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The Guises of and Guidance to Administrative Discretion in the European Court of Justice's Interpretation of EU Immigration Law

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Abstract

In EU immigration law, national authorities enjoy a degree of discretion on various accounts. However, Union law and the Court of Justice's interpretation thereof impose standards conditioning the exercise of that discretion. This contribution suggests that the acknowledgment of national administrative discretion by Union law coincides with divergent standards of guidance thereto developed by the Court of Justice. It argues that this may be the result of a deliberate choice. If Member State administrative discretion threatens to compromise the effectiveness of Union law, Luxemburg may expound stricter standards indicating how discretion must be exercised in a specific situation.

1. Introduction

Member States' administrations are at the forefront of decision-making in EU migration law. The competent national authorities deliberate whether criteria are in fact met or whether a measure should be taken in a specific situation. The application of abstract norms to an individual case inevitably involves some degree of discretion.[1] However, administrative decisions must not be taken capriciously. Rather, they follow the indicative standards imposed upon competent authorities by law. Disrespect for these standards will be reprimanded by courts.

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1 See Joana Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) 80(3) *The Modern Law Review* 443, 444. See also already: H.L.A. Hart, 'Discretion' (1956) 127(3) *Harvard Law Review* 652, 663.

Within the EU legal framework on migration,[2] discretion awarded to national administrations is subject to the control of national courts. By virtue of the preliminary reference procedure, however, the CJEU has on several accounts explicitly acknowledged the existence of national administrative discretion. Accordingly, it confirmed that national administrations enjoy a (wide) 'margin of discretion' in taking individualised decisions,[3] prompting national courts to conduct a limited review of administrative discretion.[4] Similarly, it perceived administrative discretion as 'absolute'[5], indicating that there are no pertinent standards of Union law guiding the national authority. Where EU law applies, the CJEU's interpretation of secondary law, general principles or fundamental rights has provided guidance to administrative discretion in practice.[6]

This suggests that the CJEU does not eye national administrative discretion indifferently.[7] Rather, its express acknowledgment of national administrative discretion coincides with divergent standards of guidance borne out by the CJEU's interpretation. The versatile use of the term discretion in the jurisprudence of the Luxemburg court begs the question whether there are recurrent patterns of interpretation discernible, marking the CJEU's influence on national administrations' discretion. What are the legal effects attributed to its acknowledgment of national administrative discretion?

The following sections clarify, first, the relationship between the CJEU and national administrations, highlighting the influence the former may exert on the latter within the context of the preliminary reference procedure (section 2). Subsequently, the CJEU's versatile acknowledgment of the term discretion will be accentuated, construing figures of speech which propelled the court to acknowledge national administrative discretion. It will be highlighted, however, that the court's rhetoric does not coincide with specific standards of guidance derived from Union law (section 3). Rather, the court adjusts its interpretation of national administrative discretion to the specific context in which it arises (section 4). On that account, it will be assessed whether the CJEU may consciously adjust the legal effects to its acknowledgment of national administrative discretion and which reasons may encourage it to do so (section 5).

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2 Established on the basis of Title V, Chapter I TFEU.
3 Case C-84/12, *Koushkaki* [2013] ECLI:EU:C:2013:862, para 60.
4 Case C-544/15, *Fahimian* [2017] ECLI:EU:C2017:255, para 46.
5 Case C-661/17, *M.A. et alt.* [2019] ECLI:EU:C:2019:53, para 58.
6 Case C-257/17, *C and A* [2018] ECLI:EU:C:2018:876, para 60; Case C-578/16 PPU, *C.K. et alt.* [2017] ECLI:EU:C:2017:108, para 71.
7 Cf. Rike Krämer-Hoppe, 'The relationship between "Luxembourg" and European and national administrative bodies' (2018) 40(6) *Journal of European Integration* 803, 807.

In substance, the following sections will focus on the court's jurisprudence in the field of migration law. For four reasons, that area resembles an insightful test case for the different uses of the term discretion in the CJEU's interpretation. Firstly, it relies heavily on a mode of burden sharing which entrusts the task of taking individualised decisions to national administrations. In this vein, Union law forestalls abstract criteria against which individual cases are to be assessed by Member States' administrations. It is therefore accurate to describe the legal system established as 'fused yet decentralised'.[8] As a corollary, secondly, the preliminary reference procedure has become a prevalent venue to align national administrative practice and standards of Union law in the field of migration.[9] Having since overcome practical limitations imposed upon that procedure before the entry into force of the Lisbon Treaty,[10] the conversation between national courts and the CJEU nowadays is quite vivid within this field of law.[11] The quantitative increase in jurisprudence informs the analysis of diverging uses of the term discretion with regard to national administrations.[12] Thirdly, migration law is prone to delicate deliberations. Negative decisions may have severe implications for the individual concerned and that person's fundamental rights, in particular in the context of asylum and deportations. As a result, decision-making often involves complex considerations or decisions predicting future conduct. These aspects are orthodoxically perceived to influence the control exercised by judges towards national administrations.[13] Fourthly, migration law impinges upon traditional perceptions of national sovereignty. Arguably, this may motivate a tentative interpretation by the CJEU, circumventing unpopular decisions in salient and hotly debated policy fields.[14]

The following sections test the hypothesis that the CJEU may intentionally attach varying legal effects to its acknowledgment of administrative discretion. For that purpose, administrative discretion shall be defined as the latitude awarded to decision-makers in the application of abstract provisions to an indi-

8 Cathryn Costello, 'Administrative governance and the Europeanisation of asylum and immigration policy' in Herwig C.H. Hofmann & Alexander H. Türk (eds.), *EU Administrative Governance* (Edward Elgar Publishing 2006), 299.

9 See Daniel Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' [2019] *European Law Journal* 139.

10 See ex-Art. 68 TEC.

11 See for instance Jasper Krommendijk, 'The preliminary reference dance between the CJEU and Dutch courts in the field of migration' (2018) 10 *European Journal of Legal Studies* 101.

12 Cf. Dana Baldinger, *Rigorous scrutiny versus marginal review: Standards on judicial scrutiny and evidence in international and Europan asylum law* (Wolf Legal Publishers 2013), 304.

13 See *ibid* 316 et seq.

14 See Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17(1) *European Law Journal* 80.

vidual case.[15] Two cumulative conditions cater to the existence of discretion. Firstly, administrative discretion rest on the texture of legal norms, authorising and limiting administrative latitude. Additionally, that norm must propel the reviewing courts not to supersede the initial administrative decision. The guidance ensuing the CJEU's interpretation vis-à-vis national administrative discretion will therefore usually concern procedural standards of national courts' review. However, the CJEU's guidance will occasionally entail substantive standards as well. It may, for instance, specify legislative criteria or deduce substantive heads of review from general principles of Union law.[16]

The choice of jurisprudence rests on three cumulative aspects: Firstly, it takes into consideration preliminary reference procedures that arose, secondly, in the context of interpretation of EU migration law. The examination will therefore not focus on strategies of judicial review developed by the Luxemburg court in direct actions, but draw attention instead to the CJEU's influence on national courts' judicial review of national administrations. The choice of jurisprudence is limited, third, to those cases in which the court explicitly acknowledged that national administrative authorities are authorised to exercise a measure of discretion. Exceptionally, the investigation includes judgments in which reference is made to related terms, such as 'margin of manoeuvre' or 'faculty'.

The investigation will therefore limit itself to instances in which the CJEU acknowledges national administrative discretion explicitly, arguably, adjusting the guidance given to the respective national authorities. As a corollary, interpretations of Union law affecting national administrative discretion more obliquely are excluded from the scope of the following sections.[17] Accordingly, the following sections focus on the intentional deployment of the term 'discretion' by the CJEU, examining divergent legal effects following from the uses thereof. Engendering another analytical blind spot, there is a notable imbalance to the effect that most reference procedures in the field of migration emanated from litigations in only a few Member States.[18] In particular, no conclusion can be drawn with regard to CJEU's influence on national administrative discretion where the latter has not been subject to a preliminary reference procedure.

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15 Cf. Joana Mendes, 'Administrative discretion in the EU: comparative perspectives' in Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson (eds.), *Comparative administrative law* (Research handbooks in comparative law, Second edition. Edward Elgar Publishing 2019), 642.

