Überprüfung von Handlungen der Verwaltung*, Springer, 1993.

¹² *Ibid.*, p. 75.

¹³ Von Danwitz, Thomas, *Europäisches Verwaltungsrecht*, Springer, 2008, pp. 48–49.

number of rules which determine the procedures to follow and allow administrative action. The concept of discretionary power (*pouvoir discrétionnaire*) represents the administrative entity's power to choose between two decisions or two types of behaviour which comply with the principle of legality.¹⁴ This power leaves a certain level of liberty to the administrative entity, which is carried out according to an evaluation of opportunity which allows it to act in one or other way. The concept of *competence liée* refers to a power which the administrative body must use; it is an obligation to act and has no margin of manoeuvre. It refers to a situation where the administrative body has no freedom to choose and must follow an indicated course of action.¹⁵

The French courts exercise different level of review or scrutiny when they evaluate the legal qualification of facts (*qualification juridique des faits*); judicial review is either restricted or normal. The control is restricted, for instance, when the decision which must be reviewed was taken on the basis of discretionary power, namely when the court must evaluate the legality of the decision taken by the administrative body as being the most appropriate. In the context of restricted control, the French courts rely on the principle of manifest error of appraisal; they usually clarify that the decisions taken by administrative bodies cannot be based on inaccurate facts, on errors of law, on a manifest error of appraisal or an abuse of power.¹⁶ The manifest error of appraisal has been defined as “*erreur évidente, invoquée par les parties et reconnue par le juge, et qui ne fait aucun doute pour un esprit éclairé*”¹⁷. It is a glaring mistake which could be recognised by a layman.

3.3. English legal doctrine

It is a basic tenet of the rule of law that discretionary powers should be controlled; according to Dicey, uncontrolled discretion amounted to evil to be avoided in most contexts.¹⁸ Under English law, discretionary powers are contained in statutes¹⁹, prerogatives²⁰ and common law²¹. Courts are called to draw limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament confers powers upon public authorities which at their face value may appear absolute and arbitrary. Courts have refused to countenance arbitrariness and unfettered discretion. They have created a number of strict principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes and in accordance with the spirit as well as the letter of the empowering Act. Overall, the discretion granted to administrative authorities under English law is wider than that granted in other European States.

Courts thus control administrative authorities in order to ensure that there has been no misuse of power; they can ensure that the bodies do not act illegally or irrationally. In this context, it should be remembered that the *Associated Provincial Picture Houses v Wednesbury Corporation*²² case set down the standard of unreasonableness of public body decisions which render them liable to be quashed on judicial review. The court held that it could not intervene to overturn the decision of the defendant corporation simply because the court disagreed with it. To have the right to intervene, the court would have to form the conclusion that: the corporation, in making that decision, took into account factors that ought not to have been taken into account, or the corporation failed to take into account factors that ought to have been taken into account, or the decision was so unreasonable that no

¹⁴ Chapus, René, *Droit administratif général*, Tome 1, Montchrestien, 2001, p. 1056, para. 1248.

¹⁵ *Ibid.*, p. 1058, para. 1251.

¹⁶ *Ibid.*, p. 1061, para. 1253 *et seq.*

¹⁷ Concl. Braibant, 13 nov. 1970, Lambert, *AJDA*, 1971, 35; Debbasch, Charles/Colin, Frédéric, *Droit Administratif*, Economica, 2004, p. 729.

¹⁸ Cane, Peter, *An Introduction to Administrative Law*, Clarendon Law Series, Clarendon Press, 1992, p. 133.

¹⁹ Craig, Paul, *Administrative Law*, Sweet & Maxwell, 2008, p. 533, para. 17-004.

²⁰ *Ibid.*, p. 534, para. 17-005.

²¹ *Ibid.*, pp. 535–536, para. 17-006.

²² *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223.

reasonable authority would ever consider imposing it. The term “Wednesbury unreasonableness” is used to describe the third limb, of being so unreasonable that no reasonable authority could have decided that way. This case or the principle laid down is cited in United Kingdom courts as a reason for courts to be hesitant to interfere in the decisions of administrative law bodies.²³ In order to prevent misuse or abuse of power, courts evaluate whether decisions were taken for proper purposes²⁴, whether relevant considerations were taken into account²⁵ and whether there was bad faith²⁶.

While courts control the substantive use of discretion, they are also called to control the procedure by which administrative authorities carry it out.²⁷ By developing the principles of natural justice, courts devised a sort of code of fair administrative procedure. This code has a wide general application in the numerous areas of discretionary administrative power. Procedure is not considered as being a matter of secondary importance and it is possible to require administrative bodies to exercise discretion in a procedurally fair manner. Natural law is a well-defined concept in English law and it comprises two fundamental rules of fair procedure: that a man may not be judge in his own cause; and that a man’s defence must always be fairly heard.²⁸ These principles apply to administrative power and sometimes also to powers created by contract.

3.4. European Convention on Human Rights

The notion of State margin of appreciation was originally conceived under the auspices of the ECtHR. It is generally understood as the margin of manoeuvre or discretion that the Strasbourg bodies were willing to recognise to Contracting States with regard to the implementation of their obligations under the ECHR.²⁹ This concept is rooted in the subsidiary nature of human rights protection under the ECHR. It is not defined in either the text of the Convention or the *travaux préparatoires*, but appeared for the first time in 1958 in the Commission’s report in the *Greece v. United Kingdom* case³⁰. The Strasbourg bodies have since then relied very frequently on this concept which has played an important role in the adjudication of cases relating to Articles 8–11, 14, 15 ECHR and Article 1 of Protocol No. 1. Under Articles 8–11 ECHR, the Strasbourg bodies have resorted to a three-prong test which aims at verifying whether a restriction is prescribed by law, whether it pursues one of the “legitimate aims” specified under the relevant Article and whether it is necessary in a democratic society.

The reasoning prompting the creation of the margin of appreciation has been aptly encapsulated by the Court in the *Handyside* judgment³¹. The Court pointed out that “(...) the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (...). The Convention leaves to each Contracting State (...) the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (...). These observations apply, notably, to Article 10 para. 2. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. (...) By reason of their direct and continuous contact with the vital

²³ Craig, P., supra 19 note, p. 532, para. 17-002.

²⁴ Ibid., p. 538–542, para. 17-010–17-012.

²⁵ Ibid., pp. 542–544, paras. 17-013–17-014.

²⁶ Ibid., pp. 544, para. 17-015.

²⁷ Wade, William S./Forsyth, Christopher, *Administrative Law*, Oxford University Press, 2004, p. 439.

²⁸ Ibid., p. 440.

²⁹ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Court of Human Rights*, Human Rights Files No. 17, Council of Europe, Strasbourg, 2000, p. 5.

³⁰ *Greece v. United Kingdom* (Appl. No. 176/56), Commission Report, 26 September 1958, 2 Yearbook of the European Convention on Human Rights 172 (1958–1959).

³¹ *Handyside v. United Kingdom* (Appl. No. 5493/72), Judgment, 7 December 1972, Series A, Vol. 24.

forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the «necessity» of a «restriction» or «penalty» intended to meet them³². As a result, the ECtHR usually defers to the Contracting States' determinations when it considers that it is not competent to decide a given question. It is nonetheless difficult to define the contours of the States' margin of appreciation very precisely, as the ECtHR has interpreted it with great flexibility and in an unpredictable manner.

The Strasbourg Court has generally resorted to the margin of appreciation whenever a case raised an issue that required a balancing of interests or when vague terms and expressions contained in ECHR provisions were interpreted.³³ The margin of appreciation was also used when the review of a case required the Court to assess the seriousness of a particular situation, especially where the domestic authorities would be in a better position to evaluate it and where national opinions would differ.³⁴ The scope of this concept has varied according to the importance of the rights, the nature of the interference, the text and aim of the ECHR provision, the context of the case³⁵ or the general State policies involved (social, economic, environmental, urban and rural planning)³⁶. Moreover, the margin of appreciation was narrower and the Court's scrutiny more strict whenever there was a European common ground among the Contracting States.³⁷ If no such consensus could be found, the Court usually granted a wider margin of appreciation to the Contracting States.

Attempts have been made to differentiate between the different types of margins of appreciation under the ECHR.³⁸ It has been argued that a distinction must be drawn between two different ways in which the Court has used the doctrine. The first one is in cases where the Court has to decide whether a particular interference with a Convention freedom is justified. In answering that question, the Court often uses the label 'margin of appreciation' without drawing on a substantive theory of rights that can justify the conclusion reached. The second use appears in cases where the Court refrains explicitly from employing a substantive test of human rights review on the basis that there is no consensus among Contracting States on the legal issue before it. It appears therefore that the concept of "margin of appreciation" is not a uniform concept, and it may need to be scrutinised more carefully by the ECtHR. It should be emphasised, however, that the ECtHR has never acknowledged that different versions of the concept exist.

While the ECJ has often used the term "margin of appreciation" in its case law, it does not appear that it has used it in the same sense as the ECtHR. This would have been rather difficult, as the circumstances giving rise to the use of the margin of appreciation under the ECHR do not necessarily apply to the EU context.³⁹ Under the ECHR, the margin of appreciation was used in a highly deferential manner; it served as a strategy aimed at the ECtHR's self-preservation and at compensating its fragile legal foundations.⁴⁰ With time, its use has become less restrictive⁴¹ and has evolved into a

³² Ibid., para. 48. See also, Van Dijk, Pieter / J.H., Van Hoof, Godefrious, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, 1998, p. 83.

³³ Ibid.

³⁴ Ibid., p. 85–86.

³⁵ Greer, S., note 29 supra, p. 7; Van Dijk, P./Van Hoof, G., note 31 supra, p. 87–91; Clare, Ovey/Robin, C.A., White, *The European Convention on Human Rights*, Oxford University Press, 2006, p. 54.

³⁶ Van Dijk, P./Van Hoof, G., note 31 supra, p. 89.

³⁷ Ibid., p. 87; Ovey, O./White, R., op. cit., p. 54.

³⁸ Letsas, George, *Two Concepts of Margin of Appreciation*, 26 (4) *Oxford Journal of Legal Studies* 705 (2006).

³⁹ Akos G., Toth, "The European Union and Human Rights: The Way Forward", 34 (3) *Common Market Law Review* 491, 499 (1997).

⁴⁰ James A., Sweeney, "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights", *Legal Issues of Economic Integration*, No. 34, Vol. 1, 2007, pp. 27-52, 42. For an analysis of the use of Member States' margin of appreciation in EU law in the context of conflicting values, see Shuibhne, op. cit.

⁴¹ See, in general, Howard Charles, Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Justice*, Kluwer Law International, The Hague/Boston/London, 1996, p. 25 *et seq.*

tool for requiring Contracting States to provide more detailed justifications for human rights restrictions. The ECJ did not need to work as hard as the ECtHR to establish itself as a legitimate and authoritative body; this process was carried out as part of the evolution of European integration.⁴² Although the ECJ is concerned about its institutional credibility, its legitimacy has firmer roots within the EU legal system than the ECtHR within the ECHR framework. Thus, it is not surprising that the concept has been used in a different manner under EU law and under the ECHR.

