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APPLYING FAIRNESS TO THE EU REGULATORY MODEL. TENSIONS BETWEEN A CONSTANTLY CHANGING ADMINISTRATION AND A STILL JUDICIAL REVIEW

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1. INTRODUCTION: WHICH PLACE FOR AGENCIES?

The ever-increasing number of agencies within the legal and institutional framework of the European Union (hereinafter, EU) brings to the fore the need to reflect upon such a permeating phenomenon. Indeed, this latter is vividly changing the boundaries of the separation of powers and modifying the way the law is produced and applied.

As it is, the birth of the agency-model coincided with «the rise of the bureaucratic State», namely when the political expenditure created the conditions to have a bureaucracy within the modern State[2]. By bureaucracy, according to the Weberian approach, it is meant the apparatus that allows to bring into action the political will, so long as three conditions are satisfied. First, there must be an assignment to the agency of official duties to carry out the necessary activities. Second, the distribution of the authority must be granted under the law. And third, the fulfillment of the assigned tasks must be carried out under a certain methodology[3]. The minimum unit of the bureaucratic State is given by the bureau that performs the function of a «bureaucratic agency» in the public sector[4].

This pattern strongly arose in the United States (hereinafter, US), where the agency-model is conceived as «the fourth branch of the government[5]». In the earliest studies of the American scholarship, the mandate delegated to the agency was understood in light of the principal-agent model, pursuant to the property rights theory of the firm, as a way of dealing with the organizational risks and transaction costs within the organization of a company[6]. Notably, the principal-agent model describes a relationship where the principal engages the agent «[…] to perform some service on their behalf which involves delegating some decision-

[2] J.Q. WILSON, *The Rise of the Bureaucratic State*, in *Pub. Int.*, Fall, 1975, p. 79.

[3] M. WEBER, *Economy and Society*, Berkley, California University Press, 1978, p. 956.

[4] M. WEBER, *op. cit.*, p. 956.

[5] B. ACKERMAN, *The New Separation of Powers*, in *Harv. L. Rev.*, vol. 113, n. 3, 2000, p. 691.

[6] T.M. MOE, *The New Economics of Organization*, in *Amer. Jour. Pol. Sci.*, vol. 28, n. 4, 1984, p. 756.

making authority to the agent» themself[7]. With the adaptation of this model to the «political property rights», namely, «[t]he right to exercise public authority in a given policy area[8]», the principal-agent dynamic was soon endorsed in the organization of public governance[9].

Yet, at the same time, public governance shall consider the political regime where it is enacted. In a parliamentary democracy, the delegation-model may cause distress to the separation of powers[10]. Indeed, agencies are «non-majoritarian institutions», meaning that they do not receive legitimacy through the democratic voting systems, but they rather exercise a «specialized public authority» granted under the principal-agent model[11].

Non-majoritarian agents are not necessarily at odds with the democratic system. For instance, the Court of Justice of the European Union (hereinafter, CJEU), a non-majoritarian agent lacking democratic legitimacy, has been playing a pivotal role within the European integration[12]. However, a distinction must be drawn here. Indeed, whilst agencies are considered as sheer agents under the principal-agent model, "constitutional" courts, such as the CJEU and the Supreme Court of the United States (hereinafter, SCOTUS), are more than agents. Accordingly, pursuant to a dual logic of delegation of powers, there is a double configuration of non-majoritarian agents. On the one hand, when the delegated authority has a fiduciary duty to carry out the mandate accorded by the legislature, that authority is no more

[7] M.C. JENSEN-W.H. MECKLING, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, in *Journ. Fin. Eco.*, vol. 3, n. 4, 1976, p. 308.

[8] G. MAJONE, *Two Logics of Delegation. Agency and Fiduciary Relations in EU Governance*, in *Eur. Un. Pol.*, vol. 2, n. 1, 2001, p. 106.

[9] M. THATCHER-A. STONE SWEET, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, in *W. Eur. Pol.*, vol. 25, n. 1, 2011, p. 2.

[10] M. RAMAJOLI, *Attività regolatoria e norme attributive dei poteri: alcune considerazioni*, in *Riv. reg. merc.*, fasc. 1, 2022, pp. 28-30.

[11] M. THATCHER-A. STONE SWEET, *op. cit.*, p. 2.

[12] T. TRIDIMAS, *Knocking on Heaven's Door: Fragmentation, Efficiency, and Defiance in the Preliminary Reference Procedure*, in *CMLRev.*, vol. 40, n. 1, 2003, p. 9.

than an agent[13]. On the other hand, when the delegated authority can also exercise the power to control its delegated authority, then that agent will be a trustee[14]. As a result, a constitutional court, such as SCOTUS or the CJEU[15], is *entrusted* with the task of assuring judicial review in the constitutional rule of law framework. Its public *trust*, under a granted «permissive zone of discretion», empowers it «[…] to enforce […] constitutional law against any contrary public act, including acts of the legislature»[16].

Against this background, one may argue, nonetheless, that the principal-agent relation, when applied to agencies, is problematic. This is so because it conflates in the hands of just one authority the three powers of the State, traditionally deferred to three different bodies within the checks and balances mechanism under US law[17], or within the institutional balance under EU law[18]. Therefore, the model was soon found guilty of a «democratic deficit[19]». Weber already clearly shed a light on this contention. Indeed, officials within the agency-model are not elected, but rather appointed for their technical expertise[20]. Thus, their time-horizon is not contingent upon the political mandate voted by the time of the elections, as they will perform a life-time office, serving governments of different political beliefs throughout their career[21]. This is even more important, for instance, in the case of regulated

[13] G. MAJONE, *op. cit.*, p. 113.

[14] G. MAJONE, *op. cit.*, pp. 113-114.

[15] On the CJEU acting as a constitutional court, see also, *ex multis*, T. TRIDIMAS, *The Court of Justice of the European Union* (T. TRIDIMAS-R. SCHÜTZE eds.), *Oxford Principles of European Union Law*, vol. I, *The European Legal Order*, Oxford University Press, Oxford, 2018, pp. 581-609.

[16] A. STONE SWEET-T.L. BRUNELL, *Trustee Courts and the Judicialization of International Regimes*, in *Journ. L. & Cour.*, vol. 1, n. 1, 2013, p. 65.

[17] B. ACKERMAN, *The New Separation*, cit., pp. 718, 723.

[18] M. EVERSON, *Agencies: The "Dark Hour" of the Executive?* (H.C.H. HOFMANN-A.H. TÜRK eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Cheltenham, Edward Elgar Publishing, 2009, pp. 118-120.

[19] E.S. BREMER, *The Undemocratic Roots of Agency Rulemaking*, in *Corn. Law Rev.*, vol. 108, 2022, p. 69.

[20] M. WEBER, *op. cit.*, p. 960.

[21] B. ACKERMAN, *The New Separation*, cit., p. 698.

sectors, such as energy or telecommunications, where the amortization of huge investments requires temporal stability within the regulators and cannot be left to the perpetual changing of the political will, inherent to any democratic system as such[22].

In this respect, «[t]echnical or scientific legitimacy is to serve as a substitute for the democratic legitimacy[23]». In other words, such a model may allegedly be going towards technocracy at the expense of the democratic principle. This might call for a shift from «the separation of powers conceived as a doctrine of democratic responsibility» to «the separation of powers conceived as a doctrine of functional specialization[24]», entailing more professionalism and expertise. Notably, to put it roughly, by virtue of their professionalism, agency officials «[…] are paid to decide things», pragmatically[25]. And to avoid the abuse of (arbitrary) powers, «[…] the challenge for the next century in Europe, as in America, is to construct a new doctrine of separation of powers for the bureaucratic state[26]».

This, of course, does not come to terms without tensions, as it appears in the field of regulatory law about the technical legitimacy and the alleged democratic deficit of the agencies. Indeed, regulatory law is characterized by three elements. First, there must be an objective, namely, the balancing among competing interests. Second, to attain this objective, a procedure, shaped pursuant to the principles of transparency and efficacy, must be ensured. And third, an agency – the regulatory agency – must exist to guard the regulated sector, indeed[27]. In this respect, regulatory agencies become the gatekeeper of several wholly

[22] A. DE STREEL-C. HOCEPIED, *The EU Regulation of Electronic Communications Networks and Services* (P.L. PARCU-E. BROGI eds.), *Research Handbook on EU Media Law and Policy*, Cheltenham, Edward Elgar Publishing, 2021, p. 115.

[23] M. SHAPIRO, *Trans-Atlantic: Harlow Revisited* (P. CRAIG-R. RAWLINGS eds.), *Law and Administration in Europe. Essays in Honour of Carol Harlow*, Oxford, Oxford University Press, 2003, p. 234.

[24] B. ACKERMAN, *The New Separation*, cit., p. 691.

[25] B. ACKERMAN, *The New Separation*, cit., p. 701.

[26] B. ACKERMAN, *The New Separation*, cit., p. 693.

[27] M.-A. FRISON-ROCHE, *Le droit de la régulation*, in *Dalloz*, 2001, p. 611.

regulated sectors, bringing about changes on how the law is shaped, enforced, and adjudicated[28].

Notably, the most controversial aspects arise chiefly within regulatory agencies, whereby the conflation of the three powers in one entity is made apparent. A first tension arises where the decision-making process is mostly deferred to the agencies and to their broad discretion upon adjudication[29], like it was until recently in the US legal system, where federal agencies adopt more rules than acts passed by Congress[30]. And secondly, once the rule has been passed, enforced, and adjudicated in a specific case, the second tension arises when it comes to the scope of judicial review of their administrative action. If one of the elements to grant legitimacy to the agencies is the possibility of lodging a request for judicial review in the framework of the rule of law, the question is then to what extent the judiciary can exercise such a review, especially in the multidimensional context of administrative law, such as that of the federal system of the US and of the supranational legal order of the EU.

In this regard, Section 2 focuses on the adjudicative procedure based on the principle of fairness as enshrined in US law, and whether it could be potentially applied to EU law, too. Section 3 tackles the question on the extent of the scope of judicial review both in policy and in governmental litigation. The aim is to identify that the great discretion accorded to the agencies to perform their tasks shall be counterbalanced by broader procedural guarantees, both at adjudicative and at judicial levels, to abide by the rule of law. It will be argued that this could save the agency-model in view of the separation of powers, as concluded in Section 4.

[28] According to Craig's taxonomy, regulatory agencies are just one type of agency, alongside with decision-making agencies «with the power to make individualized decisions», quasi-regulatory agencies with «strong recommendatory powers», and information and coordination agencies. See P. CRAIG, *EU Administrative Law*, III ed., Oxford, Oxford University Press, 2018, pp. 163-167.

[29] M.-A. FRISON-ROCHE, *op. cit.*, pp. 614-615.

[30] R.A. CASS, *Rulemaking Then and Now: Law Review*, in *Geor. Mas. Law Rev.*, vol. 28, n. 2, 2021, pp. 694-695.

2. DOES FAIRNESS HAVE A SAY IN THE AGENCY-MODEL?

This Section firstly analyzes the role of fairness under US law in its earlier manifestations (2.1), as well as the room it might have under EU law as a need for natural justice (2.2.), to conclude for its systematic application within the agency-model (2.3.).

2.1 The shadow of mathews v. eldridge: back to the roots of fairness

The principle of fairness in US law stems from the adjudicative function of every agency, whereby adjudication is meant to be «[…] the authoritative resolution of factual and legal disputes, involving the application of general policy to a particular party or action[31]». This is, in other words, the exercise of a quasi-judicial function, which is traditionally in the hands of courts of law.

Yet, it must be noted that SCOTUS has endorsed the creation of so-called «legislative courts» that are so distinguished from «constitutional courts[32]». Legislative courts are established by Congress within its constitutional power under art. III, US Constitution, and are usually endowed with the cognizance of matters that may be «[…] susceptible of judicial determination», but that Congress removes from the jurisdiction of constitutional courts[33]. To put it simply, legislative courts are expected to deal with disputes that «[…] arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments[34]». On the contrary, constitutional courts – and they are "constitutional" insofar as they are established by the Constitution itself – rule over private rights stemming from

[31] R.A. CASS-C.S. DIVER-J.M. BEERMANN-J. FREEMAN, *Administrative Law: Cases and Materials*, VIII ed., Boston, Aspen Publishing, 2020, p. 855.

[32] Supreme Court of the United States, 23 February 1932, 285 US 22 (1932), *Crowell v. Benson*, p. 50.

[33] Supreme Court of the United States, 23 February 1932, 285 US 22 (1932), *Crowell v. Benson*, p. 50.

[34] Supreme Court of the United States, 23 February 1932, 285 US 22 (1932), *Crowell v. Benson*, p. 50.

«[…] the liability of one individual to another under the law[35]». In this respect, agencies, upon exercising adjudication, may fall within the concept of legislative courts[36].

Certainly, to exercise such a quasi-judicial function, an agency needs the necessary tools. And this is the area where the principle of fairness becomes relevant. Chiefly, one judgment above all helps to understand the place the principle of fairness has in US law. In 1976, SCOTUS delivered the notorious *Mathews v. Eldridge* ruling[37], setting the test to be applied for the adjudication of an agency. As it usually happens, breakthroughs in the evolution of the law come forth out of daily questions. And *Mathews v. Eldridge* was no exception.

The case revolved around the withdrawal of social security benefits granted to Mr. Eldridge, whose disability had ceased to exist, according to the competent agency, in May 1972. For the agencies to be able to adjudicate upon competing interests, it was devised the enduring three-tier test that has remained steady ever since. According to this latter, three factors must be considered. First, there must be a private interest that will be affected by the official action. Second, there must be the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. And third, there must be the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail[38].

The test is not surprising as such – at least, it is not today anymore. It mandates to weigh the governmental interest *vis-à-vis* the private interest considering the affection this latter may receive by the administrative action. And yet, there is no reference *verbatim* to the

[35] Supreme Court of the United States, 23 February 1932, 285 US 22 (1932), *Crowell v. Benson*, p. 51.

[36] R.H. FALLON, JR., *Of Legislative Courts, Administrative Agencies, and Article III*, in *Harv. L. Rev.*, vol. 101, n. 5, 1988, p. 923.

[37] Supreme Court of the United States, 24 February 1976, 424 US 319 (1976), *Mathews v. Eldridge*.