16 Cf. Alexander Fritzsche, 'Discretion, scope of judicial review and institutional balance in European law' (2010) 47 *Common Market Law Review* 361, 364.

17 For the terminological incoherence of the CJEU's jurisprudence, see Alexander Fritzsche, 'Discretion, scope of judicial review and institutional balance in European law' (2010) 47 *Common Market Law Review* 361, 362 et seq.

18 See Thym (n. 9).

In terms of method, the investigation will not look at the CJEU's interpretation of one particular instrument, but rather seeks to draw conclusions that are valid for the field of migration more broadly. To this end, section 2 is descriptive, calling to mind pertinent features of influence through the preliminary reference procedure. Sections 3 and 4 are analytical in nature, examining the jurisprudence of the court with regard to constellations in which it acknowledges national administrative discretion and the legal effects it attaches to that acknowledgment. The subsequent section 5 is evaluative, as it ponders upon the question to what extent the CJEU may employ a deliberate strategy when it reaffirms national administrative discretion and if so, how.

2. Interpretation guiding national judicial review of administrative discretion

In principle, Union law does not arrogate the approximation of methods of review of administrative discretion.[19] Rather, a rich variety of national judicial strategies towards administrative discretion persists across Europe today, reflecting the diversity inherent in the notion of discretion and related phenomena.[20] Whereas the *autonomie institutionnelle et procédurale* leaves the dispersal of authority among Member State institutions in principle to national law, Union law distresses – sometimes ruthlessly – those national arrangements.[21] The role of the CJEU is vital in this regard. It translates standards of Union law for their application in national contexts, prominently via the preliminary reference procedure (a.). The guidance that is borne out by its interpretation complements national judicial strategies of control over administrative discretion, but does not replace it (b).

19 See Thomas von Danwitz, *Europäisches Verwaltungsrecht* (Enzyklopädie der Rechts- und Staatswissenschaft: Abteilung Rechtswissenschaft, Springer 2008), 591.

20 Cf. Jürgen Schwarze, *European administrative law* (1st pub. reprint, Office for Official Publications of the European Communities 1995), 261 et seq.; see Paul Craig, *EU administrative law* (Collected Courses of the Academy of European Law, Third edition. Oxford University Press 2018), 441; see Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (n. 1); see Fritzsche (n. 16); see Janneke H. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases' (2004) *Netherlands International Law Review* 135.

21 See Von Danwitz (n. 19), 580 et seq.; Alžbeta Královál, 'Legal Remedies in Asylum and Immigration Law: The Balance Between Effectiveness and Procedural Autonomy?' (2018) 16(1) *Central European Public Administration Review* 67.

2.1. Influencing national judicial review through the preliminary reference procedure

At the outset, it must be reiterated that the CJEU does not interact with national administrations directly. Rather, decisions taken by Member State administrations are subject to the judicial review of Member State courts.[22] Consequently, the CJEU must not declare a national measure void,[23] but is exclusively competent to rule on the validity of administrative measures taken by Union institutions, bodies or agencies.[24] That division in organisational terms is equally pertinent in situations in which national administrations take decisions implementing Union law. National courts remain competent to review these decisions, regardless whether they are based on Union law indirectly, i.e. on the basis of a national transposition measure,[25] directly,[26] or whether they are genuinely taken on the basis of national law, but falling 'within the scope of EU law'.[27] In principle, the judicial system of the EU therefore rests on a clear division of tasks between national courts and the CJEU.

Notwithstanding that organisational division, Member State courts are dependent on the guidance of the CJEU if they encounter uncertainties as to the proper interpretation of Union law in a specific situation. That interaction between national courts and the CJEU takes place most prominently through the preliminary reference procedure, enabling the former to guarantee full effectiveness and unity of EU law within their respective national legal order.[28] In the spirit of a 'work-sharing' fashion,[29] the preliminary reference procedure requires national courts to gather and present to the CJEU factual information,

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22 See Von Danwitz (n. 19), 274-275; see also Herwig Hofmann, Gerard C. Rowe & Alexander Türk, *Administrative law and policy of the European Union* (Oxford University Press 2011), 505-506, 643-644.

23 See for a recent exception to that rule: Joined Cases C-202/18 and C-238/18, *Rimšēvičs* [2019] ECLI:EU:C:2019:139, which took place, according to the CJEU, in 'the particular institutional context of the ESCB within which it operates'.

24 This is notwithstanding the infringement procedure under Articles 258-260 TFEU, which may be directed against any failure to fulfil an obligation under the Treaties, including by means of administrative action. However, this venue is subject to the Commissions prejudicial assessment and scrutiny; see Von Danwitz (n. 19), 295-296.

25 See *ibid* 275-276, 307 et seq.

26 See Hofmann, Rowe & Türk (n. 22), 643-644.

27 See *ibid* 644; see also Sacha Prechal, 'Competence Creep and General Principles of Law' [2010] *Review of European Administrative Law* 5; Craig (n. 20), 503-508.

28 See Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund* (Schriften zum Europäischen Recht vol 107, Duncker & Humblot 2004), 163 et seq.; see Takis Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' (2011) 9 *International Journal of Constitutional Law* 737, 738.

29 Von Danwitz (n. 19), 276; see Eberhard Schmidt-Aßmann, 'Introduction: European Composite Administration and the role of European administrative law' in Oswald Jansen & Bettina Schöndorf-Haubold (eds.), *The European Composite Administration* (Intersentia 2011), 20.

inter alia concerning the background of the proceedings and the national legal framework to substantiate the reference. The CJEU, in return, will make 'every effort to give a reply which will be of assistance in resolving the dispute', notwithstanding that 'it is for the referring court to draw the appropriate conclusions from that reply'.[30]

In the context of the preliminary reference procedure, the CJEU may acknowledge national administrative discretion in two settings. Firstly, the CJEU may directly interfere with national courts' review in situations in which Member State administrations act directly on the basis of Union law. Should a provision of Union law expressly or implicitly award national administrations discretion, the interpretation of that norm will define the limits and bounds of administrative latitude. Interpretation will be subject to the CJEU's regular interpretational tool kit. The court may guide national administrative discretion in practice to ensure that it remains within the limits extricable from the norm or adequately pursues the objective of the measure upon which it is based.[31] Secondly, the CJEU's interpretation can produce incidental effects on national administrative discretion if the latter is authorised by national law, but falls within the scope of Union law. In this vein, national courts are obliged to interpret national provisions awarding discretion in conformity with the latter.[32] In this regard, the CJEU may clarify the meaning attributed to a norm of EU law, in particular by interpreting it in light of fundamental rights and general principles thereof.[33] Accordingly, the CJEU's interpretation may guide or bind the discretion awarded to a national administration under national law. Contrarily, a national provision that nullifies administrative discretion may oblige the national court to disapply the national measure if the CJEU's interpretation of Union law foresaw a discretionary assessment on the part of the national authority.

30 Cited from: CJEU (ed.), Information note on references from national courts for a preliminary ruling (2009/C 297/01), at II, point 8, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0001:0006:EN:PDF, accessed 1 May 2019.

31 See Kay Hailbronner & Daniel Thym, 'Constitutional Framework and Principles for Interpretation' in Kay Hailbronner & Daniel Thym (eds.), *EU immigration and asylum law: A commentary* (Second edition. C.H. Beck; Hart; Nomos 2016), 9-10.

32 Case C-84/12, *Koushkaki* [2013] ECLI:EU:C:2013:862, para 75.

33 See Koen Lenaert & Jose Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47(6) *Common Market Law Review* 1629, 1650.

2.2. Normative foundations for the CJEU's guidance of national administrative discretion

Judicial strategies of review of administrative discretion are genuinely conditioned by the legal context and culture in which the latter arises.[34] The review of national administrative discretion is therefore pre-determined by the legal framework established by the Member States. Union law does not disavow these arrangements. However, it may lay down standards guiding national administrative discretion. Whereas these norms may thus complement the national legal framework awarding discretion, divergent administrative practices are not abolished. Rather, standards of Union law guiding national administrative discretion may re-shape those of national origin.