The margin of appreciation, as interpreted by the ECtHR, does not exactly fit the EU context. According to one view, “[t]he principle was designed for application by an international court where there are many different approaches to the regulation of matters such as morality and diverse legal and cultural traditions”⁴³. Pursuant to this argument, “[i]t is a concept designed by an international court with plenary jurisdiction over human rights issues to take account of highly diverse situations, and has no role within a legal order with different objectives characterised by limited competences and the goal of approximating the legislation and policy of its Member States in those areas”⁴⁴. Further, since the EU Charter of Fundamental Rights is meant to apply to the EU, which is a single jurisdiction, there is arguably no need for the inherent comparative perspective of the margin of appreciation doctrine. Finally, it has been suggested that, while there are differences in the approach taken by the Member States to numerous issues, the EU has already accommodated these differences without resorting to this doctrine.⁴⁵

Additionally, the margin of appreciation doctrine may not be easily transposed to the domain of EU law due to the subsidiary character of the ECHR protection and to the supranational and highly integrated nature of EU law.⁴⁶ The concept was developed in areas where it targeted only the ECHR Contracting States and it is not adapted to the EU, where it would apply to rights limitations issued by Member States as well as the EU institutions.⁴⁷ Further, the discretion granted to Member States under EU law is traditionally limited with respect to the interpretation of EU concepts and principles, and of their limitations.⁴⁸ As a transfer of competence took place from the Member States to the EU, they appear to have a lower discretion in certain fields than the Contracting States under the ECHR. Another substantial difference between both systems is that the use of the margin of appreciation under the ECHR may represent a risk for the universality of human rights, whereas in the context of the EU it would rather be a threat to the functioning of the internal market and the idea of Europe.⁴⁹ Furthermore, the balancing act that the ECJ has to perform in cases involving fundamental rights is more complex than the one carried out by the ECtHR.⁵⁰ Thus, these specificities of the EU special regime could render the adaptation of an ECHR concept to the EU special regime much more difficult.

⁴² Ibid.

⁴³ Peers, Steve, “Taking Rights Away? Limitations and Derogations” in Steve, Peers/Angela, Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy, Essays in European Law*, Oxford/Portland, Oregon, 2004, p. 168.

⁴⁴ Ibid., p. 169.

⁴⁵ Ibid.

⁴⁶ Gebauer, Katharina, *Parallele Grund- und Menschenrechtsschutzsysteme in Europa?: ein Vergleich der Europäischen Menschenrechtskonvention und des Strassburger Gerichtshofs mit dem Grundrechtsschutz in der Europäischen Gemeinschaft und dem Luxemburger Gerichtshof*, Duncker & Humblot, 2007, p. 298.

⁴⁷ Ibid., p. 293.

⁴⁸ Besson, Samantha, “Gender Discrimination under EU and ECHR Law: *Never Shall the Twain Meet?*”, 8 (4) *Human Rights Law Review* 647,672 (2008).

⁴⁹ Sweeney, J., note 40 supra, p. 36.

⁵⁰ The ECJ has to look “(...) at different ‘versions’ of a given right (national, ECHR, EC), different fields of responsibility for its safeguarding (the same three levels can be used here, in terms of institutions) and other competing interests and concerns (right A ‘versus’ right B versus interest C versus freedom D, and so on)”. Shuibhne, op. cit., p. 234. The human rights legal landscape under the ECHR is less complex and involves fewer institutional levels.

A similarity between both special regimes which may facilitate the reception of the margin of appreciation is that they are relatively heterogeneous in views and membership. The EU is no longer as homogenous as it used to be when it was composed of fifteen Member States.⁵¹ With the enlargement to 27 Member States, more cultural and political variations were introduced into the EU special regime. This enlargement has affected to a certain extent the general coherence and unity of EU law. Arguably, the transposition of the margin of appreciation concept into the EU legal system could improve its functioning. It would help create a common playing field among the 27 Member States and alleviate, at least in part, the difficulties experienced in harmonising certain areas of EU law. While such a practice could thus render EU law more efficient, it would also introduce fundamental changes in the EU's aims and objectives.

4. The Dynamics of State Discretion

4.1. Actors Involved

A wide variety of actors are involved in the process of determination of State discretion by the ECJ. State discretion is often shared between domestic courts, the regional or local competent authorities, the domestic legislator and the Community Institutions. Domestic courts are mostly brought to play an important role as part of the preliminary reference procedure when they refer questions of interpretation of EU law to the ECJ. Thus, the ECJ lays down EU law principles, but leaves the application of these principles to national courts. For instance, the ECJ often leaves the application of the proportionality principle and its interpretation of EU law to the specific facts of the case to the domestic courts. This is not, however, a general rule, as in some instances the ECJ applies the principle of proportionality and other EU rules to the facts of the case, therefore depriving the domestic courts of this duty. These are, nonetheless, specific preliminary references cases, and it needs to be asked, by looking at the whole context of the case, why the Court has effectively decided the case instead of delegating this task to the domestic courts.

In general, the ECJ refers to the Member State in an abstract manner without specifying which entity is granted the discretion. However, in numerous preliminary references cases, the ECJ has been much more specific and has allocated the competences among the different domestic actors. This frequently occurs when the EU legislative instrument mentions, or a domestic provision specifies, the relevant competent authority. It is therefore unsurprising that the ECJ acknowledges the existence of such sub-entities by simply following the existing legal framework. Nonetheless, despite the increasing emphasis in EU law on the competences recognised to regional and local authorities, the ECJ is sometimes on its own more willing to grant more competences to regional actors.

The process initiated by the Laeken Declaration, which recognised the need to better divide and define the competences between the Union and the Member States, has had an indirect impact on the multiplication of actors in the ECJ's case law. One of the questions raised by the Laeken Declaration was whether certain competences should not be delegated to the regions when State Constitutions provide for this. For instance, regions have become important actors that must be taken into account in cases concerning Italy, Spain and Germany due to the specific constitutional set-up in those countries. Further, the idea of multilevel governance in the EU recognises that responsibility should be shared between the different tiers of government concerned and underpinned by all sources of democratic legitimacy and the representative nature of the different players involved. As part of an integrated approach, this entails the joint participation of the different tiers of government in the formulation of Community policies and legislation, with the aid of various mechanisms (consultation, territorial impact analyses, etc). Member States are made up of different levels of government and political action should be taken at the most appropriate level to the issue at hand.⁵²

⁵¹ Gebauer, K., note 46 supra, p. 297.

⁵² Committee of the Regions, White Paper on Multilevel Governance, CONST-IV-020, 80th Plenary Session, 18-19 June 2009, available at:

Reflecting this need, the principle of subsidiarity in Article 5(3) Treaty on the Functioning of the European Union (TFEU) now recognises the regional and local authorities as part of the division of competences between the EU and Member States: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. Thus, in EU law and in the case law of the Court, Member States are not abstract identities without components; rather they are made of various entities which have been delegated different powers. Conscious of this domestic dichotomy or bound by a specific legal framework, the ECJ sometimes attributes discretion to the relevant domestic authority and not only to a Member State at large.

4.2. The Role of the European Court of Justice

As the EU was created for a certain purpose, the Treaties may point the direction in which the law ought to be developed. Arguably, this direction could be the promotion of integration, which is rooted in the Treaties agreed by the Member States themselves.⁵³ There may thus be an inherent pro-integration bias to the system, which the ECJ, as a strategic actor, is applying in the adjudication of cases. The aim of European integration remains nonetheless rather vague and its ultimate result is rather unknown.⁵⁴ Through its case law, the ECJ has put into place the legal foundation of the current EU regime⁵⁵ and to specify further the aims of the EU. It has been argued that the ECJ takes into account the anticipated responses of national Governments before it decides the cases before it. Based on a neo-rationalist approach to the study of institutions, Garrett argued that the Court is able to impose constraints on national political authorities within the Community.⁵⁶ Its continued ability to play such a role, however, does not result from any autonomous power. Although he later distanced himself from this stance, Garrett argued that the maintenance of the EU legal system is actually consistent with the interests of Member States.⁵⁷ Taking a different approach, neo-functionalists Burley and Mattli argue that the ECJ has been the prime mover in European integration and that national Governments have passively accepted the Court’s lead. They argued that European law operates as a “mask” that conceals the real effects of legal integration and as a “shield” that effectively insulates the legal system from political tampering by Member States.⁵⁸ They assert that this explanation is superior to neo-rationalist approaches which lack evidence. Member States continued collaboration within the Union indicates that they value the gains from effective participation in the internal market more highly than the potential benefits of disrespecting them.

The role that the Court has played appears to have evolved over the decades. It has been observed that, since the late 1980s the ECJ exercises greater caution in challenging Member States’ interests. This phenomenon appears to have developed in parallel to a growth in reactions against what

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<http://web.cor.europa.eu/epp/Ourviews/Documents/White%20Paper%20on%20MLG.pdf> (last visited 13 May 2011).

⁵³ de Waele, Henri, “The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment”, 6 (1) *Hanse Law Review* 3, 13 (2010).

⁵⁴ *Ibid.*

⁵⁵ Dehousse, Renaud, *The European Court of Justice, The European Union Series*, St. Martin’s Press, New York, 1998, p. 177 et seq.

⁵⁶ Garrett, Geoffrey, “International Cooperation and Institutional Choice: The European Community’s Internal Market”, 46 (2) *International Organisation* 533 (1992).

⁵⁷ Dehousse, R., note 55 supra, p. 556.

⁵⁸ Burley, Anne-Marie/Mattli, Walter, “Europe Before the Court: A Political Theory of Legal Integration”, 47 *International Organisation* 41 (Winter 1993)

appeared as a constant Europeanisation process.⁵⁹ The Court was confronted then with a much more dynamic political process. The growing reach of EU law has encouraged greater public attention to the deeds of European institutions. The increase of inter-institutional litigation has led the Court to be involved in disputes that had more of a political profile than was the case in the past. On the whole, the ECJ appeared in the late 1990s to be exercising greater restraint in most of its activities.⁶⁰ The Court may have become more sensitive to the need to preserve Member States' capacity to conduct their own public policies and seems to have become more reluctant to expand the scope of Community competences.⁶¹ It has even indicated in some instances that it could not substitute its own views for those of the EU Institutions.

As the Union is increasingly constitutionalising itself, the role of the ECJ as a strategic actor may have gradually changed. The activist approach of the ECJ has brought about significant results in the past, and much of the success of the Union project can be attributed to it.⁶² The developing EU system becomes more efficient and more democratic; there may be little need any more for the ECJ to be the "locomotive of European integration"⁶³. Further, the ECJ, which has worked so hard to constitutionalise EU law, seems to have lost ground in the process. These developments may have complicated its own role and exposed it to growing criticism. Dehousse argued that following this transformation process, a rational judge's reaction would be to consolidate his own institutional position and the effectiveness of EC law, but not to get involved in political fights.⁶⁴ Indeed, this behaviour appears to transcend some jurisprudential trends where the ECJ appears to be more calculated and cautious. Further, in the aftermath of the last EU enlargements, the ECJ is facing an ever more pluralist union with very diverse political, economic and legal traditions. The ECJ therefore has to adapt itself to this new environment, as it has previously done when there was a rise in inter-institutional disputes in its docket. The ECJ has a clear perception of its institutional role and is increasingly more cautious when it comes to its institutional credibility.