[38] Supreme Court of the United States, 24 February 1976, 424 US 319 (1976), *Mathews v. Eldridge*, p. 335.

principle of fairness, at all. However, the judgment is embedded with fairness, hidden as it is in the maze of the procedure itself.

Be as it may, Justice Powell *per Curiam* unveils where fairness steps in. «The ultimate balance involves a determination as to when […] judicial-type procedures must be imposed upon administrative action to assure fairness[39]». And it could not be otherwise, since fairness can be triggered as the corrective principle to equate the aporias deriving from a thorough use of *Mathews v. Eldridge*. Indeed, the judgment provides for a decision-making rule that is to say, an algorithm[40]. Given an initial situation where there are two (or more) interests in competition, an agency shall resort to the ruling in *Mathews v. Eldridge*, taking into account the degree of affection, «the risk of an erroneous deprivation», «the probable value, if any, of additional or substitute procedural safeguards», as well as the potential «fiscal and administrative burdens», to adjudicate and thus deliver a decision. Neither more nor less. Nevertheless, such a mathematical calculus could apply under a utilitarian approach only if values were commensurable[41]. On the contrary, values within the law are mostly comparable and yet incommensurable in the sense that they cannot be measured on the basis of a unitary metric system[42]. Therefore, utilitarianism ought to pave the way to fairness. It is undeniable that the strict adherence to a decision-making rule is likely to avoid erroneous deprivations of rights[43], but this can result in forcing the *Mathews* calculus to deal with values that are hardly reducible to numerical variables. And in so doing, the *Mathews* test ends up being the sheer manifestation of a utilitarian approach[44].

[39] Supreme Court of the United States, 24 February 1976, 424 US 319 (1976), *Mathews v. Eldridge*, p. 348.

[40] G. LAWSON-K. FERGUSON-G.A. MONTERO, *Oh Lord, Please Don't Let Me Be Misunderstood: Rediscovering the* Mathews v. Eldridge *and* Penn Central Frameworks, in *No. Da. L. Rev.*, vol. 81, n. 1, 2005, p. 4.

[41] G. LAWSON-K. FERGUSON-G.A. MONTERO, *op. cit.*, p. 22.

[42] C.R. SUNSTEIN, *Incommensurability and Valuation in Law*, in *Mich. L. Rev.*, vol. 92, 1993, p. 798.

[43] Supreme Court of the United States, 30 April 1979, 441 US 418 (1979), *Addington v. Texas*, p. 425.

[44] J.L. MASHAW, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, in *Un. Chic. L. Rev.*, vol. 44, n. 1, 1976, p. 48.

Accordingly, this is where fairness stands for. But fairness is nothing but a principle. And a principle is «[…] a general proposition of law of some importance from which concrete rules derive[45]». In other words, a principle is a source of rules. Under US law, the principle of fairness, directly couched in the Constitution, precisely in the Fifth Amendment and in the Fourteenth Amendment, gives rise to the so-called Due Process Clause, imposed upon, respectively, the federal Government and the States. In this respect, under the Fifth Amendment, no one must «[…] be deprived of life, liberty, or property, without due process of law», and similarly, it is mandated in the Fourteenth[46]. In procedural (and practical) terms, the Due Process Clause mandates that the final decision is adjudicated on the basis of documentary evidence and the active participation of the parties involved, who can subsequently exercise their right to appeal *ex novo* before an independent judge in the judicial phase[47].

Yet, fairness is not mentioned here either. Rather, it is the outcome of an interpretative process. Just as the CJEU brings to light general principles of EU law, so does SCOTUS, by envisaging constitutional principles, such as fairness, which spans across different fields of law, not only administrative law, but also, for instance, family law[48] and criminal law[49].

Accordingly, it could be argued that SCOTUS has acknowledged the constitutional principle of fairness[50]. This was made evident by Justice Ginsburg *per Curiam* in *M.L.B*[51].

[45] T. TRIDIMAS, *The General Principles of EU Law*, II ed., Oxford, Oxford University Press, 2009, p. 1.

[46] «[…] nor shall any State deprive any person of life, liberty, or property, without due process of law», Fourteenth Amendment, sec. 1, US Constitution.

[47] J.L. MASHAW, *op. cit.*, pp. 57-58.

[48] Supreme Court of the United States, 16 December 1996, 519 US 102 (1996), *M.L.B. v. S.L.J.*

[49] Supreme Court of the United States, 23 June 1997, 521 US 346 (1997), *Kansas v. Hendricks*.

[50] L. CATA BACKER, *Fairness As a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in* Hendricks *and* M.L.B., in *Tul. L. Rev.*, vol. 33, n. 1, 1997, p. 137.

[51] Supreme Court of the United States, 16 December 1996, 519 US 102 (1996), *M.L.B. v. S.L.J.*

The Court granted the extension of *in forma pauperis* to civil cases facing the actual risk that a mother could have been curtailed of her parenting rights, since she could not afford to pay the fees in court. Refusing her *in forma pauperis* would have infringed upon her right to due process under the Fourteenth Amendment. Justice Ginsburg, resorting to previous caselaw, namely, *Griffin v. Illinois*[52] and *Mayer v. Chicago*[53], fixed the principle of fairness as «[…] the "logical" consequences of groups of norms of a legal system[54]». Indeed, to fill out the letter of the Due Process Clause, the Court, not to deny justice, constructed a constitutional principle and extended the guarantees already provided for in the Due Process Clause, which were insufficient to tackle the question at stake. One may argue that the Court resorted to an «extra-constitutional principle», meaning that «[…] the Court [had] search[ed] outside the four corners of the Constitution for those norms, those principles, on which such a determination is based[55]». On the contrary, the Court rooted the basis of fairness precisely in the Due Process Clause, and thus in the Constitution itself, and employed it to overcome the statutory limitations of this latter.

Therefore, the principle of fairness entails an analysis of «[…] the constitutional adequacy of procedures under the Due Process Clause[56]». It triggers, in other words, the set of rights deriving from the Constitution, which evoke altogether a common constitutional and administrative path[57], to be followed by institutional actors, starting from agencies. Namely, under US law, due process «[…] is not a technical conception with a fixed content

[52] Supreme Court of the United States, 23 April 1956, 351 US 12 (1956), *Griffin v. Illinois*.

[53] Supreme Court of the United States, 13 December 1971, 404 US 189 (1971), *Mayer v. Chicago*.

[54] J. BENGOETXEA, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Oxford, Clarendon Press, 1993, p. 72.

[55] L. CATA BACKER, *op. cit.*, p. 150.

[56] G. LAWSON-K. FERGUSON-G.A. MONTERO, *op. cit.*, p. 4.

[57] M. SHAPIRO, *Trans-Atlantic*, cit., p. 233.

unrelated to time, place and circumstances […]», and «[…] cannot be imprisoned within the treacherous limits of any formula[58]».

Quite the contrary, *Mathews v. Eldridge*, understood as a calculus, could only impoverish the flexibility that an agency may be required to. And indeed, its roots unveil a rather different conceptualization. First, the Court never invented the test but rather took it from the Government's merits brief, which had already spelled out the three factors that the Court would have followed quite literally in the judgment[59]. Second, the Court was not conceptualizing any test nor calculus. It is by the repetitive application of the same judgment based on the *stare decisis* that the *dictum* of a judgment may become a test[60]. And this happened with *Mathews v. Eldridge*, insofar as agencies have been called upon applying this calculus under a «marginalist cost-benefit approach» over large fields of US law[61].

Yet, such a result deprives due process of its original function, and fairness too is reduced to a void principle, rather than elevated to its constitutional status. Indeed, «[…] by "due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected[62]». And fairness is all about setting the appropriate standard to decide each case individually. In other words, it appears that, to satisfy the Due Process Clause, it is not sufficient to model a test that is then rigidly applied to an infinite number of cases for which the calculus was not meant to. The result would be that the circumstances of future cases, to the extent that they do not fit the paradigms of the now *Mathews* calculus, become irrelevant. And such a result is even more far-reaching if it is compared with the subsequent caselaw regarding the original aim of the judgment, which was merely to find a

[58] Concurring Opinion of FRANKFURTER, J., in 341 US 123 (1951), *Joint Anti-Fascist Refugee Committee v. McGrath*, delivered on 30 April 1951, at 162-163.

[59] G. LAWSON-K. FERGUSON-G.A. MONTERO, *op. cit.*, p. 17.

[60] R. NOONAN, Stare Decisis*, Overruling, and Judicial Law-Making: The Paradox of the* JC *Case*, in *Ir. Jur.* (New Series), vol. 57, 2017, p. 129.

[61] A. VERMEULE, *Law's Abnegation. From Law's Empire to the Administrative State*, Cambridge (MA), Harvard University Press, 2016, p. 89.

[62] Supreme Court of the United States, 5 May 1884, 111 US 701 (1884), *Hagar v. Reclamation District*, p. 111.

«[…] common language by which legal actors can talk to each other about fairness», and to translate this latter into an operative rule[63]. Rather, the *Mathews* calculus takes fairness out of the ground, unsuitable to be caged in the strict application of a non-universal test.

It follows that the principle of fairness is meant to avoid a mathematical calculus that hardens the application of the law. And this is the legacy of the US legal system that may receive successful applications in other legal systems.

2.2 Fairness as a manifestation of natural justice in EU law

Even though it appears nearly nowhere in the EU Treaties, the principle of fairness may have crossed the Atlantic and reached EU law[64]. Indeed, in its open-endedness, this principle may be of use to different purposes, in the broader picture of the right to good administration[65]. In this respect, under EU law, fairness, which has usually taken on the form of natural justice, has an ambivalent standing.

Contrary to US law, where the principle of fairness is thought to amount to a constitutional principle, under EU law, the European Court of Justice (hereinafter, ECJ) has ruled out the possibility of recognizing to it the status of general principle of law. Indeed, under EU law, it does not exist such a principle that allows the EU authorities to consider the hardship that their acts may provoke on the person affected[66].

[63] G. LAWSON-K. FERGUSON-G.A. MONTERO, *op. cit.*, p. 15.

[64] Indeed, the word «fairness» is mentioned only once, precisely in art. 165(2) TFEU, as one of the aims to be promoted of the European «dimension in sport».

[65] K. KAŃSKA, *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights*, in *Eur. L. Journ.*, vol. 10, n. 3, 2004, p. 312.

[66] European Court of Justice- ECJ, 14 November 1983, case C-299/84, *Neumann v. BALM*, par. 33. See also European Court of Justice- ECJ, 28 June 1990, case C-174/89, *Hoche v. BALM*, par. 31; European Court of Justice- ECJ, 26 October 2006, case C-248/04, *Koninklijke Coöperatie*, par. 63.

Nevertheless, although this caselaw may render useless any further query on the potential application of the principle at stake, fairness is far from being irrelevant. It is not because it does not amount to a general principle of EU law that it shall be deprived of any relevance. Indeed, the comparison with US law clearly demonstrates that fairness directly affects the way an agency shall carry out its adjudication, far beyond the constitutional implications it has with respect to the Due Process Clause.

Consequently, to acknowledge the relevance of fairness under EU law within the exercise of the administrative adjudication, two elements can be taken into consideration: first, fairness initially lent itself to some manifestations in the caselaw of the CJEU (2.2.1.), and second, it then characterized also the right to good administration as enshrined in art. 41 of the Charter of Fundamental Rights (hereinafter, CFR) (2.2.2.). Taken together and considering the proliferation of countless agencies within the EU institutional framework, these two components may suggest that the principle of fairness shall have a thorough application in EU administrative law.

2.2.1 Fairness in the caselaw of the court of justice of the european union and of the european court of human rights

A close analysis of the caselaw of the CJEU shows that the Court has resorted to the principle of natural justice, to guarantee an appropriate action by the administration that may have led otherwise to an unfair result[67]. Fairness and natural justice thus appear to be conflated into the same objective. Accordingly, in *Société générale des grandes sources d'eaux*, Advocate General (hereinafter, AG) Cosmas suggested to the ECJ to resort to the principle of equity, understood to be a general principle of EU law by the AG, and coupled

[67] B.C. MIHAESCU EVANS, *The Right to Good Administration at the Crossroads of the Various Sources of Fundamental Rights in the EU Integrated Administrative System*, Baden-Baden, Nomos Verlagsgesellschaft, 2015, p. 429.

with the principle of «*proper* administration[68]». Although the Court relied mostly on the principle of non-discrimination in that case[69], it could be argued that the AG's proposal shed a light on the intrinsic relation between fairness and good administration, to convey appropriateness in the exercise of the administrative action. Therefore, it must be noted that whether one calls it fairness, equity, or natural justice, the aim is always «[…] to ensure general trust in the appropriateness of the administration[70]».

This was initially shown in some antitrust law cases, such as in *Wilhelm v. Bundeskartellamt* on the imposition of a fine against a cartel. The Court ruled that «a general requirement of natural justice» goes against the application of consecutive sanctions both by the Commission and the national competition authority[71]. Therefore, to meet a need for natural justice, in *Boehringer v. Commission*, the Court mandated that, upon imposing a fine, the competent authority must take into account the penalties already paid for the same action, which the enforcement procedure has been activated for[72]. In other words, in order to exercise its adjudication powers to impose a fine, a competition authority must deliver an appropriate response for those affected by its acts, to comply with the right to good administration[73]. In any event, such a legal configuration would be later envisaged pursuant to the thorough principle of *ne bis in idem* under art. 50 CFR that has been prohibiting since its earliest applications «[…] a duplication both of proceedings and of penalties of a criminal nature, for the purposes of that article, for the same acts and against the same person […][74]».

[68] Opinion of AG COSMAS in case C-361/96, *Société générale des grandes sources d'eaux minérales françaises v. Bundesamt für Finanzen*, delivered on 12 February 1998, par. 28 (emphasis added).

[69] European Court of Justice- ECJ, 11 June 1998, case C-361/96, *Société générale des grandes sources d'eaux minérales françaises v. Bundesamt für Finanzen*, par. 37.

[70] B.C. MIHAESCU EVANS, *op. cit.*, p. 427.

[71] European Court of Justice- ECJ, 13 February 1969, case 14/68, *Wilhelm v. Bundeskartellamt*, par. 11.

[72] European Court of Justice- ECJ, 14 December 1972, case 7/72, *Boehringer v. Commission*, par. 3.