In the field of EU migration law, pertinent standards of guidance vis-à-vis national administrative discretion are inferred from legislative provisions. This concerns prominently the intensity of judicial review by national courts.[35] Within the Common European Asylum System, the Procedures Directive obliges Member States to 'ensure that applicants have the right to an effective remedy before a court or tribunal' and that this demands for 'a full and *ex nunc* examination of both facts and points of law'.[36] The Qualification Directive stipulates that the assessment of an application for international protection must be carried out 'on an individual basis' and include *inter alia* all relevant facts relating to the country of origin as well as the individual position and personal circumstances of the applicant.[37] Similarly, the Dublin III Regulation highlights that an applicant benefits from the right to an effective remedy, in fact and in law, against a transfer decision before a court.[38] This demonstrates how EU law may

34 See Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (n. 1), 459 et seq.

35 Cf. Diego Acosta Arcarazo & Andrew Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy*' (2013) 51(2) *Journal of Common Market Studies* 179.

36 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), art 46; in Case C-69/10, *Samba Diouf* [2011] ECLI:EU:C:2011:524, para 56, the CJEU already held that such a review must be a 'thorough' one. For an overview and discussion of the right to an effective remedy, see Baldinger (n. 12), 330 et seq.

37 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, art 4(3).

38 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, art 27(1).

articulate standards directing national courts' review of administrative discretion, however, not transfiguring the latter entirely.

Union law, and the CJEU's interpretation thereof, may equally provide substantive guidance to national administrative discretion. This is the case, for instance, where EU legislative provisions codify the criteria which should direct administrative discretion. Moreover, the court may highlight the objective pursued by a specific provision of Union law. Discretion awarded to national authorities must not be used to thwart that objective.[39] Whereas some legislative instruments provide rather clear insights into their rationale,[40] others are lending themselves to a multitude of objectives. Against that background, the CJEU's interpretation will notably condition national administrative discretion to ensure alignment with the pertinent legislative objective.

The same holds true for the court's interpretation of EU legislation in the light of legal principles. In this vein, the CJEU's guidance informing national courts' review centres particularly on the construal of general principles and fundamental rights of Union law. It must be noted that these norms form building blocks to a 'common constitutional space', and may therefore be versed by the CJEU's guidance and national law alike, based on case-by-case assessments attributing to them varying legal weight.[41]

The principle of proportionality illustrates that effect most aptly. As a general principle of Union law, it features in national legal orders and Union law alike. In the course of the preliminary reference procedure, the CJEU will usually leave the application of the proportionality principle to national courts.[42] However, through its interpretation of EU law, it may occasionally provide substantive guidance as to how proportionality should be assessed by the latter.[43] Craig suggests that two arguments motivate the CJEU's influence on the national proportionality review: On the one hand, guidance to the Member State courts' proportionality review may be inevitable to uphold unity and effectiveness of

39 See to that effect, Case C-338/13, *Noorzia* [2014] ECLI:EU:C:2014:2092, para 14.

40 Such as Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; see to this effect, Case C-491/13, *Ben Alaya* [2014] ECLI:EU:C:2014:2187, para 29.

41 See Lenaert & Gutiérrez-Fons (n. 34), at 1630.

42 Such an abstract response in the jurisprudence of the CJEU is sometimes referred to as deference; see Paul Daly, *A theory of deference in administrative law: Basis, application and scope* (Cambridge Univ. Press 2012); see Gerards (n. 14); see for EU law Jan Zglinski, 'The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law' (2018) 55(5) *Common Market Law Review* 1341.

43 See Gareth Davies, 'Abstractness and concreteness in the preliminary reference procedure' in Niamh Nic Shuibhne (ed.), *Regulating the internal market* (Edward Elgar Publishing 2006), 218.

Union law in certain circumstances. If, for instance, proportionality assessments were left entirely to national courts, this would run the risk of instigating an excessive use of derogations in EU law subject to a proportionality caveat. In such a situation, the CJEU would forfeit control over the development of Union law. On the other hand, complexities of assessment and the need for balancing interests may encourage the CJEU to decide a matter when it has all the relevant facts at its disposal to do so, or to keep a certain distance to the national proportionality assessment.[44]

In the absence of pertinent provisions of Union law, the minimum standards of effectiveness and equivalence frame the national capacity to lay down more detailed procedural and institutional rules.[45] Besides these limits, national procedural arrangements, such as the extent to which judges control administrative action, remain subject merely to the national legal framework and culture.

3. When does the CJEU acknowledge national administrative discretion?

The CJEU's acknowledgement of Member States administrative discretion rests primarily on specific normative structures of Union law. Where, for instance, EU legislation foresees maximum harmonisation, the court genuinely refrains from acknowledging national discretion.[46] Minimum harmonisation, conversely, may cater to an acknowledgment of national administrative discretion in EU law. With regard to the previous version of the Procedures Directive which explicitly prescribed minimum standards,[47] the court held that 'Member States enjoy, in a number of respects, a discretion with regard to the implementation of [that provision] in the light of the particular features of national law.'[48]

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44 See Craig (n. 20), 690-692.

45 Case C-234/17, *XC et alt.* [2018] ECLI:EU:C:2018:853; see also *ibid*, 758. On the different interpretations of these heads of control, see also Anna Wallerman, 'Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States' Self-Imposed Limits on National Procedural Autonomy' (2016) 53 *Common Market Law Review* 339, 351 et seq.

46 See Josephine M-R Hartmann, *A blessing in disguise? Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives* (Amsterdam University Press 2016), 103 et seq.

47 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

48 Case C-69/10, *Samba Diouf* [2011] ECLI:EU:C:2011:524, para 29; Case C-175/11, *D. and A.* [2013] ECLI:EU:C:2013:45, para 63.

In a similar vein, EU legislation may make express references to national law, *inter alia* to substantiate undetermined legal concepts.[49] The CJEU will generally respect such a legislative choice, awarding national authorities a margin of discretion in this regard. However, the court requires Member States to exercise that discretion 'in a manner consistent with the directive in question' and not compromising fundamental rights or general principles of EU law.[50] Where EU legislation does not refer to national law, the court has repeatedly highlighted that 'in accordance with the need for a uniform application of EU law and the principle of equality, a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union'.[51] Should EU legislation therefore codify an undetermined legal concept without making an express reference to national law, that norm will not cater to the acknowledgment of Member State discretion in EU law.

The following examination considers instances in which the CJEU confirms Member States' administrative discretion in its interpretation of EU migration law. On that account, it discerns figures of speech within which the CJEU conceptualises national administrative discretion. In this vein, it will be demonstrated that the court coins discretion in various ways: It may construe the latter as a derogation from a rule (a.), an exceptional departure from an objective of Union law (b.) or a prerequisite to maintain the prerogatives of the Member States (c.). Likewise, it may acknowledge administrative discretion in complex administrative appraisals (d.) or misleadingly, when Member States act in their national capacity (e.). The court's rhetoric, however, does not always coincide with specific modes of guidance vis-à-vis national administrations. Rather, the jurisprudence analysed indicates that specific figures of speech lend themselves to divergent standards of guidance for national administrations.[52]

3.1. Derogation from a rule

The CJEU may construe national administrative discretion as a derogation from a specific normative rule of Union law.[53] In the field of migration law, the court's jurisprudence on the right to family reunification serves as a prominent illustration to that effect. In this context, the CJEU terms

49 See for instance Case C-257/17, *C and A* [2018] ECLI:EU:C:2018:876, para 49; Case C-528/15, *Al Chodor* [2017] ECLI:EU:C:2017:213, para 42.
50 To that effect, Case C-601/15 PPU, *J.N.* [2016] ECLI:EU:C:2016:84, para 60.
51 For instance, Case C-550/16, *A and S* [2018] ECLI:EU:C:2018:248, para 41.
52 For an analysis of the standards of guidance to national administrative discretion, see section 4.
53 See Hartmann (n. 46), 106-107.