As part of previous research, scholars have relied on the principal and agency theory to explain the delegation of power from the Member States to EU Institutions. As part of this framework, Member States (principals) delegate authority to a court (agent) to resolve disputes between themselves.⁶⁵ As Stone Sweet emphasised, the Court is viewed by some in the delegation logistics as a powerful agent, as it helps overcome dilemmas of commitment and collective action. Others tend to highlight the complex details of the Court's overall grant of authority, which varies across the different dimensions of EU governance.⁶⁶ Some scholars have questioned the applicability of the principal and agent dynamic to the EU judicial context. In exchange, Majone⁶⁷ and Moe⁶⁸ proposed the model of "Trusteeship", where the Commission since the Treaty confers upon it full discretion to bring non-compliance claims against the Member States (which cannot block them from going to the Court). According to Stone Sweet, the ECJ is also a Trustee insofar as it fulfils the following criteria: "(a) the

⁵⁹ *Ibid.*, p. 148.

⁶⁰ *Ibid.*, p. 176.

⁶¹ *Ibid.*

⁶² de Waele, H., note 53 *supra*, p. 11.

⁶³ *Ibid.*, p. 12.

⁶⁴ *Ibid.*, p. 185.

⁶⁵ Hawkins, Darren/Lake, Dave/Nielson, Daniel/Tierney, Michael, *Delegation and Agency in International Organisations*, Cambridge University Press, 2006, p. 17.

⁶⁶ Stone Sweet, Alec, "The European Court of Justice and the Judicialization of EU Governance", Yale Law School, Yale Law School Legal Scholarship Repository, Faculty Scholarship Series, Paper 70, http://digitalcommons.law.yale.edu/fss_papers/70, p. 12.

⁶⁷ Majone, Giandomenico, "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance," 2 *European Union Politics* 103 (2001).

⁶⁸ Moe, Terry, "Political Institutions: The Neglected Side of the Story" 6 *Journal of Law, Economics, and Organisations* 213 (1990).

Court possesses the authority to review the legality of, and to annul, acts taken by the EU's organs of governance and by the Member States in domains governed by EU law; (b) the Court's jurisdiction, with regard to the Member States, is compulsory; and (c) it is difficult, or impossible as a practical matter, for the Member States-as-Principals to "punish" the Court, by restricting its jurisdiction, or reversing its rulings"⁶⁹. Member States have thus created a Trustee, the ECJ, to whom they have permanently transferred authority to decide disputes between them.

Although the ECJ benefits from substantial powers in deciding disputes, it is also dependent on States for the recognition of its judgments. The ECJ may resort to the concept of State discretion in an attempt to reinforce its institutional credibility and generally to preserve diversity at the domestic level. State discretion may serve as a means to justify or to explain the lack of harmonisation or lack of consensus at the domestic level. While the initial phases of the ECJ's existence were geared toward reinforcing itself and towards setting up the foundation of EU law, the post-enlargement phase could be marked by a justification of pluralism which sometimes penetrates the ECJ case law in the form of State discretion. As the differences between the domestic legal orders are more marked than before, it becomes increasingly more difficult to reach a level of consensus. As a pragmatic correlative reaction, the ECJ may be more willing to accommodate the differences between States by using the concept of discretion. In light of the EU's constitutionalisation and expansion of competence, the concept of State discretion may further help re-establish a balance in the EU/State relations and re-draw the separation of powers through judicial channels. As the EU reinforces itself, there is an increased need to review the role that States are brought to play in this context.

4.3. A Framework of Discretion

The determination of the discretion left to States by EU law starts at the very beginning of the legislative chain and continues until the judicial determination. There are two main stages involved in controlling discretion: one is to impose *ex post facto* (or retrospectively) checks in the form of complaints; the other is to regulate the exercise of discretion in advance (or prospectively).⁷⁰ Prospective controls are imposed through rule-making. However, the line between prospective and retrospective rule-making may be difficult to draw as retrospective control may also generate rule which can give prospective guidance to decision-makers. Following this conceptual framework, the discretion granted to States and Institutions results in part from the legal framework and in part from the case law of the ECJ. As any legal power, the discretion granted to States has normative roots which are grounded in a legal basis. This basis enables States to make choice as to the measures or courses of action. The existence and scope of discretion is initially determined in the legal context in the *ex ante* (or prospective) phase. In the *ex post* (retroactive) phase, the determination of the level of discretion is then less of a normative exercise, but rather the scrutiny of the discretion as already put into practice. This phase is concerned with the control of the action itself. In this context, the level of scrutiny applied by judges is determinant in granting a margin of discretion to Member States. Judges have an important role in effectively measuring the ultimate scope of discretion granted to Member States.

The important difference among these two phases is the time at which the discretion is determined as well as the actors which are involved in determining the scope of discretion. At the *ex ante* phase, the Union legislator is mainly involved, whereas at the *ex post* phase, it is the ECJ that plays the dominant role. While the current study takes into account the *ex ante* phase of the definition of State discretion, it focuses mainly on the determination of discretion as performed by the ECJ judges. While the earlier phases of the discretion framework play an important role in this context, it was considered that a focus on the ECJ's activity would provide a more representative picture of how discretion is controlled in reality and the extent of State freedom of action which effectively remains

⁶⁹ Stone Sweet, A., note 66 supra, p. 13.

⁷⁰ Cane, P., note 18 supra, p. 133; Baldwin, Robert/Hawkins, Keith, "Discretionary Justice: Davis Reconsidered" (1984) Public Law 570.

following the ultimate control by the ECJ. It is nonetheless crucial to take into account the *ex ante* phase mentioned, as it has a bearing on the way that *ex post* the discretion of States is interpreted by the ECJ.

4.3.1. The *Ex Ante* Phase

4.3.1.1. Political Context

The political context exerts an important influence on the determination of State discretion by the ECJ. The situation surrounding the various legal instruments invoked by the parties provides an important background against which the ECJ's decisions are set. A review of the case law demonstrates that the Court responds to the various difficulties relating to the implementation and enforcement of EU law. While the Court is an independent body, it does not function in isolation from the political context which surrounds it. As a strategic actor, the Court ensures that the efficiency of EU law is preserved and interprets the relevant legal instruments in accordance with the EU aims that must be accomplished. Here, the need to ensure the efficiency of EU law ties in closely with the political context of the disputes reaching the ECJ.

The ECJ also acts as a medium through which various interests are pursued. EU Institutions, Member States and private parties have often differing interests which may clash as part of the disputes presented before the ECJ. In cases of a conflict between State and EU Institutions' interest, the ECJ tends to promote the interests of the EU Institutions in an attempt to fulfil the aims of the EU. The Commission may sometimes signal to the ECJ what may be politically tolerable to Member States and how the Court can contribute to the integration process.⁷¹ The ECJ has, however, also demonstrated its willingness to promote private interests and to act autonomously of the political interests of the EU Institutions and Member States. Further, the Court is willing to decide against Member States' interests, which implies that it does not very much fear losing its institutional credibility.

The Court can also act as a catalyst for ideas and legislative initiatives. In some areas, the ECJ's case law has uncovered problems in the functioning of EU law and proposed solutions as to how they could be handled. This has sometimes given rise to the adoption of appropriate legal instruments. Further, the EU has provided the required legal infrastructure in areas where there sometimes was none. This has provided an important starting base which could then be completed and supplemented with additional legal instruments. The EU legislator could then fill in what was lacking in the legal standards that were set by the ECJ. Undoubtedly, the Court finds itself at the apex of a diversity of interests and a complex political dynamic. As a strategic actor, the ECJ uses the notion of State discretion to strike the right balance and to further the aims of the EU.

4.3.1.2. Competence

Pursuant to Article 4 Treaty on the European Union (TEU), the competences not conferred to the EU remain with the Member States. Further, according to Article 5 TEU, the limits of Community competence are regulated by the principle of conferral. The Lisbon Treaty lists three areas of competence, namely exclusive competence, shared competence and supporting or coordinated competence. The area of EU exclusive competence (Article 3 TFEU) comprise the customs union, establishment of competition rules necessary for the functioning of the internal market, Monetary policy for Member States which use the Euro, conservation of the biological resources of the sea as part of the common fisheries policy, common trading policy and the conclusion of an international agreement when this is within the framework of EU legislation or when it is necessary to help the EU exercise an internal competence or if there is a possibility of the common rules being affected or of

⁷¹ Stein, Eric, "Lawyers, Judges and the Making of a Transnational Constitution", 75 (1) American Journal of International Law 1 (1981).

their range being changed. In this area, it is only the EU that can legislate and adopt binding acts. The Member States can only do so if they are empowered by the EU or in the implementation of EU acts.

The areas of shared competence are the internal market (Article 4 (2) TFEU), social policy with regard to specific aspects defined in the Treaty, economic, social and territorial cohesion, agriculture and fisheries (except for the conservation of the biological resources of the sea), environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, joint security issues with regard to aspects of public health, research, technological development and space and development cooperation and humanitarian aid. In this context, Article 2 (2) TFEU provides that “the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence”. Shared competence is the general residual category since Article 4 (2) TFEU provides that the EU shall share competence with the Member States where the Treaties confer on it a competence which does not deal with Articles 3 or 6 TFEU, which deal with exclusive competence, and that where the EU is not restricted to taking action to support, coordinate or supplement Member State action. This follows from Article 4 (2) which provides that shared competence applies in the ‘principled areas’ listed, implying that the list is not necessarily exhaustive.⁷² The idea of shared competence has to be read, however, in light of the category of competence dealing with economic and employment policy (Article 5 TFEU) and foreign and security policy (Article 2 (4) TFEU and Title V TEU).

In addition, it is important to bear in mind the notion of pre-emption, which implies that Member States can only exercise competence, as provided by Article 2 (2) TFEU, to the extent that the EU has not exercised it or has decided to cease to exercise it within any such area. Member State action is therefore pre-empted when the EU has exercised its competence. There are different ways in which the EU may intervene in a given area, including minimal harmonisation, uniform regulations, mutual recognition, etc. The pre-emption will occur only to the extent that the EU has exercised its competence in the relevant area. In a context of shared power, Member States will lose their competence to the extent that the EU has exercised its competence. Article 2 (2) TFEU also provides for the possibility to cease exercise competence in an area of shared competence, which would then entail that the competence would revert to the Member States. Member States have exclusive competence (Article 6 TFEU) in protection and improvement of human healthcare, industry, culture, tourism, education, professional training, youth and sport, civil protection and administrative co-operation. The EU may provide support and co-ordination for the European aspects of these areas but this cannot include harmonisation.

The granting of competence to Member States is very different from the granting of discretionary power. It relates merely to the actual granting of such power and it does not specify further the extent and scope of this discretion. It merely empowers Member States to act in a certain domain. Competence indicates the area of activity in which an entity is entitled to act. It has a substantive sense, namely the area of activity (agriculture, environment, etc) and a functional sense, namely the empowerment to produce norms. Discretionary power designates the carrying out of an action. It has an organic sense and refers to the actor entitled to a given power, and it has a substantive sense corresponding to the legal act.⁷³ However, the competence, which refers to the area of action, does not in itself define or refer to the level of discretion granted. In fact, varying levels of discretion exist within a single area of competence. Finally, competence should be interpreted as the granting of

⁷² Craig, P., *supra* 5 note.

