

## EDITORIAL COMMENTS

### *The single market in troubled waters: Discretionary decision-making by the Commission as a crisis response*

‘We have the largest single market in the world. We have the strength to negotiate. We have the power to push back.’<sup>1</sup> Commission President von der Leyen’s words before the European Parliament on 1 April 2025 now sound hollow to the ears of many who, barely four months later, witnessed her sitting next to President Trump, thanking him politely for the invitation to his Scottish golf resort,<sup>2</sup> and echoing his words about the ‘biggest trade deal ever’.<sup>3</sup> As everyone knows, the ‘biggest deal’ is a bare-bones political agreement between the EU and the US whose most striking features are a US tariff ceiling of 15% for EU goods and a statement of intent by the EU to procure US liquified gas, oil and nuclear energy products for a total of roughly EUR 700 billion over the next three years.<sup>4</sup> While the purchasing promise seems to be an ambitious goal that may or may not be achieved in the future, the tariff rate has entered into force on 6 August 2025 and reflects where the EU actually stands in the current popularity charts of the US administration: below the UK that could obtain a 10% tariff rate as a symbolic Brexit reward from a US president who always resented British EU membership, on a par with other important trading partners of the US such as Japan and South Korea, but above Taiwan (20%) and Switzerland (39%).

Whether this is a poor result depends on one’s perspective. As trade balances are the alleged, albeit economically nonsensical benchmarks of the new US trade policy,<sup>5</sup> the example of Switzerland gives EU Member States with a similarly significant trade surplus with the US (namely Germany,

1. Speech of President von der Leyen before the European Parliament, 1 April 2025, <[www.europarl.europa.eu/doceo/document/CRE-10-2025-04-01\\_EN.html#creitem2](http://www.europarl.europa.eu/doceo/document/CRE-10-2025-04-01_EN.html#creitem2)> (all websites last visited 1 September 2025).

2. Remarks by President von der Leyen at the start of the meeting with US President Trump, 27 July 2025, <[ec.europa.eu/commission/presscorner/detail/en/statement\\_25\\_1914](http://ec.europa.eu/commission/presscorner/detail/en/statement_25_1914)>.

3. Press conference by President von der Leyen, 27 July 2025, <[www.youtube.com/watch?v=ZBIRcqnnLfo](https://www.youtube.com/watch?v=ZBIRcqnnLfo)>.

4. European Commission, ‘EU-US trade deal explained’, <[ec.europa.eu/commission/presscorner/detail/en/qanda\\_25\\_1930](http://ec.europa.eu/commission/presscorner/detail/en/qanda_25_1930)>.

5. See eg Tamim Bayoumi and Joseph E Gagnon, ‘The Origins of the US Trade Deficit and the Futility of Tariffs’, <[www.piie.com/blogs/realtime-economics/2025/origins-us-trade-deficit-and-futility-tariffs](https://www.piie.com/blogs/realtime-economics/2025/origins-us-trade-deficit-and-futility-tariffs)>.

Ireland, Italy and France)<sup>6</sup> a reminder where they could have ended up if they had negotiated with the US on their own. Given the arbitrariness of Trump's tariff-setting, even Member States with a structural US trade deficit (most prominently the Netherlands, due to the large volume of oil and gas imports from the US going through the port of Rotterdam)<sup>7</sup> could hardly have relied on a more favourable treatment by the US in a hypothetical deal outside the EU. So there can be no doubt that in matters of international trade, despite the wide-spread disappointment with the EU-US deal, Member States are still better off inside than outside the Union.

However, a painful gap between the self-aggrandizing rhetoric of EU representatives and the reality of international trade relations remains. Apparently, the sheer economic size of the single market (as the world's second largest economy in terms of nominal GDP) does not translate into equivalent negotiating power. It seems that the EU is finding it difficult to back its demands with credible threats because the Member States can easily be divided by measures that do not affect all of them equally. Everyone wants the EU to fight and win, but not if this implies sacrificing one's own champagne or car production for the greater good. Moreover, the Union's political and military weakness is likely to affect its global economic clout. It is just not easy to confront an old partner on economic issues whose military support is still badly needed, or to deepen economic ties with new partners who feel free to undermine the Union's efforts to stop the Russian aggression in Ukraine.