Member States' administrative discretion as a derogation from a 'clearly defined individual right', even a fundamental right. Legislative provisions which are intended to give effect to such a right 'must be interpreted strictly' and any faculty awarded therein 'must not be used by them in a manner which would undermine the objective of the Directive [...] and the effectiveness thereof.'[54]

A sample to that 'strict interpretation' was given by the CJEU in *Chakroun*. With regard to the Family Reunification Directive,[55] the court had to clarify the notion of 'stable and regular resources' sufficient to maintain oneself as well as the family member concerned. According to the wording of the Directive, Member States were entitled to impose this requirement as a condition upon the right to family reunification.[56] However, the court highlighted that the Directive was motivated, as a rule, by the right to family life as enshrined in Article 8 ECHR and the Charter of Fundamental Rights respectively. Accordingly, it rejected a national legislative arrangement that automatically precluded family reunification if the sponsor's resources would fall below a certain minimum amount. The CJEU clarified that a Member State could use a certain amount as an indication, but not as conclusive ground for refusal, 'irrespective of an actual examination of each applicant.'[57] The need for such an individual assessment, the court highlighted, was also confirmed by Article 17 of the Directive, which presupposed an investigation into each individual application.[58]

The CJEU formally applied the same standard of interpretation in *K and A*, which concerned the imposition of integration tests as a condition to family reunification in the Netherlands. Again, the court held that, as an exception to the 'general rule', the Directive had to be interpreted strictly and Member States were barred from undermining the objective and effectiveness of it.[59] However, unlike its judgment in *Chakroun*, the situation of the case prompted Luxemburg to embed into its 'strict interpretation' the standard of proportionality as a general principle of EU law.[60] Following that line of reasoning, the court delved into intricate considerations whether and in how far civic integration tests may

54 Case C-578/08, *Chakroun* [2010] ECLI:EU:C:2010:117, para 43; Case C-154/14, *K and A* [2015] ECLI:EU:C:2015:453, paras 46 and 50; Case C-257/17, *C and A* [2018] ECLI:EU:C:2018:876, para 51.

55 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Family Reunification Directive).

56 See Family Reunification Directive, art 7(1)(c); Case C-578/08, *Chakroun* [2010] ECLI:EU:C:2010:117, para 48.

57 Case C-578/08, *Chakroun* [2010] ECLI:EU:C:2010:117, para 48.

58 *Ibid*.

59 Case C-154/14, *K and A* [2015] ECLI:EU:C:2015:453, para 50.

60 *Ibid*, para 51.

cater to integration.[61] The court's reasoning in this regard focussed on the effects of such measures: If the requirements to pass an integration test 'systematically [...] prevent family reunification', they would exceed what is necessary. According to the court, it is therefore the willingness to pass the integration exam as well as the applicants' efforts which should guide the assessment of the application.[62] In particular, the court held that specific individual circumstances must be given due consideration in the assessment whether to grant family reunification or not, regarding in particular age, (il)literacy or the level of education of the applicant.[63]

The CJEU also termed national discretion as a derogation to a general rule in *C and A*.[64] It held that after five years of residence on the basis of family reunification, as a rule, a person is to obtain an autonomous residence permit.[65] In contrast to the case in *K and A*, however, the Directive expressly allowed Member States to define the conditions relating to the award of that residence permit. The Dutch authorities used that discretion introducing a requirement to pass a civic integration test before obtaining the residence permit. The court acknowledged that the express reference to national law rendered the situation different to the one giving rise to the judgment in *K and A*.[66] 'Nevertheless',[67] the CJEU corroborated the rule-derogation relationship based on the wording and the objective of Article 15 Family Reunification Directive.[68] As a corollary, it implanted the test spelled out in *K and A*, holding that the Member States' discretion must not undermine the objective and effectiveness of the provision. With a view to the express reference in the Directive to national law, the court accepted that Member States can lay down substantive conditions and that these measures would 'in principle' not undermine the objective and effectiveness of the provision.[69] This being said, the court again had recourse to the principle of proportionality, referencing its judgment in *K and A*. Accordingly, it imposed detailed standards upon the civic integration examination, duplicating in essence its guidance in *K and A*.[70]

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61 *Ibid*, para 51 et seq.
62 *Ibid*, para 56.
63 *Ibid*, para 58.
64 Case C-257/17, *C and A* [2018] ECLI:EU:C:2018:876.
65 Family Reunification Directive, art 15.
66 Case C-257/17, *C and A* [2018] ECLI:EU:C:2018:876, para 50.
67 *Ibid*, para 51.
68 *Ibid*.
69 *Ibid*, paras 53-59.
70 *Ibid*, paras 60-65.

The first two examples illustrate that the CJEU may have resort to a 'strict' standard of interpretation when a derogation from a subjective (fundamental) right is at stake, but that varying heads of guidance can be inferred from that interpretation. Whereas in *Chakroun*, such interpretation motivated the court to reject national legislation foreseeing an automatic refusal of certain applications, in *K and A*, the court's strict interpretation insisted upon the national administrations' proportionality assessment. In contrast, the judgment in *C and A* relied heavily on the argumentation put forward in *K and A*, namely the perception of administrative discretion as a derogation from an individual right, despite the fact that the case did not concern such a right and the provision made express reference to national law.[71]

3.2. Exception to an objective of EU law

The CJEU may coin national administrative discretion moreover as an exception to an objective to EU law. The guidance that it provides to national administrations in this regard will ensure that this objective will not be compromised in practice. The court's jurisprudence with regard to controls in border regions exemplifies that effect. According to Articles 22 and 23 of the Schengen Borders Code,[72] police controls must not constitute measures having equivalent effect to internal border control. In the context of three judgments,[73] the CJEU acknowledged that an unguided, excessive use of that provision would call into question not just a principle set out in the Schengen Borders Code, but equally a treaty objective, namely the absence of internal border control, as ordained by Article 67 (2) TFEU.[74] However, the court was equally aware of the limits imposed upon the EU's competence with regard to the maintenance of law and order and the safeguarding of internal security, explicated by Article 72 TFEU.[75] Against that background, the CJEU employed a rather cautious method of guidance vis-à-vis national police discretion, urging Member States to merely establish a legal framework that would in practice ensure compatibility of national administrative discretion and the Schengen Borders Code.

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71 If there is no express reference to national law, the CJEU will usually provide 'an autonomous and uniform interpretation', see to that effect Case C-550/16, *A and S* [2018] ECLI:EU:C:2018:248, para 41.

72 Nowadays: Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

73 Joined Cases C-188/10 and C-189/10, *Melki* [2010] ECLI:EU:C:2010:363; Case C-278/12 PPU, *Adil* [2012] ECLI:EU:C:2012:508; Case C-9/16, *A.* [2017] ECLI:EU:C:2017:483.

74 Joined Cases C-188/10 and C-189/10, *Melki* [2010] ECLI:EU:C:2010:363, para 64.

75 See Case C-9/16, *A.* [2017] ECLI:EU:C:2017:483, para 50; Case C-278/12 PPU, *Adil* [2012] ECLI:EU:C:2012:508, para 66.

This approach was initially spelled out in *Melki*. The CJEU held that national legislation allowing for police checks in border regions to carry out identity checks must be counterbalanced in the light of the principle of legal certainty.[76] The respective legislative framework accordingly had to ensure that in practice, national police discretion would not amount to activities having equal effect to border checks. The elements against which the legislative framework were to be assessed in this regard followed from a non-exhaustive list set out in the Schengen Borders Code.[77]

This benign approach of guidance was confirmed and invigorated in *Adil*. In this vein, the CJEU essentially established and applied a weighing exercise. It held that 'the more extensive the evidence of the existence of a possible equivalent effect [to internal border control] [...], the greater the need for strict detailed rules and limitations laying down the conditions for the exercise by the Member States of their police powers in a border area and for strict application of those detailed rules and limitations, in order not to imperil the attainment of the objective of the abolition of internal border controls' as set out in the Treaties.[78] With regard to the information before it, the CJEU proceeded to inspect the national legal framework, concluding that the discretion enjoyed by national police forces was sufficiently guided and limited.[79] The judgment in *A.* applied the same test, but in contrast did not enable the CJEU to apply the case to the respective national legal framework. In this instance, the court left the application of the weighing test by and large to the national court.[80]

3.3. Maintaining the prerogatives of the Member States

The CJEU may furthermore assert national administrative discretion where a derogation clause is intended to 'maintain the prerogatives of the Member States'.[81] Whereas it could be argued that any derogation clause allowing Member States to deviate from a rule or an objective of Union law may serve that purpose, this formulation is notably used with regard to the discretionary clause entailed in Article 17 of the Dublin III Regulation. Pursuant to that provision, Member States may assume responsibility for examining an