[73] D. SIMON, *Le principe de "bonne administration" ou de "bonne gouvernance" concrète*, in Collectif Apogée (eds.), *Le droit de l'Union européenne en principes: Liber Amicorum en l'honneur de Jean Raux*, Edition Apogée, Rennes, 2006, p. 161.

[74] *Ex multis*, European Court of Justice- ECJ, 14 September 2023, case C-27/22, *Volkswagen v. AGCM*, par. 44.

Nevertheless, there have been other circumstances where the need for natural justice was made apparent by the contingency of the case, and where there was no other legal principle coming to its rescue. This happened in staff regulation cases, where the Court stressed the margin of discretion of the administration to be «[…] justified by the considerations of natural justice» that the administration shall take into account upon exercising its powers and adjudicating the case on its merits[75]. Notably, it must be reminded that discretion entails «[…] the freedom of action which the holder of public authority enjoys in its decision-making or rule-making activity[76]». And therefore, this freedom allows and mandates the administration to appraise «[…] the facts and circumstances adduced[77]», thereby grating a certain flexibility upon such analysis[78]. In this respect, flexibility is again the keystone for an administration to perform an appropriate adjudication in each case. Indeed, as already argued for US law, this need for natural justice brings to the fore the imperative for the administration to show appropriateness in the exercise of its administrative action. Therefore, even though the CJEU has refused to recognize to fairness the status of general principle of EU law, the need for natural justice, understood in light of the appropriateness of the administrative action, is far from being neglected any legal relevance in EU law.

This is echoed in the caselaw of the European Court of Human Rights (hereinafter, ECtHR). As known, art. 6 of the European Convention on Human Rights (hereinafter, ECHR) and its caselaw are also applicable to administrative proceedings[79]. In this respect, the ECtHR has ruled that fairness is an «overarching principle» enshrined in art. 6 ECHR, to

[75] European Court of Justice- ECJ, 7 June 1972, case 46/71, *Brandau v. Council*, para. 9.

[76] D. RITLENG, *Judicial Review of EU Administrative Discretion: How Far Does the Separation of Powers Matter?* (J. MENDES-I. VENZKE eds.), *Allocating Authority. Who Should What in European and International Law?*, Hart Publishing, Oxford, 2018, p. 184.

[77] European Court of Justice- ECJ, 7 June 1972, case 46/71, *Brandau v. Council*, para. 8.

[78] B.C. MIHAESCU EVANS, *op. cit.*, p. 430.

[79] European Court of Human Rights, 19 April 2007, Application no. 63235/00, *Vilho Eskelinen and Others v. Finland*, parr. 50-62.

be considered in light of «the character of the circumstances[80]». Hence, since international treaties on the protection of human rights are a source of inspiration for the safeguard of EU fundamental rights[81], since «[…] the ECHR has special significance» thereof[82], and since the meaning and the scope of the rights protected under the ECHR shall be the same for the rights granted under the CFR, according to art. 52(3) CFR, nothing prevents further from recognizing fairness in EU law.

2.2.2 Fairness in the charter of fundamental rights

Article 41(1) CFR on good administration entails everyone's right to have handled their affairs, among other things, «fairly». Against this background, the French version, «*équitablement*», but also the Italian one, «*in modo […] equo*», show that any distinction between equity, as already purported by AG Cosmas, and fairness is more a nominal question than one of substance. Interestingly, this wording is directly inserted in the disposition on the right to good administration. This latter was already recognized as a general principle of law before the enactment of the CFR[83], and now, under the CFR, it is conceived as a fundamental right.[84] And a fair administration is a *leitmotiv* therein[85].

At this point, one may distinguish between substantive and procedural fairness. Whilst substantive fairness hinges upon the need for natural justice that certain factual circumstances may trigger, to ensure appropriateness in the administrative action, as already discussed, procedural fairness «[…] consists in the relation[…] between procedures, fair

[80] European Court of Human Rights, 23 November 2006, Application no. 73053/01, *Jussila v. Finland*, par. 42. See also European Court of Human Rights, 25 March 1999, Application no. 25444/94, *Pélissier and Sassi v. France*, par. 52; European Court of Human Rights, 1 March 2006, Application no. 56581/00, *Sejdovic v. Italy*, par. 90.

[81] European Court of Justice- ECJ, 14 May 1974, case 4/73, *Nold*, par. 13.

[82] European Court of Justice- ECJ, 3 September 2008, joined cases C-402/05 P and C-415/05 P *Kadi I*, par. 283.

[83] General Court, 9 July 1999, T-231/97, *New Europe Consulting*, par. 39, 41.

[84] T. LOCK, *Article 41 CFR* (M. KELLERBAUER- M. KLAMERT-J. TOMKIN eds.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford, Oxford University Press, 2019, p. 2205.

[85] T. LOCK, *op. cit.*, p. 2205.

treatment, and authoritative standards[86]». In this respect, procedural fairness entails a legal duty of care (or due diligence), originating from «[…] the attribution of administrative discretion to act in a certain way», to ensure that the administration gathers the necessary information covering the factual circumstances of the case at hand and relies carefully and impartially on them, before exercising its discretion in taking the final decision[87]. This was also affirmed by the ECJ, holding that the disclosure of certain econometric models and methods in merger control procedures entails a fair procedure, insofar as it enables the exercise of the right of defense as enshrined in Article 41 CFR[88].

As a result, (procedural) fairness is not simply the formal outbuilding of the right to good administration. Indeed, the duty of care, which conceptually derives from tort law at common law[89], requires that an agency, upon adjudicating, ensures fairness in the appraisal of the public interest(s) and in the way this latter is balanced with other private competing interests[90]. In other words, it is a duty of the administrative authority to take into consideration the factual circumstances upon its adjudication, exercising its discretion fairly in balancing the competing interests of the parties involved. Indeed, the duty of care is «[…] a necessary prerequisite […] to ascertain whether the elements of fact and of law on which the exercise of that broad discretion depends [on] were present […][91]». In so doing, it has been argued that the duty of care entails itself the core of the right to good administration[92].

[86] D.J. GALLIGAN, *Due Process and Fair Procedures: A Study of Administrative Procedures*, Oxford, Oxford University Press, 1997, p. 53.

[87] J. MENDES, *Discretion, Care, and Public Interest in the EU Administration: Probing the Limits of Law*, in *CMLRev.*, vol. 53, n. 2, 2019, pp. 434-436, 440-441.

[88] European Court of Justice- ECJ, 16 January 2019, case C-265/17 P, *Commission v. United Parcel Service*, parr. 31-34, confirming the Opinion of AG KOKOTT, delivered on 25 July 2018, par. 43.

[89] J.W. GLANNON, *The Law of Torts*, VI ed., Boston, Aspen Publishing, 2020, p. 277.

[90] J. MENDES, *op. cit.*, p. 450.

[91] General Court, 16 September 2013, case T-333/10, *ATC and Others v. Commission*, par. 84.

[92] H.C.H. HOFMANN, *Between Discretion and Proportionality. The Duty of Care in EU Judicial Review*, in *Review of European Administrative Law*, vol. 13, n. 2, 2020, p. 93.

Therefore, discretion and (fair) procedures go hand in hand, just as substantive and procedural fairness complement each other. The agency shall resort to its broad discretion, taking into consideration the relevant factual circumstances of the case at stake, and make use of fairness to show appropriateness in its administrative action. At the same time, the duty of care mandates a careful and impartial examination, as it will be explored in the next section, so that the final decision is sound on a thorough assessment and not based on arbitrary choices. Procedural fairness reinforces the legitimacy of substantive fairness, and substantive fairness fills in the void of procedural fairness. Procedural guarantees would be useless without any substantive value to be protected, and conversely, substantive values would be left to the mercy of arbitrary powers without any procedural guarantee[93].

Under this perspective, it may thus be possible to conceptualize differently the wording of Article 41(1) CFR. Indeed, its German version sheds a better light on the question of fairness: «fairly» is translated as «*gerecht*», whereby the idea of *Gerechtigkeit* (fairness) is thus conveyed[94]. And the *Ge-rechtig-keit*, as the underpinning value inherent to the exercise of the *Recht* (law[95]), can be best achieved through a disentangled implementation of the two tiers of fairness, both substantive and procedural, to give an application of the *Recht* (law) that is as *gerecht* (fair) as possible. Accordingly, fairness and the right to good administration are coupled together under art. 41(1) CFR.

2.3 Fairness and the agency-model: between implied powers and procedural safeguards

The time has come to abstract fairness from its tentative applications in EU law to the level of legal theory. In this respect, it may be argued that fairness is, as the law stands, a

[93] D.J. GALLIGAN, *op. cit.*, pp. 104-107.

[94] P. VOET VAN VORMIZEELE, *Artikel 41. Recht auf eine gute Verwaltung*, in J. SCHWARZE-U. BECKER-A. HATJE-J. SCHOO (eds.), *EU-Kommentar*, IV ed. Nomos Verlagsgesellschaft, Baden-Baden, 2019, p. 3506.

[95] W. HOFFMANN-RIEM, *Wahrheit, Gerechtigkeit, Unabhängigkeit und Effizienz – das Magische Viereck der Dritten Gewalt*, in *Jur. Zeit.*, vol. 52, n. 1, 1997, pp. 1-2.

«fundamental maxim», which underpins the EU legal system by providing «interpretational guidelines[96]». This implies that fairness is not a general principle of EU law (yet), or, in other words, a «constitutional principle» (akin to US law), which is legally binding, of general application and sufficiently important to be granted the constitutional status[97]. It is still something to be waited for, indeed. However, categorizing fairness at the very least as a fundamental maxim derives a pivotal consequence, namely that «[…] it may take precedence over other principles[98]».

Accordingly, to understand the intertwinement among fairness and the (general) principles of EU law, it must be first drawn the attention to the principle of legality, in its distress caused by the agency-model within the separation of powers.

The principle of legality lends itself to a first particular definition under EU law, as a *sui generis* legal order[99], whereby, under the principle of conferral, the EU, its Institutions and bodies, can act only within the competences that have been granted to them by the Member States pursuant to art. 5(2) TEU. In this respect, the principle of legality is vested as a «*principe de spécialité*» which confines the lawfulness of EU actions within the competences conferred by the Member States[100]. In other words, the principle of legality, understood as such, does not aim at the individuals' protection as opposed to the exercise of public powers, but it rather ensures the respect of primacy of EU law within the conferral of competences[101].

[96] T. TRIDIMAS, *The General Principles of EU Law and the Europeanisation of National Laws*, in *Review of European Administrative Law*, vol. 13, n. 2, 2020, p. 14.

[97] T. TRIDIMAS, *The General Principles*, *cit.,* pp. 9-10.

[98] T. TRIDIMAS, *The General Principles*, *cit.,* p. 14.

[99] European Court of Justice- ECJ, 5 February 1963, case 26/62, *Van Gend en Loos*, p. 12.

[100] L. CLÉMENT-WILZ-L. AZOULAI, *Principe de légalité* (J.-B. AUBY-J. DUTHEIL DE LA ROCHÈRE eds.), *Traité de droit administrative européen*, III ed., Bruylant, Brussels, 2020, p. 483.

[101] L. CLÉMENT-WILZ-L. AZOULAI, *op. cit.*, pp. 483-484.

A second understanding of the principle of legality, closer to that of national laws, in upholding the framework of the rule of law, is translated into EU law as a «*principe général de protection*», as ruled by the ECJ in *Hoechst*[102]. In this respect, the principle of legality determines the legal basis for the administration to adjudicate «on the grounds laid down by law».[103] Expressly, this implies for the administration to «[…] act under and within the law, whether as contained in primary and secondary legislation or in the jurisprudence of competent courts[104]». Similarly, this has been recently confirmed in *ESMA*[105]. The ECJ partly departed from *Romano*, where it had previously held that an administrative commission delegated by the Council could not take decisions «having the force of law[106]». And it ruled in *ESMA* that an agency may be authorized to adopt «acts of general application», provided that the delegated powers arise «in strictly circumscribed circumstances», as set out by the law, and more precisely in art. 28 of Regulation 236/2012 on the powers of the European Security and Markets Authority (hereinafter, ESMA)[107].

Nevertheless, the application of the principle of legality as a «*principe général de protection*» might not be so straightforward[108]. Indeed, the mandate of an agency may be extended to *implied powers*, insofar as the administrative power to proceed in individual cases does not arise expressly from the letter of the law but rather from its «general over-riding aims[109]». In this respect, one may distinguish under art. 13 TEU between the powers

[102] L. CLÉMENT-WILZ-L. AZOULAI, *op. cit.*, p. 484.

[103] European Court of Justice- ECJ, 21 September 1989, joined cases 46/87 and 227/88, *Hoechst AG v. Commission*, par. 19.

[104] H.C.H. HOFMANN-G.C. ROWE-A.H. TÜRK, *Administrative Law and Policy of the European Union*, Oxford, Oxford University Press, 2011, p. 151.

[105] European Court of Justice- ECJ, 22 January 2014, case C-270/12, *United Kingdom v. Council (ESMA)*.

[106] European Court of Justice- ECJ, 14 May 1981, case 98/80, *Romano v. Institut national d'assurance maladie-invalidité*, par. 20.

[107] European Court of Justice- ECJ, 22 January 2014, case C-270/12, *United Kingdom v. Council (ESMA)*, parr. 63-64.

[108] J. SCHWARZE, *European Administrative Law*, I ed. (revised), Sweet and Maxwell, London, 2006, p. cxxiii.

[109] J. SCHWARZE, *op. cit.*, pp. 48, 255.

attributed to the Institutions, which are fixed because of their provisions directly enshrined in the EU Treaties, and the (extra) tasks that may be given to those Institutions, as long as these latter are in compliant with already existing powers[110]. In other words, when EU law «[…] confers a specific task […], it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers […] necessarily and *per se* the powers which are *indispensable* in order to carry out that task […][111]». In this respect, the ECJ spelled out a link of indispensability, which reflect an inherent instrumentality of implied powers with the respective (explicitly) delegated powers.[112]

This link of indispensability originally stood out in US law under Clause 18, art. I, § 8, US Constitution, the so-called Necessary and Proper Clause.[113] In the seminal judgement *McCulloch v. Maryland*, after recognizing the existence of implied powers, SCOTUS emphasized the «necessary and proper» link of implied powers with those enumerated in the Constitution for Congress to fulfil the execution of its constitutional duties[114]. And so was it argued to be applicable for agencies, too, in administrative law[115]. As a result, if the agency falls subsequently short of explicitly delegated powers, implied powers cannot be exercised anymore: *simul stabunt vel simul cadent*[116].