This leaves the relationship of the single market to the rest of the world in a limbo. On the one hand, the aspiration of integrating the single market into a multilateral economic order that extends the Union's own internal principles to the global level as enshrined in the Treaties (Article 21(2)(e) TEU) has failed for the time being.<sup>8</sup> Tellingly, reasonable concerns about the compatibility of the EU-US deal with the law of the World Trade Organization (WTO), in particular the Most-Favoured-Nation rule,<sup>9</sup> do not seem to rank high on the Commission's agenda. On the other hand, the EU on its own is evidently not strong enough to fully preserve its economic interests in the new Darwinist world of rivalling

6. Eurostat, USA-EU – international trade in goods statistics, <[ec.europa.eu/eurostat/statistics-explained/index.php?title=USA-EU\\_-\\_international\\_trade\\_in\\_goods\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=USA-EU_-_international_trade_in_goods_statistics)>.

7. Statistics Netherland (CBS), 'Trade Deficit with US Due to Mineral Fuel Imports', <[www.cbs.nl/en-gb/news/2025/09/trade-deficit-with-us-due-to-mineral-fuel-imports](https://www.cbs.nl/en-gb/news/2025/09/trade-deficit-with-us-due-to-mineral-fuel-imports)>.

8. On the shift of the Union's trade policy from multilateralism to unilateralism, see also Sophie Bohnert, 'The Shift to Unilateralism in the European Union's Trade Policy: An Exercise in Taxonomy' in this issue.

9. Julian Hinz, 'EU-US Tariff Deal Jeopardizes Rules-based Global Trade', <[www.ifw-kiel.de/publications/news/eu-us-tariff-deal-jeopardizes-rules-based-global-trade/](https://www.ifw-kiel.de/publications/news/eu-us-tariff-deal-jeopardizes-rules-based-global-trade/)>.

powers striving for dominance. This leaves the Commission with the unenviable task of navigating the EU by sight through the troubled waters of world trade, seeking and accepting *ad hoc* compromises, such as the deal with the US. If the present situation persists, this improvised strategy of ‘muddling through’ will result in a discretionary trade policy as a permanent, forever unfinished attempt at striking a balance between the Union’s interests and values and its limited scope for political manoeuvring in a quickly changing global environment.

#### *Discretionary elements of the internal market framework*

The rise of discretionary decision-making by the Commission in external trade policy illustrates a general trend that is related to the concept of ‘resilience’.<sup>10</sup> Resilient societies and institutions may yield to a certain extent to crises, but without losing their ability to recover. In a polity, resilience requires the ability to adjust political priorities, at least temporarily, when under pressure, and to rebalance different policy objectives, but without causing lasting damage to the polity itself by undermining its constitutional structure. The flexibility required for this is provided by discretionary powers that allow institutions to respond effectively to crises while at the same time keeping their relationships with other institutions and with citizens intact. As far as the EU is concerned, the Commission plays a central role in this respect. This applies not only to the EU’s trade policy, but also to the internal market framework where the external pressure weighing on the EU is also felt.

Given the present transatlantic tensions, the most sensitive case in point is probably the role of the Commission as a regulatory authority under the Digital Services Act (DSA) and the Digital Markets Act (DMA). Under the DSA, very large online platforms (VLOPs) and very large online search engines (VLOSEs), as designated by the Commission,<sup>11</sup> are subject to additional obligations (beyond the general obligations set out in the DSA) whose definition and enforcement largely lie with the Commission.<sup>12</sup> Under the DMA, the implementation of the duties imposed on digital gatekeepers designated by the Commission<sup>13</sup> also grants considerable discretion to the

10. Markus K Brunnermeier, *The Resilient Society* (Endeavor Literary Press 2021). For an application of this concept in a legal context see eg Andriani Kalintiri, ‘EU Antitrust Law’s Resilience: The Good, the Bad, and the Ugly’ (2024) 43 Yearbook of European Law 184, doi: 10.1093/yel/yeae009.

11. Art 33(4) DSA.

12. *ibid*, Arts 34–43.

13. *ibid*, Art 3.

Commission.<sup>14</sup> As currently five out of seven gatekeepers and a large proportion of the VLOPs and VLOSEs are US firms,<sup>15</sup> it does not come as a surprise that the enforcement of the DMA and of the DSA has come under attack from the US. While rumours that the exemption of US companies from EU digital market regulation could become part of a trade deal with the US have not proven to be true, there is presently no way to tell whether the US complaints have possibly had a chilling effect on the Commission's enforcement activities *vis-à-vis* US firms. Could it be the case that the DSA enforcement actions against X (formerly known as Twitter) have slowed down a bit?<sup>16</sup> Will the Commission pursue the enforcement of the DMA as enthusiastically in the future as it did until its first non-compliance decisions against Apple and Meta on 22 April 2025?<sup>17</sup> We just do not know.