76 Joined Cases C-188/10 and C-189/10, *Melki* [2010] ECLI:EU:C:2010:363, para 74.
77 See to that effect, Case C-9/16, *A.* [2017] ECLI:EU:C:2017:483, para 48.
78 Case C-278/12 PPU, *Adil* [2012] ECLI:EU:C:2012:508, para 75.
79 *Ibid*, para 87.
80 Case C-9/16, *A.* [2017] ECLI:EU:C:2017:483, para 61.
81 Case C-661/17, *M.A. et alt.* [2019] ECLI:EU:C:2019:53, para 60.

application for asylum lodged by a third-country national, subject to their sovereign choice,[82] or in other words: 'absolute discretion'.[83]

This does not, however, call into question the possibility that, in a specific situation, discretion may be bound by fundamental rights, as codified in the Charter of Fundamental Rights. The court already held in its seminal judgment in *N.S.* that this provision forms an 'integral part of the Common European Asylum System'.[84] As a consequence, national administrative authorities cannot maintain a 'conclusive presumption' that asylum seekers' fundamental rights will unquestionably be observed during or after the transfer to another Member State.[85] A more recent judgment may demonstrate the method of guidance employed by the CJEU in the context of the interpretation of a norm intended to maintain the prerogatives of the Member States.

In *C.K. et alt.*, a Slovenian court was uncertain as to which extent the Charter bound national authorities to refrain from a transfer to Croatia, under the Dublin system, where the asylum applicant was in a state of bad health. At the outset, the court highlighted that the prohibition of inhuman or degrading treatment is of fundamental importance, since it is closely linked to the respect for human dignity, as expressed in Article 1 of the Charter.[86] In addition, the asylum seeker is granted an effective remedy before a court against a transfer decision.[87] The court moreover recalled that the principle of mutual confidence among the Member States caters to a strong presumption that reception conditions in Croatia, including medical treatment, would be adequate.[88] On that basis and with a view to the case file before it, the CJEU concluded that there cannot be substantial grounds to believe that in Croatia, systematic flaws as to the medical system existed.[89] With a view to doubts whether the transfer itself may constitute inhuman and degrading treatment, the CJEU responded by stating that the national authorities must 'eliminate any serious doubts' as to the detrimental effects of the transfer on the wellbeing of the asylum seeker.[90] If the asylum seeker produces, in the course of utilising the right to an effective remedy, objective evidence, such as medical certificates showing serious deterioration of his health, 'the authorities of the Member State concerned, including

82 See to that effect, Case C-528/11, *Halaf* [2013] ECLI:EU:C:2013:342, para 38.
83 Case C-661/17, *M.A. et alt.* [2019] ECLI:EU:C:2019:53, para 58.
84 Joined Cases C-411/10 and C-493/10, *N.S.* [2011] ECLI:EU:C:2011:865, para 65.
85 *Ibid*, paras 99-100.
86 Case C-578/16 PPU, *C.K. et alt.* [2017] ECLI:EU:C:2017:108, para 59.
87 *Ibid*, para 64.
88 *Ibid*, para 70.
89 *Ibid*, para 71.
90 *Ibid*, paras 75-76.

its courts, cannot ignore that evidence.'[91] The competent authorities organising the transfer must therefore take measures of precaution, ensuring assiduous medical support during and after the transfer as to avoid a breach of Article 4 of the Charter.[92]

As a corollary, the CJEU requires national administrations on the one hand to put in place procedural safeguards, flowing from the right to an effective remedy and the need to exercise precaution. These procedural warrants are, on the other hand, coupled with substantive heads of guidance, namely regarding the health system in Croatia or the qualification of documents as objective evidence. This suggests that the CJEU does not shy away from providing detailed guidance also in its interpretation of a provision that intends to maintain the prerogatives of the Member States. Such rhetoric does not call into question the obligation of Member States' administrations to honour their fundamental rights obligations under Union law and to exercise any discretion accordingly.

3.4. Complex administrative appraisal

In several instances, the CJEU construed national administrative discretion as a prerequisite to assess abstract criteria and to apply them to an individual case. In this regard, it awarded competent national authorities a 'wide'[93] discretion *inter alia* on the basis of the wording of the respective authorising legislative norm. This was notably the case where the competent authorities were obliged to give 'particular consideration' or maintain 'reasonable doubts' with a view to an element of assessment.[94] However, the pertinent rationale for awarding wide discretion in the individualisation of abstract criteria in the field of migration law was to accept the complexity inherent in such an assessment. '[C]omplex evaluations'[95], the CJEU highlighted, in the field of migration often involve prognoses of the foreseeable conduct of an applicant, and therefore require thorough and extensive knowledge of the situation at hand.[96]

However, the CJEU's rhetoric affirming the complexity of appraisal and thus, national administrative discretion, does not rule out the possibility of deducing heads of guidance from Union law. In *Koushkaki*, the CJEU accorded a 'wide discretion' to the competent authorities to examine visa applications, both

91 *Ibid*.
92 *Ibid*, para 84.
93 Case C-544/15, *Fahimian* [2017] ECLI:EU:C2017:255, para 42; Case C-84/12, *Koushkaki* [2013] ECLI:EU:C:2013:862, para 62.
94 Case C-84/12, *Koushkaki* [2013] ECLI:EU:C:2013:862, para 61.
95 *Ibid*, para 56.
96 Case C-544/15, *Fahimian* [2017] ECLI:EU:C2017:255, para 41.

with regard to the conditions to be fulfilled by the applicant as well as the facts supporting that assessment.[97] Nevertheless, it added that this discretion must be based on a diligent investigation as well as on an individual assessment that 'takes into account the general situation in the applicant's country of residence and [his] individual characteristics, inter alia his family, social and economic situation' and a potential history of illegal stays in one of the Member States.[98] Thus, the CJEU provided some guidance to the competent authorities as to the individualised nature of administrative assessment.

In *Fahimian*, the interplay of complexity surrounding administrative assessments and the intensity of judicial review thereof were discussed. The referring German court explicitly asked the CJEU about the intensity of control that it should exercise in the review of a provision of the Students and Researchers Directive.[99] In substance, the case concerned the refusal of a residence permit to an Iranian woman who was affiliated with an Iranian university, collaborating with the respective Ministry of Defence. The German authorities raised the argument that the knowledge she might acquire during her research stay may be used by the Iranian government to endanger the security of the Federal Republic of Germany. Accurately, the court acknowledged the hypothetical nature of such claim, however, highlighting again the complexity surrounding an assessment of the foreseeable conduct of a person.[100] It concluded that the competent authorities enjoy for that reason 'wide discretion when assessing the relevant facts in order to determine whether the grounds set out in [the Students and Researchers Directive], relating to the existence of a threat inter alia to public security, preclude the admission of the third country national'.[101]

The court highlighted in this regard that national courts' judicial review of complex administrative appraisals must be limited. The latter is to verify the absence of manifest errors and to ensure procedural safeguards, including the obligation to state reasons and full assessment of facts.[102] However, the CJEU equally provided guidance to the individual case before it, clarifying that in the appraisal of facts establishing whether an applicant might pose a threat to public security, '[t]hat assessment may [...] take into account not only the personal conduct of the applicant but also other elements relating, in particular,

97 Case C-84/12, *Koushkaki* [2013] ECLI:EU:C:2013:862, para 60.
98 *Ibid*, para 69.
99 Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, art 6 (1).
100 Case C-544/15, *Fahimian* [2017] ECLI:EU:C2017:255, para 41.
101 *Ibid*, para 42.
102 *Ibid*, paras 45-46.

to his professional career.'[103] With a view to the situation at hand, the CJEU therefore made clear that the national administration was indeed competent under Union law to include into its assessment considerations of Ms. Fahimian's academic career prospects, and thus, to consider that granting her a visa to conduct research might jeopardise public security.

It must be noted that complex assessments are not just characteristic of considerations concerning visas. Complexity is equally pertinent in the field of asylum law. However, in the latter context, EU legislation stipulates explicitly that Member States are to ensure 'a full and *ex nunc* examination of both facts and points of law'.[104] This suggests that complexity does not cater to administrative discretion *per se*. The CJEU seems to be sensitive primarily to the wording of legislation. Whereas it deduced from terminology such as 'particular consideration' or 'reasonable doubts' that Member State authorities enjoy a wide margin of discretion, the normative dispositions of the Common European Asylum System appear to preclude such a discretion, and particularly, a reduced intensity of control by courts.