[110] B. DE WITTE, *The Role of the Court of Justice in Shaping the Institutional Balance in the EU* (J. MENDES-I. VENZKE eds.), *op. cit.*, p. 155.

[111] European Court of Justice- ECJ, 9 July 1987, joined cases 281/85, 283/85 to 285/85, and 287/85, *Germany v. Commission*, par. 28 (emphasis added).

[112] G. MORBIDELLI, *Il principio di legalità e i cd. poteri impliciti*, in *Dir. amm.*, fasc. 4, 2007, pp. 723-727.

[113] C.R. SUNSTEIN-A. VERMEULE, *The Unitary Executive: Past, Present, Future*, in *Supr. Cour. Rev.*, 1, vol. 2020, 2021, pp. 83-117.

[114] Supreme Court of the United States, 6 March 1819, 17 US 316 (1819), *McCulloch v. Maryland*, pp. 406, 413-414.

[115] C.R. FARINA, *Deconstructing Nondelegation*, in *Harv. Journ. L. & Publ. Pol.*, vol. 33, n. 1, 2010, pp. 92-93.

[116] N. BASSI, *Principio di legalità e poteri amministrativi impliciti*, Giuffrè, Milan, 2001, pp. 257-262. See also M. CLARICH-M. RAMAJOLI, *Diritto amministrativo e clausole generali: un dialogo*, Edizioni ETS, Pisa, 2021, pp. 28-37.

In any event, the evolution of the EU caselaw has been pretty swinging. Already in the 1950s, the ECJ gave birth to the *Meroni* doctrine, which would be complemented in the subsequent (and abovementioned caselaw), i.e. *Romano* and *ESMA*[117]. This doctrine entails that the only powers that can be delegated to an agency, insofar as they are «[…] necessary for the performance of the tasks set out in […]» the law, are executive powers, and not also discretionary, because these latter could never be reviewed in accordance with the delegating mandate[118], reducing thereby the (procedural) safeguard of the individuals to judicial review[119].

And yet, already at that time, within the framework of the European Coal and Steel Community, the Court acknowledged that an agency, to ensure the fulfilment of the objectives set out by the law, may exercise the powers stemming from not only explicit norms, but also from rules «[…] without which that treaty or law would have no meaning or could not be reasonably and usefully applied[120]». Notably, the «[…] rules established by a treaty imply the principles without which these rules cannot effectively or reasonably be applied[121]».

In this regard, fairness may step in, to counterbalance the great discretion that an agency may enjoy when it is not entrusted with a clear and precise delegating mandate, leaving room for implied powers. In particular, procedural fairness is «[…] applicable to dispute-settling procedures that are designed to protect substantive rather than procedural values».[122] Indeed, substantive values, including fundamental rights, may be majorly affected by the broad discretion an agency is granted thereto. Therefore, in *Technische Universität*

[117] On the evolution of this caselaw, see E. MACIARIELLO, *EU Agencies and the Issue of Delegation: Conferral, Implied Powers and the State of Exception*, in *Eur. Pap.*, vol. 4, n. 3, pp. 728-730.

[118] European Court of Justice- ECJ, 13 June 1958, case 9/56, *Meroni v. High Authority*, p. 152.

[119] J.-P. JACQUÉ, *The Principle of Institutional Balance*, in *CMLRev.*, vol. 41, n. 2, p. 384.

[120] European Court of Justice- ECJ, 29 November 1956, case 8/55, *Fédéchar v. High Authority*, pp. 299-300.

[121] European Court of Justice- ECJ, 15 July 1960, case 20/59, *Government of the Italian Republic v. High Authority*, p. 336.

[122] T.C. GREY, *Procedural Fairness and Substantive Rights*, in *Nom.*, vol. 18, 1977, p. 183.

München, the ECJ ruled that the broad discretion of the agency must be counterbalanced by the respect of the procedure to protect a person's rights contended in the procedure itself[123]. And the Court further crystalized this duty as a procedural obligation that «[…] must […] precede the adoption of [any] decision[124]».

In this respect, under art. 41(2) CFR, four are the procedural rights to be granted to the individual, namely, the right to be heard, the right to access their own file, the right to claim damages, and the right to receive responses from the administration in one of the official languages of the EU, in addition to the duty for the administration to state reasons recognized in art. 296, second paragraph, TFEU[125]. Therefore, art. 41(2) CFR enshrines a set of participatory and defense rights as part of procedural fairness, to counterbalance the exercise by agencies of their discretion[126].

And to come full circle, it must be noted (as it will be more thoroughly discussed in the following Section) that administrative procedural law and the subsequent judicial review are narrowly linked[127], as if the latter were just a parenthesis of the former[128]. Taken together, they can be seen as a continuum, and not as binary opposite dimensions. The procedural rights already granted during the administrative procedure are then extended if a judicial proceeding is triggered, in the contentious phase, whereby the «infringement of an essential procedural requirement» is squarely a ground of the action for annulment under art. 263(2) TFEU.

[123] European Court of Justice- ECJ, 21 November 1991, case C-269/90, *Technische Universität München*, par. 14.

[124] European Court of Justice- ECJ, 18 July 2013, joined cases C-584/10 P, C-593/10 P, and C-595/10 P, *Kadi II*, par. 113.

[125] K. LENAERTS, *'In the Union We Trust:' Trust-Enhancing Principles of Community Law*, in *CMLRev.*, vol. 41, n. 2, 2004, p. 337-340.

[126] H.C.H. HOFMANN-G.C. ROWE-A.H. TÜRK, *op. cit.*, pp. 152-153.

[127] J. SCHWARZE, *op. cit.*, pp. cli-clii.

[128] M. NIGRO, *Giustizia amministrativa* (E. CARDI-A. NIGRO eds.), VI ed., Bologna, Il Mulino, 2002, pp. 20-21.

Accordingly, the importance of the procedural guarantees has pushed part of the scholarship to consider the procedure itself as «a human right[129]», as enshrined in the CFR, where the right to good administration amounts to a fundamental procedural right[130]. Indeed, it has been argued that, if administrative law must develop a «framework for administration[131]», procedural guarantees (or due process), as expression of «administrative fairness[132]», are the means to frame the «rule-making behavior for administrative agencies», so that the individuals' right are respected upon the exercise of powers by the agencies[133]. As a result, whilst substantive fairness turns to the appropriateness of the administrative action, so that this latter is as fair as possible, procedural fairness, as a truly general principle of law[134], assigns the necessary procedural safeguards to individuals to counterbalance the (discretionary) power that an agency exercises, especially in light of implied powers. In this respect, it could be argued that, since the principle of legality as «*principe général de protection*» is being quashed by implied powers that have ephemeral textual attachments, it is for the broad participatory and defense rights under procedural fairness, to recalibrate the relation between the individual and the administration[135].

Therefore, the combined application of substantive and procedural fairness may lead up to frame the agency-model within the "constitutionality" of the EU legal system: in face of the broader discretion that agencies may enjoy, to the extent of mitigating the rigid application of the law under a need for natural justice, the counterweight is provided for by

[129] C. HARLOW-R. RAWLING, *Process and Procedure in EU Administration* Hart Publishing, Oxford, 2014, pp. 89-90.

[130] T. LOCK, *op. cit.*, p. 2205.

[131] C. HARLOW, *Global Administrative Law*, *Eur. Journ. Int. L.*, vol. 17, n. 1, 2006, p. 193.

[132] K. LENAERTS, *op. cit.*, p. 337.

[133] M. SHAPIRO, *The Institutionalization of European Administrative Space* (A. STONE SWEET-W. SANDHOLTZ-N. FLIGSTEIN eds.), *The Institutionalization of Europe*, Oxford, Oxford University Press, 2001, p. 94.

[134] G. DELLA CANANEA, *Due Process of Law Beyond the State. Requirements of Administrative Procedure*, Oxford, Oxford University Press, 2016, pp. 163-165.

[135] M. RAMAJOLI, *Consolidamento e metabolizzazione del modello delle Autorità di regolazione nell'età delle incertezze*, in *Riv. reg. merc.*, fasc. 2, 2018, pp. 177-178.

greater procedural guarantees to acknowledge further protection of individuals' rights underlying the procedure. To put it simply, the more discretion is grabbed from one side, the more is given back in the form of enhanced procedures on the other, susceptible to establish a continuum with judicial review.

3. CHALLENGING AGENCIES UNDER JUDICIAL REVIEW

«The dominant concern of administrative law is the legal control of administration[136]». This entails the essence of the modern administrative State; whereby judicial review becomes the «reliable means» to control the administration[137]. Indeed, the rule of law cannot tolerate the exercise of absolute (*solutus ab*) powers of the governor, potentially leading to «[…] arbitrary interferences with rights and freedoms of private actors[138]».

Accordingly, two preliminary remarks are necessary. First, when it comes to judicial review, the «conflicts universe» is multifaceted, as it is characterized by «conflicts between a fundamental right and a public interest» stemming from both EU law and domestic law[139]. Second, this multifaceted «conflicts universe» can be differently vested according to the type of disputes carried out, either a policy litigation or a governmental litigation. On the one hand, policy litigation, which is mainly brought in the form of preliminary ruling procedure or action for annulment in EU law, revolves around the discretion of the agency and the

[136] R.A. CASS-C.S. DIVER-J.M. BEERMANN-J. FREEMAN, *op. cit.*, p. 190.

[137] R.A. CASS-C.S. DIVER-J.M. BEERMANN-J. FREEMAN, *op. cit.*, p. 190.

[138] P. CRAIG, *Judicial Review and Judicial Deference*, (M. SCHOLTEN-A. BRENNINKMEIJER eds.), *Controlling EU Agencies. The Rule of Law in a Multi-Jurisdictional Legal Order*, Cheltenham, Edward Elgar Publishing, 2020, p. 102.

[139] T. TRIDIMAS, *Wreaking the Wrongs: Balancing Rights and the Public Interest the EU Way*, in *Colum. Journ. Eur. L.*, vol. 29, n. 2, 2023, pp. 191-192.

potential erosion of judicial review that comes therewith[140]. On the other hand, governmental litigation, which is usually vested in actions for annulment under EU law, hinges upon the direct challenge of national governments against supranational legislative acts[141]. In this respect, both policy (3.1.) and governmental litigation (3.2.) will be respectively analyzed, following a comparative assessment.

3.1 Policy litigation: deferring or retaining?

When it comes to policy litigation, one may distinguish between judicial review of legal issues and judicial review of factual circumstances. This differentiation brings to the fore the question on the scope of judicial review of agencies. This conundrum firstly emerged in the US legal system. It has evolved there from the early nondelegation doctrine, according to which the judiciary would be granted extensive jurisdiction to review acts of the agencies, to a more restrictive application, in the aftermath of the New Deal, with the rise of the agency-model, and the enactment of the Administrative Procedure Act (hereinafter, APA)[142]. Nowadays, the central question is to what extent the judiciary shall defer to the agencies' decisions[143]. In this respect, under US law, one may distinguish between the review of statutory issues and of the interpretation of regulations (judicial review of legal issues), and the review of factual determinations and discretionary decisions, indeed[144]. The former type of judicial review has led recently to major legal challenges, moving away from the landmark

[140] A. MASON, *The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights*, in *Aust. Jour. Hum. Rig.*, vol. 1, n. 1, 1994, p. 10.

[141] C. ADAM, *The Politics of Judicial Review. Supranational Administrative Acts and Judicialized Compliance Conflict in the EU*, London, Palgrave Macmillan, 2016, pp. 43-44.

[142] R.A. CASS-C.S. DIVER-J.M. BEERMANN-J. FREEMAN, *op. cit.*, p. 269.

[143] R.A. CASS-C.S. DIVER-J.M. BEERMANN-J. FREEMAN, *op. cit.*, p. 268.

[144] J.P. COLE, *An Introduction to Judicial Review of Federal Agency Action*, Report R44699 for the Congressional Research Service, 7 December 2016, pp. 12-24.

Chevron Doctrine[145] to its overruling in *Loper Bright*[146], bringing judicial review of legal issues under EU law and US law closer together.

Similarly, the tension within the scope of judicial review under EU law revolves around the extent of judicial deference to agencies that is what determines the intensity of judicial review itself. «[…] the more intense the judicial scrutiny, the less room there is for deference to the primary decision-maker, the converse being equally true[147]». This is further complicated in the EU legal order by the integrated system of the EU administration, whereby different actors, both at national and at EU level, are involved[148]. In this respect, it should be borne in mind that judicial review of acts of EU agencies cannot be analyzed in a unified manner because the range of statutes providing for the establishment of various existing agencies is multifaceted, and the actual deference may vary from one to another[149].

Accordingly, the scope of judicial review under EU law may be systematized into two main categories: the review of legal issues, on the one hand (3.1.1.), and the review of facts and discretion, on the other (3.1.2.[150]). These two topics will be now addressed separately.

3.1.1 Judicial review of legal issues under eu law

Judicial review of legal issues under EU law demands uniformity as opposed to the specialization required by US law. Indeed, contrary to the US caselaw, where the need to deal with highly technical cases has always justified – until the recent overruling of the

[145] Supreme Court of the United States, 25 June 1984, 467 US 837 (1984), *Chevron v. NRDC*.

[146] Supreme Court of the United States, 28 June 2024, 603 US__ (2024), *Loper Bright Enterprises v. Raimondo*.

[147] P. CRAIG, *Judicial review*, cit., pp. 102, 113.

[148] A.H. TÜRK, *Judicial Review of Integrated Administration in the EU* (H.C.H. HOFMANN-A.H. TÜRK eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar Publishing, Cheltenham, 2009, p. 218.

[149] P. CRAIG, *Judicial review*, cit., p. 115.

[150] P. CRAIG., *EU Administrative*, cit., p. 441.

Chevron doctrine – a certain deference to agencies' specialization, the CJEU is conversely committed to ensure uniform interpretation and application of EU law, as recognized by art. 19(1) TEU.

The necessity to warrant uniformity is firstly ensured by the preliminary reference. Accordingly, national courts have the possibility of lodging a preliminary reference of interpretation and are required to do so in case of last instances courts[151], as well as in case of preliminary reference of validity[152]. Moreover, the CJEU is granted exclusive jurisdiction under art. 344 TFEU in controversies among Member States regarding legal matters of EU law[153].