⁷³ Bouvresse, Aude, *Le pouvoir discrétionnaire dans l’ordre juridique communautaire*, Thèse pour l’obtention du Doctorat en Droit Public, Université Robert Schuman, Faculté de Droit, de Sciences Politiques et de Gestion de Strasbourg, présentée et soutenue publiquement le 28 juin 2007, p. 15; Constantinesco, Vlad, *Compétences et pouvoirs dans les Communautés européennes. Contribution à l’étude de la nature juridique des Communautés*, LGDJ, Paris, 1974, pp. 82–83.

the power to an entity to adopt certain acts or to have certain behaviour.⁷⁴ It is necessary to distinguish here between competences and powers, namely the distribution of competences (exclusive, shared, supportive) and the separation of powers (legislative, judicial, executive). In this study, the latter will be referred to as powers and not as competence.

The distribution of competences may have an indirect bearing on how the level of discretion is then interpreted by the ECJ. The nature of the competence recognised in a given field may allow to exclude discretion in a field of exclusive competence and to permit a scope for discretion in areas of shared or complementary competence. It may then apply more stringent controls to Member State action, if it considers that it may impede effective EU action or fulfilment of EU objectives. It is important to note, however, that while there is a correlative relationship between the competence attributed to the EU and the level of discretion granted to Member States, both notions are conceptually different. The notion of competence is not in itself indicative of the level of discretion granted; it merely gives a right to an entity to decide in a given field. It has a bearing on the overall power granted to Member States in the context of the EU, but it does not define the room for manoeuvre within an area attributed to them. As such the notion of competence constitutes the first and very initial phase in the eventual determination of the extent of discretion granted. The nature of competence also has a bearing on the amount of discretion that will later be attributed to Member States.

4.3.1.2. Legal Basis for Action

The EU is only entitled to act in areas where it has been granted power by the Treaties. According to the principle of attributed competences, the Community has to justify any legal action and reason why this could not have been done on the national level. The legal basis, thus, serves as the Community's legal justification to act and allows to prove that there is a Community competence in a given field. The choice of the legal basis will then determine the legal instrument to be used and the procedure that should be used to adopt it. According to Article 5 (1) TEU, "[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States". Specific provisions or basis are scattered across the Treaties granting particular legislative powers. Different procedures govern the making of legislation in different areas. The result is that it may matter a great deal to the EU Institutions and/or Member States which legal basis is chosen to assert a Community competence. The case law provoked by the need to choose is complex and often technical, but it reveals much about the tensions felt by the Member States and the EU Institutions as to the shape that the Union develops. In case of dispute, the ECJ is forced to decide the correct Treaty base for legislative action.⁷⁵ It has consistently insisted that the correct base is as a matter of law identifiable and not a matter of unfettered discretion enjoyed by the Institutions. When there are two possible legal bases, the choice is not left to the Institutions but rather implies that there is a double legal basis. The choice of legal basis does not provide EU Institutions or States with discretion, but it has nonetheless an influence on how this discretion is defined later in the legislative process.

4.3.1.3. Subsidiarity and Proportionality Principles

The principles of subsidiarity and proportionality are clearly legislative tools which are used in the *ex ante* phase of determination of State discretion. They circumscribe this State discretion further once competence has been delegated through the Treaties onto the EU Institutions. Although the principle of subsidiarity appears to be closely related to the notion of competence discussed above, a distinction needs to be drawn at this point between both concepts. Subsidiarity alone does not determine the areas

⁷⁴ Bouvresse, A., *ibid*, p. 15.

⁷⁵ Weatherill, Stephen, *Cases and Materials on EU Law*, Oxford University Press, 2007, pp. 32–33.

in which the EU is competent to act, as this is determined by the Treaties. Moreover, it does not vest the EU with authority to act where it had none. The role attributed to the subsidiarity principle is to regulate the exercise of competences for policy and law-making between European, national and sub-national (regional and local authorities) levels. It was intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level.

The principle of subsidiarity means that the EU must not undertake or regulate what can be managed or regulated more efficiently at national or regional levels. According to Article 5 (3) TEU and the Protocol on the application of the principles of subsidiarity and proportionality, the European Union must act within the limits of the powers conferred upon it by the Treaties and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Union must take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union. Any action by the Union must not exceed that which is necessary to achieve the objectives of the Treaties. The principle of proportionality (Article 5 (4) TEU) implies that, if an EU action proves to be necessary to attain the objectives of the Treaty, the European institutions must further examine whether legislative action is required or whether other sufficiently effective means can be used.

The provisions of the Protocol on the application of the principles of proportionality and subsidiarity recognise for the first time the Committee of the Regions and local and regional authorities explicitly as an integral part of the Community structure as regards application of the subsidiarity principle. The Protocol also strengthens the role of national parliaments with regard to subsidiarity monitoring. National parliaments may, within eight weeks from the date of transmission of a European draft legislative act, produce a reasoned opinion stating why they consider that it does not comply with the principle of subsidiarity (Article 6 of the Protocol). Each national Parliament has two votes (Article 7 (1) of the Protocol) and when the negative votes amount to one third of all votes allocated, the European Union draft must be reviewed. The EU legislator can then decide to maintain, amend or withdraw the draft (Article 7 (2) of the Protocol). The mechanism is stronger under the co-decision procedure, but only a majority of votes allocated to national parliaments will trigger it (Article 7 (3) of the Protocol). If the Commission then chooses to maintain the proposal, it will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. The Commission's justification for maintaining the proposal as well as the reasoned opinions of the national parliaments will be submitted to the Union legislator (Article 7 (3) of the Protocol). The Union legislator (European Parliament and the Council) will then have to consider whether the proposal is compatible with the principle of subsidiarity. The proposal will be rejected if, by a majority of 55% of the Council or a majority of the votes cast in the European Parliament, the legislator finds the proposal to be incompatible with the principle of subsidiarity (Article 7 (3) (b) of the Protocol). Pursuant to this mechanism, national parliaments do not have a veto right but they are granted a certain level of scrutiny.

4.3.1.4. Level of Harmonisation

The level of harmonisation in a given area has often been treated as an indicator by the ECJ for determining the level of discretion granted to Member States. The aim of harmonisation is to make consistent and uniform laws of Member States in a certain area in order to facilitate the achievement of certain EU aims. Harmonisation is a process of ascertaining the admitted limits of unification but does not necessarily amount to a vision of total uniformity. The EU has experimented with different types of harmonisation, including minimum, exhaustive, optional, partial and reflexive.⁷⁶ Minimum harmonization is one of the most common forms used for the approximation of domestic laws. It entails that relevant legislation is being harmonised in such a way that a minimum threshold is

⁷⁶ Barnard, Catherine, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, 2010, p. 624.

reached. The remaining old national rules, or even new rules going beyond the EU minimum requirements are still valid. Member States are free to impose stricter provisions above the harmonised level to pursue independent domestic objectives, as long as these measures do not exceed the common EU standard. The degree of harmonisation therefore is low within the rules' remit. Minimum harmonisation is a popular method to use; it helps reconcile the need for a level playing field for competition (minimum standards) with space to accommodate national diversity (above this minimum).⁷⁷ The use of minimum harmonisation was included in the Single European Act (SEA) 1986 when certain new legal bases expressly required that the Union should adopt directives laying down 'minimum requirements' (e.g. Article 153 (2) TFEU) but that these directives did not 'prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties' (e.g. Article 153 (4) TFEU). Minimum harmonisation provides the level beyond which national legislation cannot fall.

Exhaustive or full harmonisation concerns situations where diverse national rules are replaced by a single EU rule, leaving no room for Member State action. Once the Union has adopted an exhaustively harmonised standard, Member States cannot impose stricter standards because their action is pre-empted.⁷⁸ Given the pre-emptive effect of exhaustive harmonisation, the Court will check to see whether the Directive does in fact fully harmonise the field. If harmonisation is found not to be exhaustive, the ECJ will allow the relevant State to take unilateral action on the basis of EU law provisions.⁷⁹ It is quite common for a directive or recommendation to consist of a mixture of full harmonisation and minimum harmonisation clauses.

Due to the expanding EU legislative activity, the use of these methods of harmonisation has often given rise to hostility. Attempts were therefore made to introduce more flexible methods of approximation of laws. One such alternative was optional harmonisation. This process allows for two sets of rules to be in force: one is laid down in the EU measure, designed to regulate cross-border phenomena and the other set by each Member State for purely internal situations. Another alternative is partial harmonisation; this procedure does not entirely pre-empt State actions in the harmonised area. In case of partial harmonisation, however, the permissible legislation must be aimed at regulating aspects of the harmonised matter other than those covered by the EU instruments, rather than, as in the case of minimum harmonisation, at replacing EU standards with stricter ones.

There has also been a rising interest in legislation whereby a law does not seek to achieve its ends by direct prescription (e.g., exhaustive harmonisation directive) but instead empowers local actors to promote diverse local-level approaches to regulatory problems. This process is called reflexive harmonisation. In this context, the law attempts to devolve or confer rule-making powers to self-regulatory processes.⁸⁰ The reflexive quality is seen in minimum harmonisation directives which allow Member States or other actors to exceed minimum standards taking into account national interests. Another method of reflexive harmonisation is the open method of coordination which involves "(...) fixing guidelines for the Union, establishing quantitative and qualitative indicators and benchmarks as a means of comparing best practice, translating these European guidelines into national and regional policies by setting specific targets, and periodic monitoring, evaluation and peer review organised as 'mutual learning processes' "⁸¹. This method could potentially increase democracy in the EU through the enhanced role for deliberation among policymakers and the participation of a broad range of actors at different levels.

The ECJ has often mentioned the level of harmonisation achieved in a given domain as an important indicator of the level of discretion left to Member States. In some cases, the Court found that harmonisation was not complete and attempted to read into the intention of the legislator as to whether there was an attempt to effect full harmonisation. In this context, it evaluated the objectives

⁷⁷ *Ibid.*, p. 632.

⁷⁸ *Ibid.*, p. 626.

⁷⁹ *Ibid.*, p. 627.

⁸⁰ *Ibid.*, p. 642.

⁸¹ *Ibid.*, p. 643; Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, para. 37.

that were to be attained by the specific Treaty Article and the Directive. It also looked at the text of the relevant provisions in order to verify whether the text allowed Member States to introduce more stringent measures. It then proceeded to define with greater precision the margin of discretion left to Member States. The Court relied only on the notions of minimum or full harmonisation as part of its interpretation of State discretion; it did not rely on the other types of harmonisation mentioned above. The level of harmonisation was often directly linked to the level of discretion attributed to States by the ECJ and its willingness to attribute additional room for manoeuvre to States. When there was an intention on the part of the Community legislator to harmonise an area beyond a minimal level, the ECJ would not be favourably predisposed to expand the discretion granted to Member States. The level of discretion is thus a factor that is often used by the Court in its determination of State discretion, which intervenes later in this chain. There are, however, also abundant paradoxical situations when no such link can be established.

In some cases, the ECJ expressly found on the basis of previous case law, that in the absence of Community legislation, it is for the MS to provide more specific definitions or criteria. In some cases, the ECJ has mentioned, however, that in the absence of Community harmonization, a directive has to be examined in light of EC provisions.⁸² Here, the case concerned the interpretation of secondary legislation, and more general provisions were used to shed light on it. A review of the case law demonstrates that there are three methods to interpret non-harmonised Community legislation, namely to (1) verify whether it refers to national provisions, when that is not the case, to create Community autonomous meaning, (2) when there is no harmonization, to refer to the relevant Treaty provision or (3) to the relevant domestic provision.