3.5. Member States residual competence

In rare occasions, the CJEU may also refer to a residual competence of Member States as 'discretion'. An illustration to this effect can be found in *B and D*. In this case, the court had to rule on the conditions under which a third-country national has to be excluded from refugee status under Directive 2004/83, the Qualification Directive. In this course, it highlighted that Member States remain free to grant third-country nationals other status of protection, aside those laid down in the Qualification Directive. In the wording of the court, this latitude falls not within the scope of the Directive, but constitutes a choice on 'discretionary and goodwill basis for humanitarian reasons'.[105] That 'discretion' enjoyed by Member States, however, does not constitute discretion by virtue of Union law. Rather, in this case, the court highlights the vertical competence division between the Union and its Member States, in accordance with the principle of conferral and Article 2 (2) TFEU. As a corollary, no standards of guidance can be inferred from Union law to that purely national situation.

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[103] *Ibid*, para 40.

[104] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), art 46(3).

[105] Joined Cases C-57/09 and 101/09, *B and D* [2010] ECLI:EU:C:2010:661, para 118; Case C-542/13, *M'Bodj* [2014] ECLI:EU:C:2014:2452, para 46.

Similarly, a misconception of the term discretion surfaced in the infamous judgment of the CJEU in *X and X*. The referring Belgian court wished to ascertain the 'discretion' granted to Member States by virtue of Union law in respect to the Visa Code. In substance, the case concerned asylum seekers from Syria who applied for a Visa in order to subsequently request international protection in Belgium. The question aimed at an interpretation of the Charter of Fundamental Rights, asking in essence if, in the situation at hand, the national embassy's discretion would be bound to the end that it were obliged to grant a visa.[106] The CJEU, however, intimated that in the situation at hand, the Visa Code did not apply. As a corollary, it held that Member States would act in exercise of their national capacity when refusing to issue short-term visas to persons who intend to apply for asylum once they obtain the visa, thus rendering the Charter of Fundamental Rights inapplicable to the situation at hand.[107]

These examples demonstrate that the CJEU distinguishes discretion granted by virtue of EU law, and Member States' latitude to act in their national sovereign capacity. National administrative authorities exercising discretion may logically receive guidance from the CJEU's interpretation of Union law merely within the scope of the latter.[108]

4. Standards of guidance attributed to the acknowledgment of national administrative discretion

The versatile acknowledgment of national administrative discretion by the CJEU has significant repercussions for the standards of guidance borne out by its interpretation of Union law. On the basis of the case law discussed, four patterns of interpretation can be deduced, which have specific bearing for the guidance of national administrative discretion. This concerns, first, the strictness of the CJEU's interpretation towards the latter (a.). Second, the court may qualify the evidence informing an administrative assessment, thus influencing the discretion entailed therein (b.). Third, the requirement to conduct an individualised assessment, as inferred from Union law, may give rise to divergent standards of guidance towards national administrative discretion (c.). Fourth, as an exception, the court has explicitly obliged national courts to conduct a marginal review of administrative discretion (d.).

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106 C-638/16 PPU, *X and X* [2017] ECLI:EU:C:2017:173, para 38.

107 *Ibid*, para 43.

108 See e.g. Daniel Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50 *Common Market Law Review* 1267.

4.1. Strict interpretation

At the outset, it must be noted that the CJEU's interpretation of Union law rests on the conventional tool kit of methods, including textual, teleological and systematic readings of provisions, but having resort equally to legal principles, such as the general principles and fundamental rights of Union law. However, as demonstrated above, a degree of national administrative discretion on the basis of Union law might call for 'strict interpretation'.[109] In order to ensure that administrative conduct does not compromise the objective and full effectiveness of EU legislation, strict interpretation may effectively entail different heads of guidance to national administrative discretion. Unlike its test in *Chakroun*, the judgments in *K and A* as well as *C and A* centre in essence around the principle of proportionality. As a general principle of Union law, proportionality may legitimately be used to substantiate strictness of the court's interpretation.[110] However, in its jurisprudence, the court remains silent as to which situations give rise to a prevalent role for proportionality.[111]

Conversely, it has been argued that the CJEU interpreted Union law more cautiously with regard to discretion awarded to police authorities in border regions.[112] Acknowledging that this discretion was left to Member States pursuant to Article 72 TFEU, the CJEU did not impose standards upon the national police actions *per se*, but rather required the national legislative framework to guide that discretion. In order to ensure that checks would not be equivalent to internal border control, the national normative framework has to counterbalance the extent of discretion awarded to police forces, on the one hand, with effective limits thereto, on the other. Motivating that standard of interpretation, the court accentuated the principle of legal certainty.[113] Arguably, it is the balance struck between the latter principle and the constraint imposed upon the CJEU by Article 72 TFEU that motivated the cautious interpretation in this instance.

The question whether the CJEU will interpret Union law strictly or rather leniently with regard to national administrative discretion therefore depends, first, on the context in which that discretion operates, and, second, on the prevalence the CJEU attributes to legal principles. If the CJEU frames national administrative discretion as a derogation from a (fundamental) right, it may

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109 See section 3.a.

110 See Craig (n. 20), 669.

111 In particular with regard to the Charter of Fundamental Rights, art 52(1) Sentence 2, a limitation to a right, such as the right to family reunification, must be subject to the principle of proportionality.

112 See section 3.b.

113 Joined Cases C-188/10 and C-189/10, *Melki* [2010] ECLI:EU:C:2010:363, para 74.

apply the proportionality principle to guide that discretion. Should national administrative discretion safeguard the 'prerogatives of the Member States', the court may refrain from translating standards of guidance from Union law; unless, in a specific situation, the discretion would be bound by fundamental rights enshrined in the Charter or general principles of Union law.

4.2. Evidence

The CJEU's jurisprudence in the field of migration expounded another prominent avenue of influence vis-à-vis national administrative discretion, namely the qualification of evidence. In this vein, the CJEU has often concluded that Member State authorities must take into account all evidence 'relevant'[114] or 'necessary'[115]. However, that generous ascription may often be coupled with indications as to which elements qualify as such. By way of example, in the context of visa policies, the court required the administration's appraisal to include 'the general situation in the applicant's country of residence and individual characteristics, inter alia his family, social and economic situation' and a potential history of illegal stays in one of the Member States.[116] Despite awarding the national administration's wide discretion in gathering and assessing that evidence,[117] this guidance impacts the way in which administrative discretion is exercised in practice.

Similarly, the CJEU may guide national administrative discretion by qualifying a fact as conclusive, or merely indicative. There are several instances in which the court rejected an element of assessment as conclusive. This is mainly the case in situations where national transposition measures precluded administrative discretion, but rather imposed an automatic presumption, either to exclude a person from being a refugee,[118] or to reject an autonomous residence permit.[119] In *Chakroun*, the court ruled that a certain sum could indeed be used as an indicative reference amount to determine whether a sponsor for family reunification had stable and sufficient resources. Nevertheless, that amount would only constitute one of several elements of assessment, and should therefore not to be considered in itself conclusive.[120]

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114 For instance, Case C-491/13, *Ben Alaya* [2014] ECLI:EU:C:2014:2187, para 33.
115 Case C-544/15, *Fahimian* [2017] ECLI:EU:C2017:255, para 44.
116 Case C-84/12, *Koushkaki* [2013] ECLI:EU:C:2013:862, para 69.
117 Reflecting the 'qualification juridique des faits', see to this effect Von Danwitz (n. 19), 299.
118 Case C-369/17, *Ahmed* [2018] ECLI:EU:C:2018:713.
119 Case C-257/17, *C and A* [2018] ECLI:EU:C:2018:876.
120 Case C-578/08, *Chakroun* [2010] ECLI:EU:C:2010:117, para 48.