Similarly, in the interpretation and application of EU law by agencies, the CJEU cannot but retain full control over the correct interpretation and application of EU law, being able to reject a specific interpretation or application of EU law given by an agency whatsoever. It is regarded as a correctness test, applied axiomatically by the CJEU, in light of the established caselaw of civil law jurisdictions of the majority of the Member States[154]. The Court is supposed to say what the law is, and this monopoly cannot be contradicted.

However, the Court might also be ready to place more value on EU agencies' soft law, precisely to guarantee the uniform interpretation of EU law. This is the case, for instance, of the Commission's recommendations in the field of competition law, which may prevail over decisions of national regulatory authorities or even national courts. Notably, to ensure the uniform interpretation and application of EU law, the ECJ has even ruled that national regulatory authorities (hereinafter, NRAs) must «[…] 'take the utmost account' of the Commission recommendations», and «[…] even if recommendations are not intended to

[151] *Ex multis*, European Court of Justice- ECJ, 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, par. 34.

[152] *Ex multis*, European Court of Justice- ECJ, 22 October 1987, case 314/85, *Foto-Frost*, parr. 15-17.

[153] *Ex multis*, European Court of Justice- ECJ, 6 March 2018, case C-284/16, *Achmea*, par. 32.

[154] P. CRAIG, *EU Administrative*, cit., p. 442.

produce binding effects, the national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions […][155]».

This might lead to a «crypto-hard» phenomenon, whereby a source of soft law mandates legal obligations of hard law nature, without the possibility to activate against it any judicial review[156]. Indeed, by virtue of primacy of EU law, the Commission's recommendations – acts of soft law – ends up being legally binding on NRAs and domestic courts, as if they were acts of hard law. Of course, it is without prejudice, following the comply-or-explain mechanism, to deviate from these recommendations by a reasoned act considering the concrete circumstances of a case.

In any event, other than this hypothesis, it is undeniable that the CJEU will retain full jurisdiction over the interpretation and application of questions of (EU) law. This may sound at odds with the agency-model and the expertise that is assured therewith. In other words, such a configuration falls upon the broader margin that the agencies in the EU legal landscape might be potentially granted. However, it would be even more problematic where such a monopoly, even in the field of agencies, were disregarded. The EU legal order is not only composed of several EU bodies and agencies, but also by the national administrative and judicial systems that make inherent the risk of fragmentation of EU law[157]. Thus, recognizing the monopoly of uniform interpretation and application of EU law to the CJEU, even at the price of disregarding any margin of interpretation and "creative" application of EU law by the agencies, means ensuring that EU law is not fragmentally interpreted and

[155] European Court of Justice- ECJ, 15 September 2016, case C-28/15, *KPN v. ACM*, parr. 37-42.

[156] M. RAMAJOLI, Self regulation, soft regulation *e* hard regulation *nei mercati finanziari*, in *Riv. reg. merc.*, fasc. 2, 2016, p. 53.

[157] G.C. ROWE, *Administrative Supervision of Administrative Action in the European Union* (H.C.H. HOFMANN-A.H. TÜRK eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Cheltenham, Edward Elgar Publishing, 2009, p. 209.

applied. And therefore, one may talk about of true discretion of EU agencies only in the case of judicial review of facts and discretion.

Nonetheless, it must be recalled that discretion may play a limited role in EU law, insofar as the principle of conferral of powers and the choice of a precise legal basis to delegate powers, are likely to limit considerably the discretion that an agency may exercise upon implementing any policy under EU law[158].

There may be, in any case, one field where this solid structure favoring the role of the CJEU could fall apart, that is to say the political question doctrine. This latter is understood as an extraordinary situation where courts renounce on their paramount function of judicial review under the rule of law because of political expediency[159]. In other words, it refers to the awareness of a court of law of its jurisdictional limits for the non-justiciability of the questions arising therefrom, and the corresponding better position that another branch of the government is entrusted to deal with those same questions[160]. Under this perspective, the political question doctrine is another way of analyzing the dynamics within policy litigation, in the balancing of judicial review and judicial deference.

Given that this doctrine deals with political issues, which are not under the cognizance of courts of law, it is inherent that judges are not granted jurisdiction over political questions. However, since the line between politics and the law is sometimes quite subtle[161], especially in light of the greater margin of State intervention in the economy, it may be difficult to draw it once for all[162].

[158] D.-U. GALETTA-J. ZILLER, *EU Administrative Law*, Cheltenham, Edward Elgar Publishing, 2024, p. 6.

[159] L. HENKIN, *Is There a "Political Question" Doctrine?*, in *Yale L.J.*, vol. 85, n. 5, 1976, p. 599.

[160] G. BUTLER, *In Search of the Political Question Doctrine in EU Law*, in *Leg. Iss. of Econ. Int.*, vol. 45, n. 4, 2018, pp. 329-330.

[161] On this distinction, see also, *ex multis*, E. CHELI, *Atto politico e funzione d'indirizzo politico*, Giuffrè, Milan, 1961; P. BARILE, *Atto di governo (e atto politico)*, in *Enc. dir.*, IV, Milan, Giuffrè, 1959, pp. 220-232.

[162] P. IBÁÑEZ COLOMO, *Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law*, in *Cambr. Year. Eur. Leg. Stud.*, vol. 24, 2022, p. 146.

Therefore, one should be cautious about leaving aside any possibility whatsoever of judicial review. In this respect, it must be reminded that the EU legal order abides by the rule of law, which mandates that the administration is «[…] procedurally and substantively accountable before the courts […][163]», considering that «[…] policy is constrained by, and formulated through, law[164]». Accordingly, there could be a renewed discussion about the line to be drawn between politics and law.

This conundrum appears to be caught in recent cases before the ECJ on Common Foreign and Security Policy (hereinafter, CFSP) in the field of external relations law – the branch of EU law where the political question doctrine has been mostly studied about[165]. This is the case of two recent opinions delivered by AG Ćapeta in the cases *KS/KD*[166] and *Neves*[167], and followed not entirely by the ECJ[168], that bring to the fore the application of the ground of judicial review of fundamental rights. These latter, alongside with other general principles of EU law, such as proportionality, are of transversal application, irrespective of the action triggered before the CJEU[169] – an action for damages in *KS/KD* and a preliminary reference in *Neves*.

As known, proportionality mandates, as usually understood in its three tiers, to determine whether the act is disproportionate to attain the objective(s) set out by the delegating authority under the law[170]. On the other hand, fundamental rights require to assess

[163] P. CRAIG, *EU Administrative*, cit., p. 269.

[164] P. IBÁÑEZ COLOMO, *op. cit.*, p. 114.

[165] G. BUTLER, *op. cit.*, p. 334.

[166] Opinion of AG ĆAPETA in joined cases C-29/22 P and C-44/22 P, *KS/KD*, delivered on 23 November 2023.

[167] Opinion of AG ĆAPETA in case C-351/22, *Neves*, delivered on 23 November 2023.

[168] European Court of Justice- ECJ, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS/KD*; European Court of Justice- ECJ, 10 September 2024, case C-351/22, *Neves*.

[169] European Court of Justice- ECJ, 26 February 2013, case C-617/10, *Åkerberg Fransson*, parr. 17, 19. See also, K. LENAERTS-K. GUTMAN-J.T. NOWAK, *EU Procedural Law*, II ed., Oxford, Oxford University Press, 2023, p. 240.

[170] European Court of Justice- ECJ, 21 February 1979, case 138/78, *Stölting v. Hauptzollamt Hamburg-Jonas*, par. 7; General Court, 29 September 2000, case T-87/98, *International Postash Company*, par. 39; European Court of

whether any act of EU law complies with the protection of fundamental rights[171]. Notably, this latter constitutes an integral part of the EU legal order under the rule of law, mandating the full respect, among other things, of the right to defense and the right to effective judicial protection[172].

As a result, the review on grounds of fundamental rights might be of further assistance to frame at its best the scope of judicial review in EU administrative law. This shall be envisaged in light of the recent developments in EU law in the field of CFSP matters concerning the jurisdiction of the CJEU, which is expressly limited pursuant to art. 24(1) TEU and art. 275 TFEU.

In her Opinion in *KS/KD*, recalled in her other Opinion in *Neves*[173], AG Ćapeta admits that the scope of the jurisdictional limitation over CFSP is justified by the fact that the CJEU should be left out of the possibility of interpreting policy choices in CFSP matters[174]. Translated into administrative terms, this would be a situation where the choice of the policy would be constructively and legitimately left to the agency by virtue of the mandate delegated upon by the legislature. Therefore, according to the AG, given a set of potential (and not legal) interpretations of an act, A, B or C, which all pertain to the policy itself, the jurisdictional limitation granted under CFSP would be totally accorded[175], just as it is established for judicial deference to agencies on policy interpretations.

Justice- ECJ, 12 March 2002, case C-27/00, *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd*, par. 62.

[171] European Court of Justice- ECJ, 20 September 2016, joined cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd*, parr. 55-60, 67.

[172] European Court of Justice- ECJ, 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, parr. 66, 97, 119.

[173] Opinion of AG ĆAPETA in case C-351/22, *Neves*, delivered on 23 November 2023, par. 3.

[174] Opinion of AG ĆAPETA in joined cases C-29/22 P and C-44/22 P, *KS/KD*, delivered on 23 November 2023, parr. 111-113.

[175] Opinion of AG ĆAPETA in joined cases C-29/22 P and C-44/22 P, *KS/KD*, delivered on 23 November 2023, par. 122.

Yet, according to AG Ćapeta, this jurisdictional limitation must be assessed in light of the broader context of the EU "constitutional" framework under the rule of law[176]. This latter entails that the EU Institutions and the Member States are subject to judicial review[177] and imposes that the respect of fundamental rights is a condition of lawfulness of any act[178], starting from the right to effective judicial protection[179].

Therefore, under this renewed perspective, given a set of interpretations, A, B or C, where only A and B are compliant with fundamental rights, the CJEU, according to AG Ćapeta, would still have jurisdiction over C, to strike it down if it were found incompatible with fundamental rights[180]. In CFSP matters, it could be argued that one thing is the respect for fundamental rights, integral part of the "constitutional" framework of the EU, another thing is the uniform interpretation and application of EU law, normally excluded in case of jurisdictional limitations provided for in the Treaties[181].

Similarly, this reasoning may be applied to situations of judicial deference to agencies, where judicial review would be limited by virtue of policy considerations that do not pertain to the legal field[182]. Nevertheless, there would be still room for a thorough judicial review by the CJEU even in cases that appear to be caught *prima facie* by the political

[176] Opinion of AG ĆAPETA in joined cases C-29/22 P and C-44/22 P, *KS/KD*, delivered on 23 November 2023, par. 123.

[177] European Court of Justice- ECJ, 23 April 1986, *Les Verts v. Parliament*, case 249/83, par. 23.

[178] European Court of Justice- ECJ, 3 September 2008, joined cases C-402/05 P and C-415/05 P *Kadi I*, parr. 281-284.

[179] European Court of Justice- ECJ, 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, par. 32.

[180] Opinion of AG ĆAPETA in joined cases C-29/22 P and C-44/22 P, *KS/KD*, delivered on 23 November 2023, par. 124.

[181] Opinion of AG ĆAPETA in joined cases C-29/22 P and C-44/22 P, *KS/KD*, delivered on 23 November 2023, par. 123.

[182] On the relation between agencies and fundamental rights, see also F. MEYER, *Protection of Fundamental Rights in a Multi-Jurisdictional Setting of the EU* (M. SCHOLTEN-A. BRENNINKMEIJER eds.), *Controlling EU Agencies. The Rule of Law in a Multi-Jurisdictional Legal Order*, Cheltenham, Edward Elgar Publishing, 2020, pp. 145-155.

question doctrine, with the further advantage under EU administrative law (and contrary to CFSP) of benefitting of the uniform interpretation and application of EU law. Notably, under a closer analysis, the incompatibility with fundamental rights, which is a legal question, would attract the matter and establish the jurisdiction of the CJEU to verify whether the act in question is at least compliant with fundamental rights.

Therefore, there would be a shift from the irrelevance of the political question to its legal relevance by virtue of the *legal* nature of the matter of compatibility with fundamental rights. And as a result, following this reasoning, the CJEU would be granted jurisdiction over situations where it is kept at bay from reviewing because of discretionary policy choices. In doing so, the (EU) legal system would truly abide by the rule of law, and mostly with fundamental rights, indeed.

It must be noted, however, that the ECJ decided the case at hand with a more nuanced approach[183]. Indeed, its jurisdiction has been expanded solely over those acts that, even belonging to the area of CFSP, do not entail strategic or political evaluations. For instance, the Court has held that the lack of sufficient personnel to conduct potential violations of human rights does not pertain to the strategic or political discretion of an Institution or body and can be thus brought before the CJEU under its jurisdiction[184].

In any event, the caselaw here recalled shows that, once the matter has shifted from political irrelevance to legal relevance, the CJEU would also have full jurisdiction over the

[183] See, on this point, L. LONARDO, *How the Court Tries to Deliver Justice in Common Foreign and Security Policy, Where the Need for Judicial Protection Clashes with the Principles of Conferral and Institutional Balance. Joined Cases C-29/22 P and C-44/22 P* KS and KD, in *Eur. Pap.*, vol. 9, no. 2, 2024, pp. 830-844; EDITORIAL COMMENTS, *From Opinion 2/13 to KS and KD: Confronting a Legacy of Constitutional Tensions*, in *CMLRev.*, vol. 61, no. 6, 2024, pp. 1455-1468; L. GROSSIO, *One Step Too Far, One Step Too Close. The Rocky Roads Towards Defening the Scope of Judicial Review in CFSP Matters in Light of* KS and KD v. Council and Others *and* Neves77 Solutions, in *Riv. cont. eur.*, fasc. 3, 2024, pp. 1-32.

[184] European Court of Justice- ECJ, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS/KD*, parr. 113-137.

correct interpretation and application of EU (administrative) law by virtue of the above mentioned caselaw on judicial review of legal issues, contrary to CFSP issues, where, as already recalled, the EU Treaties provide for statutory limitations. On top of it, and perhaps more importantly, the CJEU would also play the role of guardian of the "constitutional" framework of the EU via the respect of fundamental rights. Indeed, administrative deference can never question the "constitutional" framework of the rule of law and the protection of fundamental rights therein, nor even in the case of the political question doctrine. This is ultimately what the modern administrative State under the rule of law stands for.