Finally, the nature of the competence taken together with harmonisation is often combined and determines jointly the level of discretion granted to States. The exclusive character of a competence does not only result from the Treaty provisions themselves, but it can also depend on the extent of the measures taken by the Community institutions for the application of these provisions and which are capable of depriving Member States of their competence.⁸³ Interestingly it appears that when the level of harmonisation is higher, the Community legislator grants a greater margin of manoeuvre to Member States for their execution. However, when a matter regards shared competence, Community institutions adopt more specific acts and leave a smaller margin of manoeuvre to Member States for their application.⁸⁴

4.3.1.5. The Type of Instrument

The choice of the type of legal instrument may have an important bearing on the discretion of Member States. In the past, the distinction between the various legal instruments was to some extent an indicator of the distribution of competences in the EU context. The directive for instance is usually used in the context of joint or shared competences, while the regulation is usually relied on in the field of exclusive competence. Although the difference between these instruments is sometimes blurred, it nonetheless provides a good indication as to the intention of the legislator. EU institutions can then choose, for instance, a directive and then leave Member States a choice as to the means to adopt a regulation in order to ensure a coherence and uniformity in domestic laws. The decision as to the legal instrument is often taken by the subjective consideration of the relevant actor who is in a better position to evaluate which type of instrument will attain the chosen objectives. For instance, pursuant to Article 106 (3) TFEU, the Commission “shall, where necessary, address appropriate directives or decisions to Member States” suspected of having granted unlawful aid. These two instruments have a very different nature and leave a different type of freedom to States. It is left to the Commission to evaluate the most appropriate method, the function that it is meant to serve and the objective that it is meant to attain. The choice of instrument provides information as to the objective that the Commission

⁸² Case C-265/06 *Theodor Jäger. v. Finanzamt Kusel-Landstuhl* [2008] ECR I-00123.

⁸³ Bouvresse, A., note 73 supra, p. 175.

⁸⁴ *Ibid.*, p. 175.

is trying to attain. A directive puts into place a preventive mechanism listing obligations that must be respected by States. The decision intervenes in a more repressive context which does not leave any margin of manoeuvre to Member States. The Commission has a particularly extensive discretion as to the choice of instrument in this field. It should be remembered, however, that the ECJ may question the denomination of a given instrument in determining whether it is a decision under the Treaty or in evaluating its meaning. It has been noted that, on the basis of an analysis of the Articles of the then EEC Treaty in which the directive was the only instrument prescribed, directives were often used in those areas where existing national law is rather complex and voluminous and needs to be adapted for the purposes of the Treaty.⁸⁵ From those Treaty Articles, it appeared to follow that the most important field of activities in which directives will be used as a means of Community intervention will be the harmonization of laws. More recently, however, directives were also used as instruments for liberalisation in the fields of communication, electricity and gas.⁸⁶ The scope and the content of an instrument cannot be hidden behind the legal qualification attributed by the author.

4.3.1.6. The Text of the Legal Provision

The determination of discretionary powers often starts with the text of the relevant provision granting a power to the Member States. Legal provisions include words such as “may” or “shall” which indicate that Member States have a margin of discretion. In such cases, words such as “must” or “is to” are used to indicate a duty and therefore preclude the use of discretion. Permissive norms in fact indicate that there is a margin of manoeuvre left to the competent authority, whereas imperative statements tend to indicate that no such margin has been granted. These different words should not be taken as the definitive rules. The text of the legal provision often prescribes a number of objectives which must be attained without precluding a certain margin of discretion. This is the case when the text leaves Member States the liberty as to the measure which should be adopted. There is, however, no discretion left when the objective to be attained appears to leave only one option as to the measure to be adopted. In addition, there may be discretionary power granted when there was no harmonization or when the action is indeterminate under the relevant legal provision. When there were conditions defined as to the taking of a particular action by the competent authority, there is a certain margin of discretion granted by this sole fact. The limits set in this context are the objectives which must be attained by the measure. The level of indeterminacy of the action is therefore to some extent indicative of the level of discretion granted.

It should be noted that State discretion is substantially limited in this context by the fact that EU institutions have the power to enact EU law. National authorities are mainly the actors in charge of enforcing EU law and implementing secondary and not primary legislation.⁸⁷ Certain Treaty Articles are directly addressed to Member States which are meant to apply them. The competence which is thereby attributed to them is characterized by positive or negative obligations. Treaty Articles are mainly prescriptive norms; they contain various prohibitions to act in terms of trade restrictions, including measures having an equivalent effect, restrictions to free movement of goods, discrimination of workers on grounds of nationality and State aid. These negative obligations leave no margin of discretion to Member States and the exceptions are strictly regulated in the relevant provisions. The positive obligations contained in the Treaty provisions also exclude substantive discretionary powers. Even when States are not bound by specific Treaty Articles, the obligation of cooperation (Article 4 (3) TEU), whereby Member States are obliged to take any appropriate measure to ensure fulfillment of the obligations arising out of the Treaties. Although these positive obligations leave no margin of discretion to Member States, they may nonetheless leave them a margin as to the choice of means. This choice is nonetheless not extensive as it is conditioned by the effectiveness of EU law.

⁸⁵ Prechal, Sacha, *Directives in EC law*, Oxford EC Library, Oxford University Press, Oxford/New York, 2005, p. 3.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, p. 143.

4.3.2. The *Ex Post* Phase

4.3.2.1. The Level of Scrutiny

The dynamics of State discretion are defined by the combined effect of the factors mentioned in this section and they cannot be understood in an isolated manner. These factors are interdependent and often appear together in a given case. The ECJ refers to the level of harmonisation in an attempt to determine State discretion, which then has an impact on the level of scrutiny applied in judgments. A review of the case law shows that the level of judicial review of legislation varies with the level of harmonisation of the area at issue. The ECJ sometimes mentions that when the level of discretion and harmonisation is higher, it will apply a limited judicial review.

Under EU law, the main provisions for judicial review are Articles 263, 265, 268, 277 and 340 TFEU. Article 263 TFEU empowers the ECJ and the CFI to review the legality of binding institutional acts. It provides that “[t]he Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties”. Article 288 TFEU provides a list of acts considered to be binding. It is important to note, however, that the ECJ has considered the “nature and effect” of an act and not simply its form. Further, Article 265 TFEU provides that “Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established.” In addition, Article 268 provides “The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340”. Finally, Article 277 TFEU includes the ability of an individual to challenge a regulation adopted by the institutions jointly or singly. While judicial review is usually concerned with the legality of Community Institutions acts, it should also be noted that Article 267 TFEU grants a sort of power to the ECJ to review in cases in Member State courts before a decision has been taken and to advise those courts on how the cases should be decided in accordance with established EU law.

There are various levels of judicial review applied by the ECJ depending on the types of questions that come before it. The ECJ clarified that, “although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for applying the competition provisions of the EC and ECSC Treaties are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant 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 appraisal or misuse of powers”⁸⁸ The ECJ therefore applies a fuller review to legal questions and a limited review to factual questions. In the context of complex economic⁸⁹, scientific⁹⁰ or social⁹¹ factual assessments, the ECJ uses the standard of manifest error of appraisal mainly with regard to EU Institutions but also Member States. In cases of limited discretion, for instance with regard to derogation from free movement of goods and persons, the ECJ applied no limit as to the extent of judicial review. Given the generality and gaps in the Treaty Articles, the ECJ has also tried to rely on principles which governed judicial review of EU law. The principle of proportionality, for instance, has often played an important role in the review of both Institutional and State discretion. In addition, Craig listed four main principles

⁸⁸ Case C-195/99 *Krupp Hoesch v Commission*, [2003] ECR I-10937, para. 55

⁸⁹ *Ibid.*

⁹⁰ Case C-88/03 *Portugal v Commission*, C-88/03 [2006] ECR I-07115, para. 99

⁹¹ Case C-120/97 *Upjohn II* [1999] ECR I-00223, paras. 33 and 34

guiding the Court's judicial review, namely rule of law, institutional balance, effectiveness and cooperation and administrative efficacy.⁹² The ECJ's level of scrutiny was also mentioned in the context of cases involving the exercise of wide discretion, under Community acts the Court applied a limited Standard of review.⁹³

The ECJ was also more equivocal as to the standard of judicial review to be applied with regard to certain areas of the Union's competence. It clarified, for instance, that "[t]he Community legislature has a wide discretion where the common agricultural policy is concerned, corresponding to the political responsibilities given to it by Articles 34 EC to 37 EC. Consequently, judicial review by the Community Court must be limited to verifying that the measure in question is not vitiated by any manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of its discretion"⁹⁴ This applied not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts. With regard to the principle of judicial review, the ECJ explained that "bearing in mind the wide discretion enjoyed by the Community legislature where the common agricultural policy is concerned, the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue"⁹⁵. Thus, "what must be ascertained is therefore not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate"⁹⁶. It should be noted, however, that the ECJ was much less explicit with regard to the standard of review of State discretion, even when it found that the level of harmonization was low and the discretion granted expansive.

In addition, the level of scrutiny of State discretion by the ECJ varies in accordance to the type of proceedings before the ECJ. As part of the preliminary reference proceedings, the evaluation of State discretion was often left to the domestic courts. Traditionally, domestic courts have been granted the task of evaluating the proportionality of measures taken by the Member States. In these instances, the ECJ simply mentioned that the legislation is not precluded and that it is for the domestic courts to decide whether it meets the proportionality test. On an occasional basis, the ECJ also applied on its own initiative the proportionality test and did not mention the domestic courts at all. In some cases, it then found that legislation such as the one in the proceedings was not disproportional and was not precluded. The application of the test of necessity, proportionality or legitimate aim remains at times very superficial and brief. The ECJ rarely engaged in a fully-fledged proportionality analysis in this context. Infringement proceedings resemble to the ECtHR's evaluation of the State margin of appreciation and sometimes include a more extensive application of the principle of proportionality. The level of scrutiny appears at times to have been more restrictive in these cases, as the principles were applied more stringently and the reasoning was less opaque.

4.3.2.2. Teleological Interpretation

From its very inception, the ECJ has used teleological interpretation to set up the foundations of EU law. It has always had an important role in the development of EU legislation and the EU's evolution. The ECJ seldom tries to establish the subjective intention of the legislator of the text.⁹⁷ The preparatory works of the Treaties were not published, and only some national material, Commission proposals as well as opinions of the European Parliament and the Economic and Social Committee are available, but not often considered by the Court. The intention of the authors may be less relevant, as by the time an agreement on a legal instrument is reached, there may be no longer any common

⁹² Craig, Paul, *EU Administrative Law*, Oxford University Press, Oxford/New York, 2006, p. 270 et seq.

⁹³ Case C-310/04 *Spain v Council* [2006] ECR I-07285, paras. 96 and 98.

⁹⁴ Case C-189/01 *Jippes and Others* [2001] ECR I-5689, para. 80.

⁹⁵ *Ibid.*, para. 82.

⁹⁶ *Ibid.*, para. 83.