Moreover, the CJEU may require national administrative authorities to weigh elements of evidence against each other. In the field of asylum law, this is prominently exemplified by the principle of mutual confidence. As the court pointed out in *C.K. et alt.*, that principle caters to a strong presumption of compliance with reception conditions in all Member States, including for the purposes of the case, Croatia.[121] In the context of a Dublin transfer, however, that presumption may exceptionally be rebuttable. The principle of mutual confidence does therefore not cater to a conclusive presumption that transfers are conductible in any situation, but merely attaches weight to such an assumption.[122]

4.3. Individualised assessment

A second prominent method for the CJEU to influence national administrative discretion flows from the requirement to conduct an assessment on an individualised basis. That requirement should not come as a surprise in instances in which an individual application requires processing. If a person applies for a visa, for example, the individual position of the applicant is elementary. Nevertheless, the CJEU may attach requirements to that need for an individual evaluation. With regard to visa applications, accordingly, the court held that national administrative authorities must include in their evaluation considerations as to the personality of the applicant, his integration in the country of residence as well as the 'political, social and economic situation in that country'.[123] National administrations may therefore not simply conclude that applications from residents of a particular country will automatically be refused. Rather, following this interpretation of Union law, they must substantially consider and assess all these aspects, subject to the review of national courts.

The CJEU may furthermore require national administrations to undertake 'a full investigation into all the circumstances of [an] [...] individual case', even though under national law, they are barred from doing so. The arguments in *Ahmed* may illustrate this effect. The case concerned the question under which circumstances a third-country national may be excluded from refugee status under the Qualification Directive.[124] The Hungarian transposition measure re-

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121 Case C-578/16 PPU, *C.K. et alt.* [2017] ECLI:EU:C:2017:108, para 70.

122 See Koen Lenaert, 'La vie après l'avis: Exploring the Principle of Mutual (yet not blind) Trust' (2017) 54 *Common Market Law Review* 805, 813 et seq.

123 Case C-84/12, *Koushkaki* [2013] ECLI:EU:C:2013:862, para 56.

124 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, art 12(2)(b) and (c).

quired that a third-country national who had received a custodial sentence of five years or more, would automatically be excluded from protection status. In opposition to that national measure, the court insisted that the Qualification Directive, read in light of the Geneva Convention, provided for an individual assessment as to whether that person 'constitutes a danger to the community of that Member State'.[125] A national transposition measure which strips the administration from the possibility to undertake such 'a full investigation into all the circumstances of his individual case' and instead authorises the automatic exclusion from protection status, is therefore incompatible with the Qualification Directive.[126] Even though the CJEU did not expressly qualify that investigation to involve a degree of discretion, the CJEU held that the length of penalty could not serve as the sole criterion informing the administrative assessment and that the seriousness of the crime must be ascertained with regard to the individual situation of the case.[127]

The court has rejected automatic administrative presumptions in several other contexts. By way of example, a similar conclusion was drawn in *Y.Z. et alt.* The case concerned the Family Reunification Directive which stipulates that Member States 'may ... withdraw' a residence permit. Regarding that wording, the court emphasised that a withdrawal would therefore require an actual examination 'on a case-by-case basis', making 'a balanced and reasonable assessment of all the interests in play'.[128] Concerning integration tests conditioning family reunification in *K and A*, the court accentuated that the proportionality principle ordains respect for the individual situation of the person concerned, in particular the age, illiteracy or the level of education of the applicant.[129]

4.4. Prescribed marginal review

Exceptionally, the CJEU may explicitly require national courts to exercise a reduced intensity of review vis-à-vis national administrative discretion. The court's judgment in *Fahimian* aptly illustrates that effect. In this regard, the CJEU held that the competent authorities enjoy 'wide discretion when assessing the relevant facts in order to determine whether the grounds set out in [the Students and Researchers Directive], relating to the existence of a threat inter alia to public security, preclude the admission of the third country nation-

125 Case C-369/17, *Ahmed* [2018] ECLI:EU:C:2018:713, para 48.
126 The same argument is employed in Joined Cases C-57/09 and 101/09, *B and D* [2010] ECLI:EU:C:2010:661, paras 87-93.
127 Case C-369/17, *Ahmed* [2018] ECLI:EU:C:2018:713, para 58.
128 Case C-557/17, *Y.Z. et alt.* [2019] ECLI:EU:C:2019:203, para 51.
129 Case C-154/14, *K and A* [2015] ECLI:EU:C:2015:453, para 58.

al'.[130] Consequently, it confirmed that national judicial review of that administrative appraisal is to merely verify the absence of manifest errors and to ensure procedural safeguards, including the obligation to state reasons and a full assessment of facts.[131]

The guidance that the CJEU provided in this constellation therefore explicitly concerns the national courts' intensity of review with regard to administrative discretion. Whereas the CJEU usually does not prescribe a specific intensity of control to national courts, the court in this case begs to differ. Since the referring German court explicitly asked for a delineation of its judicial review powers, by virtue of its response, the CJEU notably interfered with the *autonomie institutionnelle et procédurale* of Member States. In this case, the wide margin of discretion benefits national administrative authorities, consequently, delimiting national courts' review.

Against that background, it has been suggested that the reduction in the intensity of review may follow from the fact that Member States' administrations act in their national capacity to ward off any threat to public security, in accordance with Article 72 TFEU.[132] However, that competence caveat addresses Member States *in toto* and cannot therefore explain the CJEU's eloquence regarding the interplay of two national entities. Rather, the ruling in *Fahimian* appears to be motivated primarily by the CJEU's intention to 'give a reply which will be of assistance in resolving the dispute'.[133] Nonetheless, building on this judgment, in the future, the CJEU may have resort to *Fahimian* as a point of reference to attribute to the various instances of national administrative discretion a reduced intensity of judicial review by national courts.[134]

5. A strategy in the making? A deliberate acknowledgment of discretion

The relationship between the CJEU and national administrations, Krämer-Hoppe suggests, can be described as either subordinate or indifferent. From the perspective of the CJEU, that hypothesis would imply that the court may presume national administrations to subserviently follow its every

130 *Ibid*, para 42.
131 *Ibid*, paras 45-46.
132 See Katharina Eisele, 'Public security and admission to the EU of foreign students: Fahimian' (2018) 55(1) *Common Market Law Review* 279, 292 et seq.
133 CJEU (n. 30).
134 In this vein, Opinion of Advocate General Pitruzzella, Case C-380/18, *E.P. (Menace pour l'ordre public)* [2019] ECLI:EU:C:2019:609, para 30.

word, or conversely, hardly ever take note of its judgments, essentially carrying out its discretionary business as usual.[135] The preceding analysis of jurisprudence in the field of migration, however, casts doubt on both of these perceptions.

It has been demonstrated that the jurisprudence of the CJEU reverberates national administrative decision-making, in particular where the latter entails a measure of discretion. In several instances, national administrative discretion is corroborated or even invigorated by the court's reading of Union law. This is notably the case where the CJEU interprets Union law to the end that national courts must enable the respective administrative authority to conduct a diligent evaluation, for instance by 'a full investigation into all the circumstances of [an] [...] individual case'.

However, the jurisprudence analysed indicates that the CJEU's guidance vis-à-vis national administrative discretion varies notably. This section will develop arguments with regard to the capacity of the CJEU to incorporate deliberate considerations into its interpretation of Member States' administrative discretion. In how far can the court intentionally adjust legal effects attributed to its interpretation of Union law in light of national administrative discretion? And what may be motives for doing so? Three arguments are advanced and discussed in the light of the preceding analysis; first, the argument of the court playing a 'competence game' (a.), second, indications of judicial intuition (b.) and third, guidance as a means to maintain control (c.).

5.1. Competence game?

It has been demonstrated that the CJEU occasionally (and misleadingly) speaks of 'discretion' to refer to a residual Member State competence, which falls outside the scope of Union law. At the same time, discretion may be conceptualised as 'absolute'[136] or 'sovereign'[137], but to fall within the ambit of EU law. This differentiation is elementary for the determination whether national administrative discretion may be bound in a specific situation, by the Charter of Fundamental Rights or general principles of Union law. However, with regard to the versatile perceptions of discretion, the fault line between situations that fall within the scope of Union law and those that are subject merely to national law is blurred at times.[138]

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135 Cf. Krämer-Hoppe (n. 7), 807.
136 Case C-661/17, *M.A. et alt.* [2019] ECLI:EU:C:2019:53, para 58.
137 To that effect, Case C-528/11, *Halaf* [2013] ECLI:EU:C:2013:342, para 38.
138 This is acknowledged implicitly in Case C-617/10, *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 29.