3.1.2 Judicial review of facts and discretion under eu law

When it comes to facts and discretion, the CJEU, based on an established caselaw, especially with regard to the action for annulment, has traditionally exercised a great deal of self-restraint upon «[…] the assessment of highly complex scientific and technical facts» carried out by administrative authorities, and thus limiting its judicial review to «[…] manifest error of appraisal or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion[185]».

More precisely, the excess of the limits of agencies' discretion usually pertains to the violation of the principle of protection of legitimate expectations[186]. The misuse of powers, built upon the French *détournement de pouvoir*, revolves around the discrepancy between the purposes for which the power was originally granted and the actual result reached by the agency[187]. And eventually, the manifest error of appraisal, evolved throughout the years from a lenient to a more robust interpretation, requires determining whether the

[185] European Court of Justice- ECJ, 22 January 1976, case 55/75, *Balkan Import-Export*, par. 8; European Court of Justice- ECJ, 15 October 2009, case C-425/08, *Enviro Tech (Europe)*, par. 47; European Court of Justice- ECJ, 21 July 2011, case C-15/10, *Etimine SA v. Secretary of State for Work and Pensions*, par. 60.

[186] European Court of Justice- ECJ, 15 July 2004, joined cases C-37/02 and C-38/02, *Di Lenardo*, parr. 70-71.

[187] European Court of Justice- ECJ, 7 December 1976, case 23/76, *Pellegrini*, par. 30; See also T.C. HARTLEY, *The Foundations of European Union Law*, VIII ed., Oxford, Oxford University Press, 2014, pp. 424-427.

agency has turned to factually accurate, reliable, and consistent evidence, whether those evidence also contained all the necessary information to assess the complex situation at issue, and whether the agency was able to draw conclusions from them in the case at stake[188].

One may be tempted to ask to what extent these three grounds of review correspond to those statutorily listed in art. 263(2) TFEU about the action for annulment. It appears to be some correspondence only regarding the misuse of powers. Conversely, the manifest error of appraisal and the excess of the limits of the discretion fall foul of the wording of that provision, and they seem to be a more creative addition acquainted through the caselaw. Therefore, it could be questioned whether the introduction of these two other grounds of review by the Court, as also consolidated in the subsequent caselaw, is legitimate at all. This tendency could be seen, especially regarding the manifest error of appraisal, as a way for the EU Courts to expand their substantive review despite their self-constraint, by introducing a new head of review[189].

In any case, the query appears still open. And it is not a secondary issue, inasmuch as it determines the balance between the executive and the judiciary. This brings to the fore the need to explore different paths, to find valid alternatives to the broad self-restraint of EU courts, considering the outstanding place that is recognized to the rule of law (and fundamental rights) in the EU "constitutional" framework that shall be warranted by the EU judiciary. Notably, EU courts have usually limited their judicial review based on the wide margin of discretion granted to the agencies, especially in the field of socio-economic assessments, unless the administrative implementation is constrained by specific and objective statutory requisites (such as the notion of state aid)[190].

[188] European Court of Justice- ECJ, 15 February 2005, case C-12/03 P, *Tetra Laval*, par. 39.

[189] P. CRAIG, *UK, EU and Global Administrative Law. Foundations and Challenges*, Oxford, Oxford University Press, 2015, pp. 483-484.

[190] H.C.H. HOFMANN-G.C. ROWE-A.H. TÜRK, *op. cit.*, pp. 491-506.

Against this background, three different options go on stage: a full jurisdiction on questions of facts and discretion, too (3.1.2.1.), the resort to the duty of care (3.1.2.2.), and the use of expert evidence (3.1.2.3.).

3.1.2.1 Option one (not an option): full jurisdiction

This first option appears to be the least feasible. Indeed, recognizing full jurisdiction on questions of facts and discretion, unless it derives from an overruling of the well-established caselaw, would trigger a statutory amendment. This latter may be inserted into a specific legislation on the establishment of a specific agency, but this would provoke a high risk of fragmentation. Indeed, the legislature would recognize a full cognizance of the CJEU on questions of facts and discretion of an agency's decisions, whilst the consolidated caselaw, granting broad deference to administrative factual assessments would still apply for any other agency. Otherwise, such a statutory amendment may be inserted upon modifying the EU Treaties, but there is little to say about the difficulty of amending primary law.

Therefore, one may be tempted to assess more nuanced alternatives other than recognizing full jurisdiction on questions of facts and discretion, without entailing either an overruling of the consolidate caselaw nor any statutory amendments whatsoever.

3.1.2.2 Option two: the duty of care – who cares about the duty?

Against this background, the second option, following the continuum already started in the administrative procedure phase, revolves around the duty of care, which is of pivotal application in the context of the action for annulment. As ruled in *Kadi II*, any EU authority is mandated to examine «carefully and impartially» the reasons and evidence that have been

adduced to the request presented before it[191]. This hendiadys involves a procedural guarantee that can better balance the discretion granted to agencies and judicial review[192].

As already argued in Section 2, the duty of careful and impartial examination is an expression of (procedural) fairness and stems from a more general duty of care. It was firstly imposed by the ECJ in *Netherlands v. High Authority* as a criterion of review of legality[193], which might fall under the continuum between substance and procedure at judicial level. Indeed, the more discretion is granted to the agencies, the more in-depth judicial review over the respect of a given procedure must be[194]. This is so because the procedure is the tool granted at the administrative level for the private parties to present their claims and allegations before the agency.

Moreover, this duty must apply «[…] irrespective of the individual or general scope of the act under review[195]». If the act under review is of general application, there will be a confrontation between two public interests, such as, for instance, the right to sound administration as opposed to the efficiency of the administration[196]. Conversely, if the act under review is of individual application, the conflict will trigger an individual fundamental right, such as the right to effective judicial protection, opposed to a public interest, including the efficiency of the administration[197]. In both instances, the duty of careful and impartial examination plays the role of a procedural guarantee[198].

[191] European Court of Justice- ECJ, 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, par. 114.

[192] H.C.H. HOFMANN, *Between Discretion*, cit., pp. 96-97.

[193] European Court of Justice- ECJ, 21 March 1955, *Netherlands v. High Authority*, case 6/54, par. 112.

[194] European Court of Justice- ECJ, 21 November 1991, case C-269/90, *Technische Universität München*, par. 14.

[195] J. MENDES, *op. cit.*, p. 431.

[196] General Court, 13 September 2013, case T-333/10, *ATC and Others v. Commission*, parr. 84-94.

[197] General Court, 7 March 2012, case T-210/02, *British Aggregates*, par. 177.

[198] J. MENDES, *op. cit.*, p. 426.

The next step aims at determining whether the infringement of this duty may constitute a ground of judicial review. Considering that Article 263(2) TFEU lists the «infringement of an essential procedural requirement» as one of the grounds for review, a procedural requirement is *essential* when it is «[…] intended to ensure that the measures concerned are formulated with all due care and prudence[199]». In particular, it has been argued that this ground of review concerns the respect of five different components: the duty to consult, the right to be heard and the right to defense, the duty to confidentiality, compliance with internal procedural rules, and the duty to state reasons[200]. If closely analyzed, it appears that the duty of care and impartial examination amounts to such an essential procedural requirement to make void the contested act,[201] as it was affirmed by the ECJ in *Technische Universität München*[202] and *Nölle*[203].

This has been also confirmed more recently in *Kadi II*, where the ECJ imposed on the proceeding authority the assessment of «[…] whether it is necessary to seek the assistance of the Sanctions Committee» (duty to consult), the respect for «the rights of the defense», the duty to comply with the «procedural obligation» enshrined in the Sanctions Regulation contested, and «the obligation to state reasons laid down in [art.] 296 TFEU[204]». Moreover, the Court made evident the link between the set of these rights, as enshrined in art. 41(2) CFR, and the right to effective judicial protection under art. 47 CFR[205], the former being the precondition for the exercise of the latter.

[199] General Court, 22 April 2015, T-554/10, *Evropaïki Dynamiki*, par. 80.

[200] K. LENAERTS-K. GUTMAN-J.T. NOWAK, *op. cit.*, pp. 382-383.

[201] H.C.H. HOFMANN, *Between Discretion*, cit., p. 91.

[202] European Court of Justice- ECJ, 21 November 1991, case C-269/90, *Technische Universität München*, parr. 22, 28.

[203] European Court of Justice- ECJ, 22 October 1992, case C-16/90, *Eugen Nölle v. Hauptzollamt Bremen-Freihafen*, par. 13.

[204] European Court of Justice- ECJ, 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, parr. 111, 113, 115, 116.

[205] European Court of Justice- ECJ, 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, parr. 99-100.

Under this perspective, the duty of careful and impartial examination is welded with fundamental rights by virtue of its transversal application. Indeed, in *KS/KD*, the ECJ made explicitly reference namely to the right to a fair trial and an effective remedy, as enshrined in art. 47 CFR, as well as in art. 6 and art. 13 ECHR, to frame the need to respect fundamental rights in the EU "constitutional" framework under the aegis of the rule of law[206].

Therefore, granting procedural safeguards under the duty of care rounds off the continuum from the administrative procedure to the judicial phase. And it may ensure a means of maintaining the balance in the regulatory framework, with an emphasis on the importance of procedural safeguards in upholding the rule of law. In this respect, whilst agencies benefit from broad discretion, procedural safeguards are fundamental to ensure accountability and protect fundamental rights. As a result, the duty of care tops off, from the perspective of judicial review of facts and discretion, the recent caselaw on respecting fundamental rights as an integral component of the rule of law in the EU "constitutional" system.

In the broader picture, it is therefore again the balancing between substantive discretion and procedural guarantees that can save the agency-model within the EU "constitutional" framework of the rule of law. Indeed, if the CJEU cannot substitute its own economic and technical assessment for that of the competent agency, its judicial review shall be exercised at least to determine as to whether the relevant procedural safeguards have been complied with[207]. Accordingly, the duty of care is a useful procedural tool that strikes a balance between the great discretion granted to the agency under the delegating mandate and the undeniable judicial review by a court of law[208]. This is, after all, where the rule of law stands

[206] European Court of Justice- ECJ, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS/KD*, parr. 77-80.

[207] General Court, 1 June 2022, case T-481/17, *Banco Popular Español*, parr. 167-168.

[208] H.C.H. HOFMANN, *Between Discretion*, cit., p. 96.

for[209]. It is not a question of formality, but rather of vesting substance the in appropriate procedural (and thus, formal) guarantees.

3.1.2.3 Option three: expert evidence

The third option, which might complement the second one, concerns expert evidence. Expert evidence implies that the court does not possess the sufficient expertise required by the case it deals with, and thus it decides to resort to the help of a neutral expert, directly appointed by the court itself[210]. This faculty is recognized by art. 25 of the Statute of the CJEU, and further substantiated in art. 70 of the Rules of Procedure (hereinafter, RoP) of the ECJ and in art. 96 RoP of the General Court (hereinafter, GC). Neutral expert evidence shall be distinguished from partisan expert evidence, which is brought before the Court directly by the parties. Indeed, one thing is to rely generally on mainstream expertise, as it is understood by the general technical or scientific knowledge in each field that may be relevant in a controversy of law. This may be brought to the attention of the Court also by the parties in their allegations submitted thereto. Another thing is for the CJEU to rely on expert evidence, which would provide to the court in a neutral manner the necessary knowledge of the factual circumstances related to the case at hand.

The ECtHR has recognized that resorting to expert evidence constitutes a procedural safeguard under art. 6(1) ECHR, which mandates that the parties in the proceeding must be able to participate in the interviews of the expert and have access to the documents the expert has compiled[211]. Furthermore, as clearly set out in the Explanations to the CFR, the second

[209] European Court of Justice- ECJ, 6 October 2015, case C-362/14, *Schrems I*, par. 95; European Court of Justice- ECJ, 28 March 2017, case C-72/15, *Rosneft*, par. 73.

[210] G. CUMMING, *Expert Evidence Deficiencies in the Judgments of the Courts of the European Union and the European Court of Human Rights*, Alphen aan den Rijn, Wolters Kluwer, 2014, p. 77.

[211] European Court of Human Rights, 18 March 1997, Application no. 21497/93, *Mantonavelli v. France*, par. 33.

paragraph of art. 47 CFR corresponds to art. 6(1) ECHR, and, pursuant to art. 52(3) CFR, the meaning and the scope of art. 47 CFR shall be the same as the one laid down in art. 6(1) ECHR and its caselaw[212]. Therefore, it can be argued that the right to effective judicial protection, and the procedural safeguards that it entails, cover a broad array of guarantees, including the possibility of resorting to expert evidence.

In this respect, under art. 51(1) CFR, the institutions, bodies, offices and agencies of the EU, as well as Member States only when they are implementing UE law, must abide by the respect of the right to an effective remedy and to a fair trial, giving rise to the right of effective judicial protection[213]. Moreover, it must be noted that this latter requires, under the second subparagraph of art. 19 TEU(1), that Member States establish «[…] remedies sufficient to ensure effective legal protection in the fields covered by Union law[214]». It derives that the right to effective judicial protection is not only limited to Member States when implementing EU law, but its field of application is broader, referred to any field of law which is covered by EU law, and beyond the mere implementation of this latter[215].

It appears that resorting to expert evidence, as part of the right to effective judicial protection, is a thorough procedural safeguard whose use shall be central in the practice of the CJEU. Nevertheless, in a survey conducted in 2008, it was shown that the CJEU had resorted up to that year only twenty-five times to expert evidence[216]. There might be different

[212] *Ex multis*, European Court of Justice- ECJ, 11 July 2024, joined cases C-554/21, C-622/21, and C-727/21, *Hann-Invest*, par. 45.

[213] A. ALBORS-LLORENS, *The Asymmetrical Impact of Article 47 of the Charter on National and EU Remedies*, in *The EU Charter of Fundamental Rights: A Commentary* (S. PEERS-T. HERVEY-J.KENNER-A. WARD eds.), II ed., Oxford, Hart Publishing, 2021, pp. 1735-1756.

[214] *Ex multis*, European Court of Justice- ECJ, 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, par. 29.

[215] *Ex multis*, European Court of Justice- ECJ, 26 March 2020, joined cases C-558/18 and C-563/18, *Miasto Łowicz*, parr. 32-36.