⁹⁷ Hartley, Trevor, *The Foundations of European Union Law*, Oxford University Press, 2010, p. 71.

intention but only a compromise agreement on the words that should be used.⁹⁸ Further, the Treaty provisions are phrased in very general terms, and leave the Court an important manoeuvre in the interpretation process. The ECJ then interprets the texts on the basis of the objectives that it thinks that the EU should fulfill. Through its teleological interpretation, the ECJ mainly tries to strengthen the EU, to increase the scope and effectiveness of EU law and to enlarge the powers of the EU Institutions.⁹⁹ Thus, the Court tries to further European integration.

The ECJ's use of policy and strategy as part of its legal reasoning can nonetheless become problematic. In some cases, the ECJ favours a teleological approach even when its application contradicts the clear and unambiguous literal meaning of plainly expressed words. The ECJ has in the past circumvented the intention of the legislator under the cover of interpreting EU law. This approach becomes questionable when it attempts to further EU aims at all costs and to the detriment of basic legal principles. The Court's proper function may then be brought into question. While the Court's role is important for the advancement of European integration, it remains nonetheless fundamental for the Court to fulfill the expectations of its founders.¹⁰⁰

4.3.2.3. General and Area-Specific Principles

As part of its case law, the ECJ often relies on principles to justify or to support its reasoning. A review of the case law demonstrates that in specific areas, where directives and regulations have proliferated, the ECJ refers to *area-specific principles*. In situations where rules are less harmonised or less detailed, the ECJ refers more to *general principles*, such as subsidiarity, proportionality, legal certainty or legitimate expectations. These principles are less referred to when the Court faces a highly regulated area or very detailed legal provisions leaving less space for its judicial discretion. As the State discretion increases in the *ex ante* phase, it appears that there is a corresponding tendency in the Court's use of *general principles* in addition to the *area-specific* principles. When a legal instrument leaves a substantial discretion to Member States, it also leaves more room for manoeuvre to the ECJ in assessing it. Benefitting from greater judicial discretion and less legislative constraints, the ECJ may engage more actively with *general* and *area-specific* principles to structure its reasoning. These principles thus allow the Court to circumscribe and to define further State discretion granted in less harmonised areas of EU law.

While the principle of proportionality has been frequently used by the ECJ in its case law, doubts have been expressed as to whether the principle of subsidiarity was justiciable.¹⁰¹ Due to the imprecision of the principle's meaning and the difficulty of making an objective examination as to the best level of national action, it was argued that it was highly unlikely that the principle could be meaningfully applied to stop expansionist exercises of power.¹⁰² In spite of these views, it has also been demonstrated in academic literature that the principle of subsidiarity is to a limited extent justiciable.¹⁰³ Further, the ECJ has supplied clarifications and has clearly relied on the principle of subsidiarity as part of its reasoning.¹⁰⁴ In some cases, the control on subsidiarity appears however to

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid, p. 76.

¹⁰¹ Bermann, George A., "Taking Subsidiarity Seriously: Federalism in the European Community and the United States", 94 *Columbia Law Review* 33, 395 (1994); Emiliou, Nicholas, "Subsidiarity: An Effective Barrier Against 'The Enterprises of Ambition'", 17 *European Law Review* 383, 402 (1992).

¹⁰² Marquardt, Paul D., "Subsidiarity and Sovereignty in the European Union", 18 (2) *Fordham International Law Journal* 616, 630 (1994).

¹⁰³ Toth, Akos G., "Is Subsidiarity Justiciable?", 19 *European Law Review* 269 (1994).

¹⁰⁴ For further information, see Wyatt, Derrick, "Subsidiarity and Judicial Review" in O'Keefe, David/ Andenæs, Mads T., (eds.), *Judicial Review in European Union Law*, Vol. II, *Liber Amicorum* in the honour of Lord Slynn of Hadley, Kluwer Law International, 2000, p. 505; Schütze, Robert, *From Dual to Cooperative Federalism, The Changing Structure of European Law*, Oxford University Press, 2010, p. 253; Estella, Antonio, *The EU Principle of Subsidiarity and Its Critique*, Oxford University Press, 2002, p. 137.

have been exploitable just in case of manifest error or misuse of power.¹⁰⁵ Further, pursuant to Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality, the ECJ has jurisdiction in “actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 TFEU by Member States or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof”. The Committee of the Regions may also bring such actions against legislative acts where the TFEU provides that it be consulted. Pursuant to Article 9 of the Protocol, the Commission submits a report on the application of Article 5 of the Treaty on European Union each year to the European Council, the European Parliament, the Council and national Parliaments.¹⁰⁶ These reports include a section where the Commission analyses the use of the principle made by the ECJ. In light of the provisions of the Protocol on the application of the principles on subsidiarity and the case law, there is thus a clear role to be played by the ECJ in the context of the application of the subsidiarity principles and each year there are several cases. The problem remains, however, that the use of subsidiarity is relatively benign and even less coherent in comparison to the use of the notion of discretion. While the notion of discretion does not benefit from the same textual acknowledgment in legislative provisions as the principles of subsidiarity and proportionality, it is clearly applied in practice and it deserves to be paid more attention.

4.3.2.4. Empowerment and Allocation of Competences

As a strategic actor, the ECJ tries to strengthen the Union and to increase the effectiveness of EU law. Brought to consider conflicting interests, the ECJ must strike the right balance in order to further the European integration process. In many cases, the ECJ effectively ends up distributing competences among the relevant actors. A review of the case law reveals that, in situations where there are problems of implementation of EU law, the Court interprets the requirements of EU law restrictively in order to limit State discretion and to empower the Commission in the enforcement process. Further, as the role of private parties in the enforcement process of EU law increased and the limitations of the Commission become more apparent, the ECJ provided them with enforceable rights and reinforced the legal framework through which they can raise EU law complaints, thereby putting greater emphasis on the empowering domestic courts rather than the Commission. The ECJ is responsive to the political context and the needs of the EU. Through its case law, the Court effectively allocates competences among the relevant actors and empowers those actors who can strengthen and render EU law more effective.

5. Types of State Discretion

Under EU law, there is no rigid distinction between the various types of discretion granted to States as there may be in the domestic legal systems. The specificity of EU law renders it difficult to introduce additional conceptual distinctions. Such an exercise would nonetheless be very helpful in understanding how State discretion functions at the EU level. Some academic attempts have been made to distinguish the various types of discretion at the EU Institutional level. Together with the domestic and regional doctrines of discretion described above, these attempts help to clarify the conceptual distinctions that should be introduced as part of EU State discretion. State discretion is a

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For some prominent cases, see Case 84/94 *United Kingdom v. Council (Working Time Directive)* [1996] ECR I-05755; Case 233/94 *Germany v. Parliament and Council (Deposit Guarantee Scheme)* [1996] ECR I-02405.

¹⁰⁵ Case 84/94 *United Kingdom v. Council (Working Time Directive)*, *ibid*; Case 233/94, *Germany v. Parliament and Council (Deposit Guarantee Scheme)*, *ibid*.

¹⁰⁶ See the website of the European Commission, Better Regulation, http://ec.europa.eu/governance/better_regulation/reports_en.htm (last visited 14 September 2011).

highly fragmented concept due to the specific nature of the diverse policy areas and regulations. There are nonetheless certain cross-cutting trends which appear in most areas and which deserve further attention. For the purposes of this study, State discretion is defined broadly as the margin of manoeuvre left to Member States once EU competences and discretion have been defined, delegated, interpreted and adjudicated. This broad definition captures at best the myriad of meanings which the ECJ attributes to this notion in the various areas of the EU's competence. State discretion can then be significantly down within the specific areas chosen for this research. Discretion must be understood as an indeterminate process which is limited in the prospective and retroactive phases. In addition, discretion is a functional concept in that it plays a specific purpose in each given regime (for instance, furthering European integration or supporting European pluralism). This purpose has to be established on a contextual basis by reconstructing the case law and legislation on an area-specific basis. Further, based on the German legal doctrine, a cross-cutting distinction needs to be introduced between the margin of appreciation and the margin of discretion.

5.1. The Difference between the Margins of Discretion and Appreciation

The margins of discretion and appreciation are difficult to distinguish. While the ECJ appears to use these interchangeably in its case law, there is nonetheless a distinction which should be described in order to better understand the functioning of the EU and the determination of State discretion. The German theory of indeterminate legal concepts (*unbestimmte Rechtsbegriffe*) clearly distinguishes between the margin of appreciation (*Beurteilungsspielraum*) derived from an indeterminate legal concept, and discretionary power (*Ermessens-spielraum*). Discretionary power and the margin of appreciation do not refer to the same operation. While the indeterminate legal notion implies a judgment or appreciation, discretionary power is the manifestation of a choice. As part of this study, the margin of appreciation is presumed to involve a judgment and to imply a margin of interpretation; it includes the interpretation of indeterminate concepts, interpretation of complex factual information and enforcement of EU law. The margin of discretion refers to a liberty of action and to the exercise of the will; it includes, for instance, the margins of designation and implementation.

Under EU law, there is an additional difference between the margin of discretion and the margin of appreciation in terms of the role played by the ECJ. With regard to the State margin of discretion, the ECJ is most often in a context where it has to control State discretion and to verify whether EU law has been rightly implemented or applied. Legal instruments often provide detailed requirements and different options for implementation which have to be controlled by the ECJ. In this context, the Court itself has more legitimacy and judicial discretion to constrain the freedom of action of Member States. With regard to the margin of appreciation, the role of the ECJ is more limited as EU law grants Member States an important freedom under EU law to interpret its requirements in the application process. The role of the ECJ is less evident in this context and often marked by a narrower judicial discretion. This type of margin of appreciation often appears in the context of interpretation of key concepts or application of derogation clauses. The State margin of appreciation resembles more administrative or institutional discretion.

The CFI appears to have recognised the distinction between State margin of appreciation and interpretation in an isolated judgment, namely in the *BP Chemical* case¹⁰⁷. The dispute related to Article 8 (2) d) of Directive 92/81/CEE. The Commission decided that the aid granted by France on the basis of this instrument was compatible with the common market. The Tribunal did not follow this decision and decided to annul it. The resolution of the dispute hinged on the meaning of the expression "pilot projects for the technological development of more environmentally-friendly products". It was found that "[i]t must next be pointed out that the margin of discretion which the Commission lawfully intends leaving to the Member States in applying the concept of pilot projects for the technological development of more environmentally-friendly products referred to in the abovementioned Article

¹⁰⁷ Case T-184/97 *BP Chemicals Ltd v Commission of the European Communities* [2000] ECR II-03145.

8(2) of Directive 92/81 must be distinguished from the margin of discretion conferred on the Commission by Article 93 of the Treaty in order to determine to what extent State aid is compatible with the common market within the meaning of Article 92 of the Treaty. Whereas the power conferred on the Commission by Article 93 of the Treaty presupposes that that institution will undertake discretionary appraisals of complex economic and social situations, of which judicial review must be of a limited nature, any appraisal of an application of the provision of Directive 92/81 at issue here must, in contrast, be guided by a plausible interpretation of the legislative concepts of a vague and indeterminate character used in it, an appraisal which, in the last resort, is a matter for the Community judicature"¹⁰⁸. Although the Court used the notion margin of discretion, it substantively differentiated both terms; there was a difference between the discretion of the Commission to decide on the compatibility of State aid and the interpretation of an indeterminate legal notion.