A salient example to that effect is the judgment in *X and X*, concerning the issuance of humanitarian visas. The referring Belgian court wished to obtain guidance concerning the 'discretion' granted to Member States by virtue of Union law in respect to the Visa Code. In particular, it inquired an interpretation of the fundamental rights enshrined in the Charter. However, the CJEU excluded the situation at hand from the scope of Union law, stipulating that it did not concern short-term stays but rather, by virtue of international protection, a long-term stay.

It is reasonable to characterise the court's argumentation in this case as 'formal, but compelling.'[139] There are valid reasons to agree with the finding that the situation in fact does not fall within the scope of the Visa Code, which merely covers short-term stays.[140] Accordingly, it would be deceiving in this instance to speak of discretion by virtue of EU law. Rather, the CJEU draws a clear division of competence, excluding from its own jurisprudence situations like the one at hand. As the opinion of Advocate General Mengozzi in the judgment indicates, however, the view could have equally been maintained that the situation concerned short-term visas only (and only afterwards international protection) and thus would have constituted discretion on the basis of EU law. However, there is no verifiable information concerning the motivation of the court. It is, thus, sufficient to respectfully note that divergent perceptions of discretion may enable the CJEU to adjust the guidance it wishes to give to national administrative discretion. It may utilise a competence game to eliminate any influence of Union law on a specific situation, or adjust its guidance according to the context in which discretion arises.

Exemplifying the second situation, the CJEU's interpretation of the Schengen Borders Code, and the notion of 'measures equivalent to internal border control' may be recalled. In *A.*, the court had to rule on the compatibility of German police control in the light of Union law. Since Article 72 TFEU explicitly confirms Member States' competence to maintain law and order as well as to safeguard internal security, the German government argued that no interpretation by the CJEU could call into question the compatibility of police checks with Union law.[141] The court, notably, disagreed. It held that the respective national compe-

139 Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice' (2017) 31(2) *Journal of Refugee Studies* 216, 225 et seq.

140 There are maybe even better reasons to think otherwise, see for instance Opinion of Advocate General Mengozzi, Case C-638/16 PPU, *X, X* [2017] ECLI:EU:C:2017:93. Cf. Evelien Brouwer, 'The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportunism?' (2017), https://www.ceps.eu/wp-content/uploads/2017/03/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary_0.pdf, accessed 3 June 2019.

141 Case C-9/16, *A.* [2017] ECLI:EU:C:2017:483, para 24.

tence caveat was respected by the provisions of the Schengen Borders Code.[142] Accordingly, the Member States remain competent to authorise police checks, limited only in so far as these checks do not amount to measures equivalent to internal border control. In order to ensure absence of such effect, the CJEU adjusted its guidance, namely by imposing cautious standards on the national legal framework directing the police forces' discretion.

5.2. General principles and judicial intuition

On the basis of the jurisprudence discussed, moreover, the view can be posited that the CJEU adjusts the guidance directing national administrative discretion in accordance with a sense of judicial intuition. The differing weight and prevalence of general principles of EU law by the court illustrate that effect. Despite the ambiguity as to when the CJEU has recourse to general principles in its interpretation, their use may cater to a degree of equity, as perceived from the perspective of the individual concerned. This is arguably the case with regard to a person who failed an integration test because (s)he is illiterate or in a bad state of health, may nevertheless may be entitled to be reunified with her or his family member.[143] Similarly, it is not unreasonable to highlight the principle of legal certainty with a view to the absence of internal border control. In this sense, general principles increase the CJEU's arsenal of arguments, complementing the interpretational toolbox of Union law. However, in the absence of reliable data, the rationale inspiring the court's resort to general principles must remain speculative.

5.3. Guidance to exercise control over the development of Union law

A more substantiated hypothesis regarding the motives for the CJEU's guidance towards national administrative discretion centres on the need to exert control over certain developments of Union law. Against that background, it should be reiterated that discretion can be perceived as problematic within a multi-level system.[144] If Member States' administrations were to exercise the discretion awarded to them merely on the basis of national law, the application of Union law may be compromised in practice. The guidance that the CJEU infers from the latter is therefore vital.

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142 *Ibid*, para 50.

143 See section 3.a.

144 See Mattias Wendel, *Verwaltungsermessen als Mehrebenenproblem: Zur Verbundstruktur administrativer Entscheidungsspielräume am Beispiel des Migrations- und Regulierungsrechts* (Jus Publicum, 1. Auflage, Mohr Siebeck 2019).

With a view to national administrative discretion, however, it has been shown that the CJEU's guidance varies. On the basis of the preceding analysis of jurisprudence in the field of EU migration law, it can be argued that the court intentionally adjusts the legal effects attributed to the acknowledgment of national administrative discretion in order to exert control when that discretion threatens to compromise the effectiveness of Union law in practice.[145] Context therefore matters. With a view to the complexity surrounding visa applications, the court deduced from wording such as 'particular consideration' or 'reasonable doubts' that Member State authorities enjoy a wide margin of discretion. Conversely, the assessment whether a person is excluded from being a refugee has not been characterised by the CJEU to involve (wide) discretion,[146] despite the fact that the Qualification Directive employs similar language.[147]

None of this indicates indifference or subordination. Rather, the CJEU seems to care for the practical application of national administrative discretion. This is borne out by numerous instances of acknowledgment in its jurisprudence. But the court does not simply shrug acknowledgment. Rather, it seems to occupy itself with the way in which national administrative discretion is exercised. Should Member State administrations in practice exercise their discretion in a way that threatens to compromise Union law, including its general principles, the court may adjust its interpretation to induce more eloquent indications for national administrations, subject to the enforcement thereof by national courts.

6. Guidance where guidance is due

The preceding sections displayed patterns of interpretation in the jurisprudence of the CJEU with regard to national administrative discretion. To that end, it was highlighted that the CJEU can influence national administrative conduct by virtue of the preliminary reference procedure. On the basis of the jurisprudence arising in the field of migration law, it has been argued that the CJEU acknowledges national administrative discretion in numerous occasions. These instances originate from distinct normative constellations, for instance, where an assessment involves complexity of some sort or where national administrative discretion constitutes a derogation from a rule. Sub-

145 Drawing a similar conclusion with regard to the specificity of response, see Paul Craig & Gráinne d Búrca, *EU law: Text, cases, and materials* (Sixth edition. Oxford University Press 2017), 497.

146 Case C-369/17, *Ahmed* [2018] ECLI:EU:C:2018:713.

147 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, art 12(2)(b) and (c).

sequently, it was demonstrated that the interpretation of the court attributes divergent legal effects to the acknowledgment of national administrative discretion. In particular, the court may adjust its guidance to national authorities, either qualifying certain elements of evidence as indicative or conclusive or insisting upon an individualised 'actual'[148] assessment undertaken by the competent authorities.

On the basis of these considerations, the preceding sections discuss what may motivate the CJEU to adjust its guidance vis-à-vis national administrative discretion. In this vein, arguments that the court may play a 'competence game' when referring to national discretion or that its use of general principles embodies a form of judicial intuition must remain speculative, at least in the absence of reliable evidence in this regard. However, it was highlighted that the court appears to acknowledge a wide margin of discretion to the benefit of national administrations where it does not intend to exercise a high degree of control over national administrative practice. Contrarily, where the exercise of discretion runs the risk of compromising the effectiveness of Union law, the court may not highlight the existence of administrative discretion or provide detailed guidance to it, directing national administration in practice.

Unlike the presumption that the CJEU eyes national administrative discretion indifferently or – perhaps worse – undeservingly,[149] the preceding sections clarify that the court does, on several accounts, engage with national administrative discretion. Admittedly, it has not established a coherent mode of guidance in its interpretation of that discretion. However, there are recurrent patterns detectable which may be consolidated by future jurisprudence. In the field of EU migration law, it is therefore safe to assume that national administrations will have to pay close attention to the CJEU's guidance. When exercising discretion, the CJEU's interpretation of Union law often complements the national legal framework, in many instances affecting national administrative practice.

148 Case C-578/08, *Chakroun* [2010] ECLI:EU:C:2010:117, para 48.
149 A characterisation suggested by Krämer-Hoppe (n. 7), 807.