[216] E. BARBIER DE LA SERRE-A.-L. SIBONY, *Expert Evidence before the EC Courts*, in *CMLRev.*, vol. 45, n. 4, 2008, p. 949.

reasons why there has been so little room for expert evidence in the caselaw of the CJEU. First, as a matter of fact, even though the possibility of resorting to expert evidence is provided for by the law, it is still up to the ECJ and the GC to appoint an expert, turning to their own discretion[217]. Second, a low number of cases where expert evidence is employed, may derive from an improper use of judicial notice[218]. This latter implies that «[…] the judge can make use of his general knowledge where some fact has to be established and take notice of the existence of that fact without requiring it to be formally proved[219]».

In this respect, excessive resort to judicial notice might be a further complication if we consider the dynamics intrinsic to the administrative procedure. In a case where private parties have not been involved in the administrative procedure, to the extent that they have not exercised their consultation rights, the judicial proceeding is the only way for them to bring to the fore their own assessments of facts and discretion. In other words, if they have not been granted the necessary safeguards under the principle of procedural fairness in the administrative phase, they will not have other option but to allege in the judicial proceeding their own assessments, perhaps also grounded on partisan expert evidence. However, if the judge cuts across the controversy and resorts to judicial notice, the parties are deprived of the possibility of exercising their rights under a fair trial, and no account of their allegations will be beheld. At the very least, the judge may exclusively rely on the assessment carried out by the agency, or worse, resort only to their judicial notice.

This is highly problematic in those cases where it would not be appropriate to employ judicial notice because the matter involves an assessment that goes beyond the legal knowledge that a court of law shall have under the principle of *iura novit Curia*[220]. In this respect, a court, instead of balancing the different views submitted before it, might substitute

[217] G. CUMMING, *op. cit.*, pp. 105-106.

[218] G. CUMMING, *op. cit.*, p. 106.

[219] C. MANCHESTER, *Judicial Notice and Personal Knowledge*, in *Mod. L. Rev.*, vol. 42, p. 22.

[220] This principle was recognized by, *ex multis*, European Court of Justice- ECJ, 16 October 1975, case 90/74, *Deboeck v. Commission*, p. 1128.

its own assessment of facts and discretion, by resorting to its judicial notice, or might also exclusively rely on the evaluation carried out by the administrative agency of the case at hand. Indeed, a right to a fair hearing includes the right to adversarial proceedings, which entails the possibility for each party to be informed of any evidence brought to the attention of the court[221].

As brilliantly put by AG Jacobs, «[t]he Court of Justice is not, for example, the appropriate forum in which to determine whether the Philips PSEM 500 X possesses a back-scattered electron detector capable of distinguishing atomic number differences. Nor is the Court well placed to judge whether that machine's eucentric tilting specimen stage is capable of setting the surface of the specimen on the Rowland circle of the spectrometer faster and more accurately than the light microscope fitted to the JEOL JSM-35 C[222]». In other words, the judge faces such a complex assessment that «[…] there are […] no judicial or manageable standards by which to judge these issues, or to adopt another phrase […], the court would be in a judicial no-man's land[223]».

This is where expert evidence may be of pivotal application. Art. 19(1) TEU mandates that the CJEU «[…] shall ensure that in the interpretation and application of the Treaties the law is observed». This does mean that the CJEU can rely on its own knowledge on matters other than EU law, to solve the cases before it, openly resorting to judicial notice. In this regard, «[a] 'complex' assessment is […] one where the relevant factual background cannot be established objectively or with absolute certainty, since reasonable and well-informed persons could, at least to some extent, disagree on the outcome of the fact-finding exercise or the legal qualification of the facts[224]». This is the reason why the CJEU tends to defer to administrative agencies, avoiding any substitution of the assessment conducted

[221] European Court of Human Rights, 18 March 1997, Application no. 21497/93, *Mantonavelli v. France*, par. 33.
[222] Opinion of AG JACOBS in case C-361/96, *Technische Universität München*, delivered on 11 July 1991, par. 15.
[223] Per LORD WILBERFORCE, in *Buttes Gas and Oil Co v. Hammer* [1982] AC 888, p. 938, quoted by AG JACOBS in his Opinion in case C-120/94, *Commission v. Greece (FRYOM)*, delivered on 6 April 1995, par. 50.
[224] Opinion of AG EMILIOU in case C-389/21 P, *ECB v. Crédit Lyonnais*, delivered on 27 October 2022, par. 50.

already by the administrative agency[225]. Yet, the reluctance of the CJEU to resort to expert evidence can be neither justified under the need to grant extensive deference on questions of facts and discretion. Indeed, asking for technical assistance to a neutral expert does not imply to substitute the discretion of the CJEU with that of administrative agencies. Rather, in compliance with the procedure set out by the law and the parties' procedural rights, it brings technical knowledge to the cognizance of the judges, broadening up the margin to detect potential manifest error(s) of assessment committed by the agency[226].

Moreover, the procedural safeguard enshrined in art. 6(1) ECHR cannot be set aside either. Since the right to effective judicial protection, as already noted with regard to the political question doctrine, is an integral part of the rule of EU law, neither resort to judicial notice nor deference to administrative agencies can sufficiently ensure the exercise of this right, and, more broadly, uphold the rule of law[227].

Therefore, a possible solution is represented by expert evidence, which could be envisaged as a third path between deference and judicial notice. And its use shall be increasingly encouraged. Indeed, the technical legitimacy derived from it could be seen as a reinforcement of the procedural legitimacy of courts, and it could reflect a crystallization of the technical expertise in the evolution of the caselaw[228].

In this respect, expert evidence complements the principle of procedural fairness. On the one hand, granting further safeguards to the parties allows to re-establish the continuous link between substantial and procedural fairness from the administrative procedure to the judicial proceeding. On the other hand, expert evidence, other than being a procedural guarantee, may also play an important role in the balancing among the

[225] *Ex multis*, European Court of Justice- ECJ, 6 October 2009, joined cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P, *GlaxoSmithKline Services Unlimited v. Commission*, parr. 86, 88.

[226] E. BARBIER DE LA SERRE-A.-L. SIBONY, *op. cit.*, p. 958.

[227] G. CUMMING, *op. cit.*, p. 107.

[228] E. BARBIER DE LA SERRE-A.-L. SIBONY, *op. cit.*, pp. 969-970.

institutional powers of the courts and the agencies. Whilst these latter would still be granted extensive deference in the administrative procedure, the use of expert evidence in the judicial proceeding would allow to restore a correct balance upon the judgment of the court. Indeed, the judges would be in the correct position to verify, resorting to neutral technical expertise, whether the assessment conducted by the agency was correct in light of the added technical knowledge brought by neutral expert evidence, without substituting their discretion with that already exercised by the agency. In this respect, judicial review would not be kept at bay from the courts of law, which have limited their jurisdiction to a rigorous self-restraint, and, in so doing, the EU legal system would truly abide by the rule of law.

3.2 Governmental litigation: judicial legalism

The impact of the agency-model in EU law can be lastly analyzed considering governmental litigation, which involves the challenge of EU legislative acts by one or more Member States before the CJEU. Notably, this type of judicial disputes arises, according to the mentioned classification of the «conflicts universe», between two competing public interests, namely, a national public interest, held by the Member States as such, as opposed to an EU public interest, in the context of the conferral of competences. Moreover, contrary to policy litigation, marked by a high judicial deference, in governmental litigation, the judiciary retrieves its central role, in the broader context of «Eurolegalism», insofar as this type of disputes mainly involves judicial review of legal issues[229], making the EU Court the major actor therein[230].

Eurolegalism entails a law-making process that relies on the role of the judiciary through litigation and dispute resolution[231]. It stems from the «adversarial legalism» that has

[229] C. ADAM, *op. cit.*, p. 44.

[230] B. MARCHETTI, *Genesi e questioni aperte del diritto amministrativo dell'Unione europea*, in *Riv. trim. dir. pubbl.*, fasc. 2, 2016, p. 313.

[231] R.D. KELEMEN, *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Cambridge (MA), Harvard University Press, 2011, p. 11.

particularly influenced the evolution of the law and regulation in the US[232]. In fact, adversarial legalism is characterized, on the one hand, by «a formal legal contestation», which entails litigation and/or judicial review over competing rights and interests, and a «litigant activism», which calls for bringing up claims, legal arguments and evidence before a court[233]. And it is mostly activated where «the authority is fragmented», and where «hierarchical control is relatively weak[234]».

In this respect, adversarial legalism does play a role in shaping the institutional balance among the different actors in the EU legal framework, and it is thought to become a major tool of governance in policy and regulation[235]. In this respect, the cornerstone of governmental litigation is obviously given by the two constitutional principles of subsidiarity and of proportionality (respectively under art. 5(3) TEU and 5(4) TEU)[236], which play a fundamental role in drawing the set of competences between the EU and its Member States in the supranational system under the principle of conferral[237].

3.2.1 A first type of dispute: establishing national regulatory authorities

A first type of conflict has concerned the establishment of NRAs at national level, as provided for in EU secondary law. In its ruling *Commission v. Germany*[238], the ECJ tackled the problem arising from the lack of democratic legitimacy. In the case at hand, the

[232] R.A. KAGAN, *Adversarial Legalism. The American Way of Law*, II ed., Cambridge (MA), Harvard University Law, 2019, pp. 3-4.

[233] R.A. KAGAN, *op. cit.*, p. 10.

[234] R.A. KAGAN, *op. cit.*, p. 10.

[235] R.D. KELEMEN, *op. cit.*, pp. 11-12.

[236] On this notion, see T. TRIDIMAS, *The General Principles of EU Law*, cit., pp. 8-14.

[237] P. CRAIG-G. DE BÚRCA, *EU Law. Text, Cases, and Materials*, VII ed., Oxford, Oxford University Press, 2020, pp. 96-99.

[238] European Court of Justice- ECJ, 2 September 2021, case C-718/18, *Commission v. Germany*.

Commission brought an infringement procedure against Germany for failing to transpose into domestic law Directive 72/2009 and Directive 73/2009 of the third energy package. Germany contended that the delegation to an NRA of the power to fix energy wholesale prices, as required by EU law, would be contrary to the democratic principle.

The ECJ, confirming its previous caselaw[239], ruled that the establishment under EU law of NRAs, which are «[…] outside the classical hierarchical administration», is not incompatible *per se* with the democratic principle so long as «[…] they are not shielded from all parliamentary influence[240]». Moreover, by resorting to the *Meroni* doctrine, it mandated that the legislature cannot delegate to an agency such a discretion that would allow this latter to substitute «[…] the choices of the delegator by those of the delegate».[241] And eventually, it required that acts of the NRAs undergo «[…] judicial review of the competent courts».[242]

In so doing, the Court stressed the importance of the review *ex post* over the action of NRAs in view of the aims to be pursued administratively, alongside with the *ex ante* determination by the legislator of the powers of the NRAs and the objectives to be attained thereby.

3.2.2 A second type of dispute: establishing EU agencies

[239] European Court of Justice- ECJ, 9 March 2010, case C-518/07, *Commission v. Germany*, parr. 42, 43, 46.

[240] European Court of Justice- ECJ, 2 September 2021, case C-718/18, *Commission v. Germany*, par. 126.

[241] European Court of Justice- ECJ, 2 September 2021, case C-718/18, *Commission v. Germany*, par. 131.

[242] European Court of Justice- ECJ, 2 September 2021, case C-718/18, *Commission v. Germany*, par. 126.

A second form of conflict has stemmed from the litigation concerning the establishment of EU agencies, as made evident in *United Kingdom v. Parliament and Council (ENISA)*[243] and *United Kingdom v. Council and Parliament (ESMA)*[244].

Both cases revolve around the question on whether the EU legislature may resort to art. 114 TFEU to set up an EU agency (*ENISA*) and to grant it the power of taking general and individual decisions (*ESMA*). In both cases, the ECJ ruled that the legislature's choices were legitimate. In fact, the Court in *ENISA* concluded that it belongs to the EU legislature to take all steps deemed necessary to accomplish the harmonization of national laws under art. 114 TEU in the field of electronic communications services and associated facilities and services, including the possibility of establishing an agency, provided that the tasks delegated upon it are «[…] closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States» under art. 114 TFEU[245].

Likewise, the Court in *ESMA*, as already outlined in Section 2, ruled that, on the one hand, art. 28 of regulation 236/2012, enabling ESMA to take certain decisions of both general and individual application with respect to short selling activities on the financial market was compliant with the *Meroni* doctrine, also by virtue of «the specific technical and professional expertise» deferred to the agency at stake[246]. At the same time, it ruled that art. 290 TFEU and art. 291 TFEU were not the relevant benchmark for the case at stake, since those provisions cover delegating powers to the Commission (and exceptionally to the Council[247]).

[243] European Court of Justice- ECJ, 2 May 2006, case C-217/04, *United Kingdom v. Parliament and Council (ENISA)*.

[244] European Court of Justice- ECJ, 22 January 2014, case C-270/12, *United Kingdom v. Council and Parliament (ESMA)*.

[245] European Court of Justice- ECJ, 2 May 2006, case C-217/04, *United Kingdom v. Parliament and Council (ENISA)*, parr. 44-45.

[246] European Court of Justice- ECJ, 22 January 2014, case C-270/12, *United Kingdom v. Council and Parliament (ESMA)*, parr. 43-54.

[247] European Court of Justice- ECJ, 22 January 2014, case C-270/12, *United Kingdom v. Council and Parliament (ESMA)*, parr. 78-86.

Interestingly, it could be argued that the *Meroni* doctrine may still be relevant when the delegation of powers is performed *vis-à-vis* authorities other than the Commission (and exceptionally the Council), in circumstances falling under neither art. 290 TFEU nor art. 291 TFEU[248].

On the other hand, the ECJ mandated that the decisions of individual application delegated to ESMA fall within the scope of art. 114 TFEU because, first, the EU legislature may envisage different tools to attain the aim of harmonization, including deferring decisions to entities with «[…] specific professional and technical expertise», and second, nothing in art. 114 TFEU may preclude the fact that the addressees of such legislation are solely the Member States, and not also the individuals through the decisions taken by the agency at hand[249]. Accordingly, the common regulatory framework established by the EU legislature is compliant with EU primary law, by satisfying the link, already set out in *ENISA*, between the tasks delegated and the subject-matter of the harmonization[250].