Such a formulation does not occur very often in the case law of the ECJ. There are nonetheless some instances where judges recognise that indeterminate legal concepts relate to interpretation rather than to discretion.¹⁰⁹ Judges have taken the case from the perspective of interpretation which did not offer a discretionary choice and "is bound to be significantly reduced as soon as there is a body of precedents enabling the criteria used to be identified and systematically categorised and thus to be known in advance"¹¹⁰. This distinction appears to be simple in principle, however EU realities as well as the jurisprudence of the ECJ are much more convoluted and sometimes do not allow to make a clear distinction between both.

There is an additional difficulty where mixed legal provisions are at stake in the ECJ's case law.¹¹¹ In this context, a mixed provision is an article providing the legal basis for actions and involving both a margin of discretion and a margin of appreciation. Such a provision could for instance involve an indeterminate legal concept and a choice between several actions. For instance, if a provision indicates that in special circumstances a certain course of action must be taken, the competent authority and possibly the ECJ must first determine what special circumstances are and which course of action is appropriate. This process involves two different operations and occurs quite frequently in the case law of the ECJ. In cases involving indeterminate notions, judges may apply a lower standard of review, wanting to leave more margin of manoeuvre to the competent entity and this may further complicate the distinction between both terms. An additional obstacle lies in the fact that it may be difficult to differentiate conceptually between a margin of appreciation and discretion, as some discretionary actions involve inevitably a certain amount of judgment. The distinction therefore sometimes may appear artificial. Thus, in situations where a certain action appears to belong to both categories, the current study will mention that it is a hybrid action.

5.2. Margins of Appreciation

5.2.1. Interpretation of Indeterminate Key Concepts

The ECJ is often brought to consider indeterminate key concepts in disputes between Member States and EU Institutions contesting their meaning. The room for manoeuvre left to Member States in this context is often limited as interpretation guidelines are often provided by EU institutions. Member States sometimes contest this interpretation or ask the ECJ for further clarification. In these cases, the ECJ has played an important role in further specifying their meaning by relying on teleological interpretation. While this is clearly the case in preliminary reference proceedings, it has also often occurred in infringement proceedings. The Court's predisposition towards interpreting these concepts

¹⁰⁸ Ibid., para. 56.

¹⁰⁹ Bouvresse, A., note 73 supra, p. 60

¹¹⁰ Joined Cases C-9/97 and C-118/97 *Raija-Liisa Jokela and Laura Pitkäranta* [1998] ECR I-06267.

¹¹¹ Bouvresse, A., note 73 supra, p. 64–67.

was conditioned by numerous factors. The level of harmonisation, the intention of the legislator and the existence of interpretive guidance has restrained to an important extent the ECJ's room for manoeuvre. Paradoxically, this was also the case when the level of harmonisation was low, the intention of the legislator unclear and the interpretative guidance lacking; in these instances, the ECJ also felt that it was an indication that a margin of appreciation should be left to the competent authority and that it was not in a position to offer guidance. In this case, the relevant variable having a bearing on its reasoning may have been the area of competence, the interests at stake or the political issues surrounding a given dispute. It remains nonetheless that there is an important strand in the ECJ's case law where the Court takes an active part in the definition of key indeterminate concepts.

5.2.2. Interpretation of Complex Factual Information

In cases involving complex factual or scientific evidence, the ECJ practices self-restraint and grants a wide margin of appreciation to the domestic courts and authorities. Under the preliminary reference procedure, the ECJ usually, but not always, leaves the domestic courts the task of applying its interpretation of EU law to the facts of the case. The exact facts of the case were evaluated in domestic proceedings and the ECJ does not have the required information to make an accurate decision in these situations. There are also cases involving complex factual assessments, where the ECJ is more likely to abstain from intruding into the determinations made by the relevant EU Institution or Member State and grants them an extensive margin of appreciation. This is, for instance, the case in competition proceedings where facts can be difficult and multifaceted and can give rise to different interpretations on behalf of the parties involved. It then also becomes possible for either party to commit an error in the evaluation of the factual situation or not to take an aspect into account. In certain situations, Member States have to weigh opposing social and economic interests and take into account the specific situation in a given country. The ECJ then leaves a margin of appreciation to the relevant domestic authority. The rationale behind this approach is that the body which best knows the situation and is more competent should decide the case.

5.3. Margins of Discretion

5.3.1. Margin of Implementation/Transposition

The issue of implementation concerns mainly directives which are not directly applicable and not immediately part of the domestic legal order as regulations. By distinguishing between the result to be achieved and the choice and form and methods, Article 288 TFEU indicates what is within the competence of the Community and what remains within the competence of the Member States. This Article also mentions that the choice is limited to the kind of measures to be taken; their content is entirely determined by the directive at issue. The margin left to the Member States does not therefore involve interpretation or appreciation in terms of policymaking, but rather a choice between methods, and therefore fits within the category of "margin of discretion". In this manner, the margin of implementation respects as far as possible the sovereignty and law-making power of the Member States.¹¹² The freedom to choose form and methods gives the Member States some latitude and enables them to take into account (legal or other) peculiarities and economic, social, and other circumstances when implementing a directive.¹¹³ EU law is in principle not concerned with the question of which authorities enact the necessary measures and it does not interfere with the internal structure of the Member States. The Directive was designed as a relatively 'mild' instrument of EU intervention, leaving the Member States considerable leeway with respect to the measures taken for implementation. According to the Court, the implementation of a directive does not in fact necessarily require that its provisions be transposed literally. Neither is there a requirement that the implementing

¹¹² Prechal, S., *supra* 85 note, p. 73.

¹¹³ *Ibid.*

measures must follow the structure of the directive. However, the content of the implementing measures must be clear and precise, particularly when the directive is intended to create rights and duties for individuals.¹¹⁴ In addition, the Member States discretion is often limited by a specific result to attain or as to the choice of procedure and instrument of the transposition. The case law of the ECJ concerning the incorrect transposition of directives is also very extensive and further limits the discretionary powers granted to States in this context.

As the primary actors responsible for the enforcement of EU law, Member States benefit from an important institutional, procedural and remedial autonomy in this task. This autonomy leaves Member States certain discretionary powers which have to be seen from the perspective of EU integration. The existence and scope of their discretion is conditioned by the requirements of effectiveness and uniformity of EU law. Article 4 (3) TEU further stipulates that “Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives”. Also, the principle of supremacy and direct effect of EU law limits State discretion in this field by requiring that EU law be uniformly applied. In this context, Member States do not have a choice as to the content or objective and their discretion is limited to the more technical tasks of enforcing provisions which have already been predetermined at the EU level. Member States intervene at the end of the normative chain when the main substantive questions have already been resolved by higher norms. The enforcement of these norms requires States to put into place the appropriate infrastructure and personnel to ensure the administration of EU law. The enforcement of EU legislation therefore leaves Member States a limited margin of appreciation. The competence to enforce these norms is usually included explicitly in a provision or it can be derived from the obligation of loyal cooperation.

Member States also have the obligation to “to nullify the unlawful consequences of a breach of Community law”¹¹⁵. They therefore have the obligation to act, but they still have a choice as to the content of the sanction and as to the type of sanction. The ECJ explained that “whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive”¹¹⁶. Member States discretion in this context is substantially limited by the principles of equivalence, efficiency and proportionality. The respective Member State will have to apply the same sanction that it applies to similar violations in its domestic law and it will have to ensure that these sanctions are proportional to the violation committed. The ECJ also left Member States the choice as to the type of sanction, either criminal or administrative.¹¹⁷ As a result, the discretionary powers of Member States in this context appear to be increasingly reduced.

5.3.2. Margin of Designation

Under some EU legal instruments, the method of designating serves as a cost efficient manner with which to assign EU measures to specific territories, areas or products. Due to their specific knowledge of the situation in their countries, Member States are given the choice as to the designation. This method has been used, for instance, under numerous EU environmental law directives. An important amount of the EU environmental case law concerns infringement proceedings that were brought by the European Commission against Member States for designating too few or too small areas under the

¹¹⁴ Ibid., p. 77.

¹¹⁵ Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357.

¹¹⁶ Case C-68/88 *Commission of the European Communities v Hellenic Republic* [1989] ECR 02965

¹¹⁷ Case C-173/03 *Commission of the European Communities v Council of the European Union* [2005] ECR I-07879.

directives. Member States had to designate areas under the Wild Birds Directive,¹¹⁸ the Habitats Directive,¹¹⁹ the Nitrates Directive¹²⁰ and the Bathing Water Directive¹²¹.

5.4. Judicial Discretion

The question of determining State discretion also ultimately boils down to the margin of manoeuvre that the ECJ is attributed or attributes itself in this task. Judicial discretion has been defined as “the power given to the judicial authority to choose between two or more alternative solutions, when each of the alternatives is lawful”¹²². Judges are often called to exercise discretion when they have exhausted the interpretative rules of the system and still are confronted with several lawful solutions since the interpretative rules cannot lead them to one prevailing norm and cannot help them in making a choice between open alternatives. The existence of discretion presupposes that there are two alternatives; if only one is involved, then the Court is only performing a duty in choosing the lawful option and discarding the unlawful one.¹²³ The discretion also varies in accordance with the type of cases that come before the ECJ. For instance, clear cases where the application of the relevant law is relatively unproblematic leave judges little doubt and discretion. In hard cases, however, judges are still faced after a process of interpretation with a number of lawful possibilities; this leaves them an important discretion.¹²⁴ The issue of judicial discretion is quite important for the ECJ which helped in setting up the legal foundations of the EU legal order and in propelling European integration.

The distinction between appreciation and discretion outlined above is also reflected in the judges’ reasoning. By considering decisions made by States, the ECJ also has to evaluate to some extent the margin of discretion or interpretation which they used in the process. This has a direct bearing on the substance of their reasoning and the distinction is reflected in the very subject matter that the ECJ has to evaluate. Judicial discretion involves three different sets of activities: it requires the Court to determine a set of facts to resolve the dispute; to determine the area of application of a given norm or to establish the norm itself by choosing among the normative possibilities.¹²⁵ The first and second types of discretion mentioned are less numerous, as the Court deals in the majority of cases with preliminary rulings concerning interpretation and validity of law and not the determination of the facts or the application of a norm to a given set of facts which are mostly the task of domestic courts. In more rare cases, the ECJ could also be found to be exercising a “margin of discretion” when two clear possibilities, for instance in terms of policy in hard cases, are involved and a course of action has to be chosen. These appear nonetheless to be rare cases, and the Court may then leave the matter to EU Institutions or Member States.

6. A Functional Analysis

The current study does not aim to provide a descriptive or literal understanding of the Court’s use of the term discretion. It essentially focuses on the function that State discretion currently plays in four specific areas. A trans-European concept of State discretion is difficult to put into place in the specific EU context. When possible, the study attempts to extract broader conclusions as to the purpose that State discretion plays in certain contexts, but it proceeds on the premise that a fragmented concept of

¹¹⁸ Directive 79/409/EEC, OJ L 103, 25.4.1979, p. 1.

¹¹⁹ Directive 1992/92/43/EEC, OJ L 206, 22.7.1992, p. 7.