This second type of litigation shies away from the policy deference delegated to the agency and permits to look at the agency-model in the broader "constitutional" framework. Indeed, considering the separation of powers, it is precisely the issue of institutional balance that comes to the fore regarding this form of litigation. And, in a supranational legal system, the question spans across all institutional players, whose competences conferred by the Treaties may be infringed upon by undue overstepping. Consequently, allowing the Member States to trigger a governmental litigation would enable the CJEU to exercise a full judicial review over the choices of the EU legislature establishing a new agency or mandating the Member States to set up a new NRA. This would permit to offset the dynamics within the

[248] H.C.H. HOFMANN-G.C. ROWE-A.H. TÜRK, *op. cit.*, p. 241.

[249] European Court of Justice- ECJ, 22 January 2014, case C-270/12, *United Kingdom v. Council and Parliament (ESMA)*, parr. 104-107.

[250] European Court of Justice- ECJ, 22 January 2014, case C-270/12, *United Kingdom v. Council and Parliament (ESMA)*, parr. 108-117.

institutional balance from the perspective of the actors involved, mostly the EU legislature *vis-à-vis* the Member States.

After all, it is not different from what happens in consolidated federal systems, such as the US, under the umbrella of adversarial legalism. Fundamental in this respect has been the federalism review under the Commerce Clause (Article I, Section 8, Clause 3, US Constitution), which allows Congress to regulate the commerce «[…] among the several States». In this regard, the interpretation given by SCOTUS to this Clause is «[…] complex and evolving», to the extent that resort to the Commerce Clause has been broadly granted also, for instance, for public health-related issues[251]. On closer analysis, that is not conceptually distant from EU law, where the EU legislature may adopt harmonization measures to the benefit of the internal market, and thus of situations presenting a cross-border element (in other words, *among the Member States*), taking into account also other grounds, such as public-health reasons, provided that the conditions enshrined in art. 114 TFEU are firstly met[252].

In both cases, the task of the judiciary is to review in abstract whether the principles of federalism on the repartition of the competences are respected[253]. Notably, under US law, within the balancing of the exercise of competences, the central question amounts as to whether a particular activity affects interstate commerce «[…] significantly enough to justify federal regulation, considering the loss of local autonomy involved[254]». That is, in other

[251] L. RUTKOW-J.S. VERNICK, *Law and the Public's Health*, in *Pub. Heal. Rep.*, vol. 126, n. 5, 2011, p. 750.

[252] European Court of Justice- ECJ, 5 October 2000, *Germany v. Parliament and Council (Tobacco I)*, C-376/98, par. 88.

[253] D. HARVEY, *Federal Proportionality Review in EU Law: Whose Rights are They Anyway?*, in *Nor. Journ. Int. L.*, vol. 89, n. 2-3, 2020, p. 321.

[254] L.A. GRAGLIA, *United States v. Lopez: Judicial Review Under the Commerce Clause*, in *Tex. L. Rev.*, vol. 74, n. 4, 1996, p. 769. To that effect, «interstate commerce» refers to goods that cross State borders during their transportation and delivery, while «intrastate commerce» refers to a delivery of goods within the borders of the same State.

words, the application, under EU law, of the principles of subsidiarity and proportionality, to justify harmonization under art. 114 TFEU.

The leading case in US law is *Lopez v. United States*, when SCOTUS, by resorting to both the affects doctrine and the bar doctrine, for the first time since 1930s, annulled a federal law, notably the Gun-Free School Zones Act, for exceeding Congress's powers under the Commerce Clause[255]. In particular, for the application of this latter, the affects doctrine mandates that the distinction between intrastate and interstate commerce shall be evaluated not only with regard to the regulated activity *per se*, but also in light of its effects (affectation) on the out-of-state commercial activity[256]. On the other hand, the bar doctrine impedes the shrewd exercise of powers by Congress for purposes other than those the federal Government is entrusted with[257].

Against this background, in *Lottery Case*, the Court departed from *Gibbons*[258], where it had ruled that the scope of Congress's legislative powers was dependent solely on the political control (and not also on judicial control)[259]. In so doing, according to Justice Fuller's dissenting opinion, the Court took «[…] a long step in the direction of wiping out all traces of state lines, and the creation of a centralized Government».[260] Ultimately, with *Lopez*, the Court reached the point of even invalidating a federal act. The Court's approach has been criticized to the extent that the allocation of political powers in the US federal system «[…] is not a feasible or appropriate function of the Court», since there is «[…] a clear nonjudicial means» of forestalling encroachments upon State autonomy, which is put forth by «[…] the election of federal representatives committed to preserving state autonomy[261]».

[255] Supreme Court of the United States, 26 April 1995, 514 US 549 (1995), *Lopez v. United States*, p. 567-568.

[256] R. BERGER, *Judicial Manipulation of the Commerce Clause*, in *Tex. L. Rev.*, vol. 74, n. 4, 1996, pp. 702-706.

[257] Supreme Court of the United States, 6 March 1819, 17 US 316 (1819), *McCulloch v. Maryland*, p. 423.

[258] Supreme Court of the United States, 23 February 1903, 188 US 321 (1903), *Lottery Case*, p. 363.

[259] Supreme Court of the United States, 2 March 1824, 22 US 1 (1824), *Gibbons v. Ogden*, p. 197.

[260] Dissenting Opinion of FULLER, J., in 188 US 321 (1903), *Lottery Case*, delivered on 23 February 1903, p. 371.

[261] L.A. GRAGLIA, *op. cit.*, pp. 768, 771.

However, precluding the exercise of judicial review would infringe upon the rule of law. On the other side of the Atlantic, the CJEU has repeatedly held that the choice of the legal basis for the adoption of any EU measure[262], which entails the correct conferral of competence between the EU and the Member States[263], has «constitutional significance[264]» and «[…] must rest on objective factors amenable to judicial review […][265]». So did SCOTUS in *Lopez*, by excluding the resort to the federal Commerce Clause, and preserving the State autonomy.

To put it differently, the assessment of the choice of the legal basis appears to be taken away from the political question doctrine because of its legal relevance. In federal and supranational systems, choosing the correct legal basis implies choosing the correct institutional actor. Thus, there is no or little room for politics in this field. The final act will have to be taken under the correct legal basis(es) and passed by the correct institutional actor(s) under the correct legislative procedure. And when these conditions are not met, there is nothing to do but to challenge the act before a court of law. After all, the main concern of the administrative State is avoiding arbitrariness in the exercise of powers. And the judiciary is better entrusted to accomplish this task.

[262] B. DE WITTE, *op. cit.*, pp. 147, 152.

[263] I. GOVAERE, *To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon*, in M. CREMONA (eds.) *Structural Principles in EU External Relations Law*, Oxford, Hart Publishing, 2018, p. 75.

[264] European Court of Justice- ECJ, 26 July 2017, Opinion 1/15, *EU-Canada PNR Agreement*, par. 71; European Court of Justice, 6 October 2021, Opinion 1/19, *Istanbul Convention*, par. 199.

[265] European Court of Justice- ECJ, 19 July 2012, case C-130/10, *Parliament v. Council (Financial Sanctions)*, par. 37; European Court of Justice- ECJ, 20 November 2018, joined cases C-626/15 and C-659/16, *Commission v. Council (AMP Antarctique)*, par. 61.

4. CONCLUSION: TOWARDS A NEW SEPARATION OF POWERS?

Considering the principal-agent dynamic, the very core of the agency-model revolves around the trust that is delegated by the legislature: «[…] what limits Congress is not expertise, but public trust[266]». However, within the framework of the rule of law, this relation may be in distress, especially when the public trust is consistently reduced by the need to grant a broader discretion and deference to agencies, administrative (and not legislative) authorities.

The analysis here conducted has embraced the notion of the rule of law under the perspective of ensuring judicial review against administrative acts and the protection of fundamental rights[267]. However, it must be recalled that this concept assumes an ampler significance that cuts across the EU legal domain and is susceptible to application in both the internal and external reference framework of the EU action[268]. Indeed, the rule of law, as a value of the EU under Article 2 TEU, represents the precondition for the enjoyment of any right and requires that the exercise of any public power must be established by the law in accordance with a democratic law-making process[269].

[266] E.H. STIGLITZ, *Delegating for Trust*, in *Univ. Penn. L. Rev.*, vol. 166, n. 2, 2018, p. 637.

[267] Judicial review and the protection of fundamental rights are only two of the several elements that are usually enumerated to give substance to the rule of law, such as absence of corruption, open government, independence of the judiciary, and media pluralism and freedom. On this point, see M. D'ALBERTI, *Rule of Law in Decline? The Quest for Progress*, in *Riv. trim. dir. pubbl.*, fasc. 1, 2025, pp. 3-11.

[268] I. GOVAERE, *Promoting the Rule of Law in EU External Relations: A Conceptual Framework*, in *The Rule of Law's Anatomy in the EU. Foundations and Protections* (A. ROSAS-J. RAITIO-P. POHJANKOSKI eds.), Oxford, Hart Publishing, 2022, 189-206.

[269] D.-U. GALETTA-J. ZILLER, *op. cit.*, p. 124, recalling the third recital of regulation (EU) 2020/2092: «The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making

In this respect, therefore, when the rule of law is applied to the field of administrative law, the exercise of any public power must respect some fundamental guarantees. First, the administrative action must be set out by the law, in compliance with the principle of legality. However, it has been argued in this paper that legality may not be sufficient when the sheer wielding of public power may provoke hardships to the detriment of the private. This is where fairness might become of great application as a manifestation of natural justice.

As a result, in shaping a new relation between the administration and the individual, it has been suggested to resort to the principle of fairness, both in its substantive and procedural dimension. It has been argued that, on the one hand, substantive fairness implies the appropriateness of the administrative action in a given case, and, on the other hand, procedural fairness entails the recognition of more extensive participatory and defense rights. And these procedural obligations must be bestowed already in the administrative procedure, when the agency performs its adjudicative functions.

Yet, this is not sufficient. Once the judicial phase is reached, the CJEU tends to shy away from its public trust and acknowledges a self-restraint to the benefit of agencies and their deference regarding facts and discretion. It must be noted that "[f]actual complexity is no excuse for inertia or superficiality on the part of the judges[270]". The rule of law, as substantiated in the protection of fundamental rights, mandates a thorough judicial review. And when judicial review is self-restrained for policy reasons, it is the duty of care that gets back on track in policy litigation. It is a continuum under the umbrella of procedural guarantees, from the administrative procedure to the judicial proceedings. By contrast, the CJEU exerts a full judicial review in governmental litigation, where the checks and balances are controlled before the instituted agency can even exercise its discretion *vis-à-vis* specific cases.

process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts and separation of powers, be respected».

[270] Opinion of AG EMILIOU in case C-389/21 P, *ECB v. Crédit Lyonnais*, delivered on 27 October 2022, par. 49.

Accordingly, the respect of the rule of law may be further substantiated by the fair administrative procedure, whereby fairness might allow the administrative to give an appropriate solution upon adjudicating a case placed before it. The abuse and the arbitrariness shall be avoided first by the legislative delegation of powers, thoroughly complying with the principle of legality. And then, squaring the circle, the judicial review ensures that the administrative action has abided by the principle of legality and that of fairness. This latter might thus become of pivotal application. Indeed, it might give shape to a new relationship between the individual and the administration that is more appropriate to the needs of the specific case, provided that also the principle of fairness is squared within the rule of law.

«*Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir*[271]». The public trust always aims at balancing the powers, for the power to limit the power. This is the ultimate challenge in view of the doctrine of separation of powers. However, it must be also noted that the legal system has been shifting from the traditional *trias politica* towards a new separation of powers, where the public powers mutually control each other on the basis of a mechanism of reinforced checks and balances [272]. Indeed, the strict separation of powers, as conceptualized by Montesquieu, may not be suitable anymore for the twenty-first century, where new institutional forms, starting from the agencies, can be hardly classified entirely within the legislative, the executive or the judiciary branch[273]. In this respect, the new institutional system is further articulated within Europe. The sources of law are not confined to national boundaries anymore, but they are

[271] C. BARON DE MONTESQUIEU, *De l'esprit des lois* (1748), tom. I, liv. XI, chap. IV, London (available on *HeinOnline*), 1768, p. 309.

[272] M. RAMAJOLI, *Principio della separazione dei poteri, indeterminatezza delle norme e* standard *valutativi*, in *Concetti giuridici indeterminati e* standards *valutativi del potere amministrativo* (M. TRIMARCHI ed.), Napoli, E.S.I., 2024, p. 22.

[273] B. ACKERMAN, *Good-bye, Montesquieu*, in *Comparative Administrative Law* (S. ROSE-ACKERMAN-P.L. LINDSETH-B. EMERSON eds.), Cheltenham, Edward Elgar, 2017, pp. 38-43.

also to be found beyond the State, distributed across national and EU levels, where the institutional balance reflects progressively the regulatory power exercised by the agencies[274].

As the structure of the administration changes, so the law should do. «Law must be stable and yet it cannot stand still[275]». This is the everlasting drive. And perhaps it would be enough to save the agency-model.

Abstract. *The paper addresses the topic of the separation of powers in the field of EU administrative law, under the application of the rule of law. It considers specifically both the administrative procedure and the subsequent judicial review within the EU regulatory model. Adopting a comparative approach between EU law and US law and dwelling upon the principle of (substantive and procedural) fairness, it is argued that it is possible to strike a balance between the pure respect of the principle of legality and the need to temper some hardships that the strict application of the law may provoke. Naturally, to avoid abuse or arbitrariness by the public power, a great deal of attention is drawn to the judicial review and the protection of fundamental rights, essential components of the rule of law. In this regard, informing the administrative action to the principle of fairness (both substantial and procedural) is not necessarily at odds with a thorough respect of the rule of law in the field of administrative law. Indeed, the EU legal system has all necessary means to react against possible abuse and arbitrariness by the public power, starting from the respect of the principle of legality and then ensuring full judicial review over administrative acts. Therefore, applying fairness to the administrative action of EU agencies might give a further substantiation to the relationship between the individual and the administration.*

[274] J. CORKIN, *Refining Relative Authority: The Judicial Branch in the New Separation of Powers*, (J. MENDES-I. VENZKE eds.), *op. cit.*, pp. 159-160.

[275] R. POUND, *Interpretations of Legal History*, New York, The Macmillan Company, 1923, p. 1.