¹²⁰ Directive 91/676/EEC, OJ L 375, 31.12.1991, p. 1

¹²¹ Directive 76/160/EEC, OJ L 31, 5.2.1976, p. 1.

¹²² Barak, Aharon, *Judicial Discretion*, Yale University Press, 1989, p. 7; Canor, Iris, *The Limits of Judicial Discretion in the European Court of Justice*, *Schriften des Europa-Instituts der Universitats des Saarlandes – Rechtswissenschaft*, Band 22, Nomos Verlagsgesellschaft, 1998, p. 19.

¹²³ *Ibid.*, p. 20.

¹²⁴ *Ibid.*, pp. 20–21.

¹²⁵ *Ibid.*, p. 21.

State discretion will probably remain a dominant feature of European administrative law. The study attempts to evaluate the purpose that discretion plays in the ECJ allocation of competences among the EU institutions and Member States. As part of this functional analysis, the author attempts to identify areas where the concept can be used in a more coherent and uniform manner in order to optimise the efficiency of EU law and to improve State/EU relations.

The initial phase of the research for this study began with statistical analysis and case mapping spanned over the last five years of the ECJ's case law; this analysis revealed that there were some clear trends which would require further analysis. The initial research question consisted in identifying: (1) the areas in which the Court use the term discretion; (2) the actors involved; (3) the relevant specific variables; and (4) the areas where the Court grants Member States or other competent authorities discretion. The variables considered in this research include the date of the case, the type of instrument, the type of discretion, the type of procedure, the area and type of competence, the level of harmonisation, the EU institution involved, the Member State involved, the language used, the principles mentioned, the interpretation methods relied on and the tests applied.

The concept of discretion mostly appeared in cases concerning environment, taxation, agriculture, free movement of goods, free movement of persons and human rights. The next step consisted in evaluating the areas where the Court granted Member States discretion and the reasons which prompted this decision. Rather surprisingly, the ECJ granted States discretion in tax and environment cases and gave discretion to the domestic courts in free movement of goods, competition and agriculture cases. It appears that the type of competence, the level of harmonisation, the type of instrument used (Directive or Treaty) as well as the sensitivity of the question at stake may have had a bearing on the level of discretion granted.

The second phase of the research was focused on four main areas, namely environmental law, agriculture, free movement of goods and human rights. A chapter was dedicated to the study of each area. The research project covers the period between 2000 and 2010, with a specific emphasis on the post-enlargement period. Over the last ten years, it appears that the ECJ has increased overall the discretion available to Member States, but this trend could be gradually changing in the post-enlargement phase. The cases where the ECJ gave States discretion to decide represented about 30% of the case law analysed. This trend should be compared with the recent practice of the ECtHR, which also seems to indicate that the Strasbourg Court has reduced State discretion over the last five years.¹²⁶

It is crucial to identify areas where the use of discretion may be appropriate or inappropriate. It has been argued that the concept of "margin of appreciation" (not distinguished in this context from the margin of discretion) has gained much popularity among international courts and tribunals, but that its use should be confined to certain contexts. According to Shany, the notion is suitable "only for certain types of international law norms, which are intrinsically uncertain or consciously sacrifice legal certainty for pluralism (standard-type norms, discretionary norms and result-oriented norms). It should not be used to obfuscate areas of the law where legal precision has been or is in the process of being attained"¹²⁷. The common denominator of these norms is that their application across diverse situations involving different state actors can never attain significant uniformity since they are either inevitably dependent on circumstance or purposefully non-uniform. As a result, the practice of States applying these norms is bound to be inconsistent. Although this finding was made in the context of the international legal order, it is also applicable to some extent to the EU context where flexible result-oriented directives are preferred in a number of key areas.

The concept of State discretion plays a different role in the various areas of EU law. It is interesting to note a paradoxical situation: in some areas where the level of harmonisation is high, Member States may still have extensive discretionary powers in the enforcement of EU law. Further, in areas where

¹²⁶ Pollicino, Oreste, "Strasbourg and Luxembourg at the Forefront of the Enlargement of Europe: An Antithetical Judicial Approach?" in Fontanelli, Filippo/Martinico, Giuseppe, *The ECJ under Siege New Constitutional Challenges*, Icfai, University Press, 2009, p. 109.

¹²⁷ Shany, Yuval, "Toward a General Margin of Appreciation in International Law", 16 (5) *European Journal of International Law* 907, 939.

the level of harmonisation is lower, Community institutions may adopt more precise legislation and leave less discretionary powers to States.¹²⁸ The first scenario applies to the field of agriculture, which is marked by a high harmonisation level, and leaves States wide discretionary powers for the enforcement of this policy. The Common Agriculture Policy evolved in a steady manner and States have had the time to assimilate it. The risk of competition distortions and incoherent application of EU law had thus been minimised. Gradually, the application of EU law in this field became decentralised.

The situation is quite different in the field of EU environmental law. The Community legislator intervened by means of directives, thereby leaving an important margin of implementation to Member States. The efficiency of EU environmental law has been affected by the lack of transposition of directives by States into domestic law. Community institutions thus attempted to limit State discretionary powers in the application of EU environmental law. The ECJ interpreted EU environmental law more restrictively and found increasingly more that Member States violated EU law. It attempted to attribute Community wide meaning to notions of EU environmental law in order to establish a comprehensive environmental policy. EU Institutions issued increasingly more precise guidelines to Member States and reduced their margin of manoeuvre. As is apparent from the field of agriculture and environment, the notion of State discretion is very much context-specific and has to be analysed together with other factors within a certain area. Such an analysis provides a more accurate picture of the dynamics and the function that State discretion may play in different areas of EU law.

In addition to an area-specific function, the notion of discretion could also have a more general purpose in the evolution of a system. Although it is difficult to generalise and to establish an EU-wide concept of discretion, the notion has played a wider purpose in time as part of the various periods of the EU's evolution. Here, a comparison with the ECHR system should be made: the notion of margin of appreciation appears to have been a fundamental concept in the initial development of the ECtHR. It has essentially served in establishing its institutional credibility among the Member States. The Strasbourg Court has initially granted an important "margin of appreciation" to Member States and has demonstrated its deference in order to gain their respect. Indeed, the proper functioning of the ECtHR depends to a great extent on the acceptance of the Member States. In the later phases of the ECtHR's evolution, the notion of "margin of appreciation" was applied more stringently. As the objectives of the EU legal system are different from those of the ECHR, the concept of "discretion" may play a different role in the case law of the ECJ. As part of the current study, it is thus also important to determine the purpose that the notion of discretion currently fulfils in the post-Lisbon and the post-enlargement phase of the EU.

The functional aspect of discretion has to be seen in the context of two different judicial paradigms or predispositions of the Court to a case. Each judicial paradigm constitutes an extreme of the adjudication spectrum. At one end of the spectrum, the Court adjudicates in an activist manner in order to further EU goals and EU integration. At the other end of the spectrum, the Court exercises self-restraint and attempts to further pluralism and State interests. The Court rarely relies on only one of these paradigms, but its decisions tend to lean to one or the other end of the spectrum. In this context, State discretion can be used as a variable to understand the Court's predisposition in a case. The ECJ can thus rely on the notion of State discretion as a tool to further EU goals and constrain Member States, or to constrain the EU and further Member State goals.

7. The Inadequacy of Subsidiarity

A central stance taken in legal literature underlines that it is difficult to operationalise and scrutinise subsidiarity. Although when it became part of the EU's framework, subsidiarity was perceived as a protection against the overwhelming EU legislation, since Maastricht the EU has expanded its competence into new areas. A handful of critics have expressed doubts as to whether this principle is adequate and sufficient for the protection of national powers and whether it provides understanding on how the powers are balanced in practice between these two legal worlds. Although still a trendy catch-

¹²⁸ Bouvresse, A., note 73 *supra*, pp. 175–176.

all concept used and promoted by the European institutions, subsidiarity may no longer be an adequate tool to gauge the exercise of powers in the EU.¹²⁹ Despite the innovations introduced by the Lisbon Treaty and attempts to clarify the concept of subsidiarity further, its use in practice and its appearance in the case law of the ECJ remain infrequent. More far-reaching initiatives may be necessary in order to reassure Member States against the continuing arrogation of power on behalf of the EU. A more promising innovation is the codification of the principle of sincere cooperation in Article 4 (3) TEU. This principle may provide the ECJ with an opportunity to move beyond the infrequent and restrictive use of subsidiarity and to become more respectful of the States' margin of manoeuvre by taking cooperation more seriously.¹³⁰ The current study proceeds on a different basis by proposing to rely on the notion of State discretion. This notion, as defined earlier, provides a more reliable picture as to the margin of manoeuvre left to Member States under EU law. It is also a more reliable and comprehensive tool for EU Institutions to determine the States' room for manoeuvre. The principle of subsidiarity in itself does not provide sufficient guidance as to the scope and extent of latitude granted to Member States. It merely regulates the exercise of competence and does not clearly further define the margin of manoeuvre left within an area of competence. The principle of proportionality provides a more accurate picture in the context of the analysis of State discretion, as it is applied later in the process, and determines more precisely how an action should be carried out. Both principles are nonetheless only partial representations of the determination of State discretion; they are steps or constitutive elements as part of a larger phenomenon which consists of various stages and components.

8. The Need to Recognise State Discretion

Introduced into EU law through the back door of ECJ's case law, the notion of State discretion leaves one perplexed. First, the notion of State discretion remains unacknowledged in EU law in spite of the fact that it is used more frequently in practice than other EU principles establishing the relations between the EU and its Member States. Second, the notion of State discretion alters the way in which we envisage the supranational, highly integrated and increasingly more constitutionalised EU system. However, even highly integrated supranational systems need to leave space for the Member States which have created them in order to preserve a much needed equilibrium. In this sense, the emergence of the notion of State discretion may not be a paradoxical phenomenon but rather a normal development in the EU's constitutionalisation process. In the framework of an ever-increasing pluralist legal order and various legal traditions, the recognition and acknowledgement of an official doctrine of State discretion in European administrative law may provide the desired improvement in future EU and State relations.

It is no longer sufficient to view the concept of State discretion in isolated pieces, either through the lens of subsidiarity, proportionality, sincere cooperation or margin of appreciation. State discretion has a clear framework and is composed of different elements which need to be recognised on an area basis. It may not be possible to reconstruct an EU-wide principle of State discretion, as some fragmentation in this field may be inevitable. Further, the concept has to be viewed not only from a functional perspective, but also as a process which is determined at *ex ante* and *ex post* phases of EU law-making which accumulate in the ECJ's case law. These phases are made up of a complex interplay of factors and must be understood together in order to provide a more accurate understanding of the dynamics of State discretion. In the language of Davis, an optimal balance between these phases should be struck in order to render the use of the concept of State discretion more efficient and

¹²⁹ See, for instance, Constantin, Simona, "Rethinking Subsidiarity and the Balance of Powers in the EU in Light of the Lisbon Treaty and Beyond", 4 *Croatian Yearbook of European Law and Policy* 151 (2008).

¹³⁰ Martinico, Giuseppe, "Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union", Paper presented at the *Instituto de Derecho Público*, Universitat de Barcelona on 11 May 2010.

more meaningful. Finally, on grounds of conceptual economy and legal certainty, the use of State discretion in certain areas of EU law has to be streamlined and rendered more coherent.