This leads us to a general problem of discretionary decision-making in the internal market and beyond: the exercise of discretion can be made transparent by procedural rules, and it can be limited by substantive rules. But ultimately, if procedural and substantive requirements are not meant to reduce discretionary powers to zero, an uncontrolled space for decision-making by the competent authority remains. The extent to which such a space is accepted as legitimate depends on the level of trust that the authority enjoys.

#### *The potential rise of discretionary powers as a crisis response*

In the case of the Commission's powers to shape the internal market, the string of examples where this issue occurs may be extended in the future. This is not because the Commission seeks power for its own sake, but because of the current crises which affect the internal market and, according to wide-spread opinion, require swift action. Apart from the loss of reliable trade relations with the rest of the world, there is a growing sense that the

14. Cf Richard Feasey and Giorgio Monti, 'Implementing the DMA: Early Feedback' (CERRE, March 2025), <cerre.eu/wp-content/uploads/2025/03/DMA-Early-Feedback\_FINAL.pdf>.

15. For a list of gatekeepers designated under the DMA see <digital-markets-act.ec.europa.eu/gatekeepers\_en>; for a list of VLOPs and VLOSEs under DSA see <digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses#ecl-inpage-twitter>.

16. The Commission sent preliminary findings to X for breach of the DSA on 12 July 2024, <digital-strategy.ec.europa.eu/en/news/commission-sends-preliminary-findings-x-breach-digital-services-act>.

17. See press release of 23 April 2025, <ec.europa.eu/commission/presscorner/detail/en/ip\_25\_1085>.

EU is technologically and economically lagging behind the US and China and effective responses are urgently needed.<sup>18</sup> Three examples illustrate this trend.

First, the proposal for the Multiannual Financial Framework (MFF) 2028–2034 comes with an enhanced role for the Commission.<sup>19</sup> The MFF aims at ‘a more ambitious budget that is simpler, more flexible and more strategic’.<sup>20</sup> Many previous programmes, including the costly Common Agricultural and Cohesion Policies, will be bundled together in a single large fund that covers ‘economic, social and territorial cohesion, agriculture and rural, fisheries and maritime, prosperity and security’. The spending of the budget will be controlled via ‘national and regional partnership plans’ (NRPs) for each Member State which will be drafted by national governments and negotiated with the Commission, before being implemented after approval of the Council. The NRPs will grant Member States more leeway to allocate funds, but will also require reform pledges from them in order to meet European Semester recommendations and other demands by the Commission.<sup>21</sup> By allowing the Commission to define the milestones Member States have to reach as a *quid pro quo* for their allocated funds, the MFF will equip the Commission with a powerful discretionary instrument to bring Member States into line with the policy goals of the Union.

Another element of the new MFF that will also contribute to the central role of the Commission is the creation of a European Competitiveness Fund. This Fund is meant to replace the current patchwork of 12 funding programmes for industry support with a single instrument that covers four funding areas that are regarded as critical for EU competitiveness.<sup>22</sup> Except for the area of defence and space, the work programmes that will specify the funding under these broad headings will be defined by the

18. Cf Mario Draghi, ‘The Future of European Competitiveness’, Part A, Foreword (2024).

19. For a critical account of the new MFF (based on leaked drafts), see Päivi Leino-Sandberg, ‘Leaked and Loaded: Why the NGEU Model is Ill-Suited for Responding to the EU’s Current Geopolitical Challenges’ (*Verfassungsblog*, 18 March 2025) <verfassungsblog.de/mff\_ngeu\_leaked-and-loaded/>.

20. ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A Dynamic EU Budget for the Priorities of the Future – The Multiannual Financial Framework 2028–2034, COM(2025) 570 final, <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025DC0570>.

21. Romy Hansum and others, ‘Ripe for Reform – What’s in the EU Budget Proposal and What Should Come Next’, <www.delorscentre.eu/en/publications/detail/publication/ripe-for-reform-whats-in-the-eu-budget-proposal>.

22. Clean Transitional and Industrial Decarbonization; Resilience and Security, Defence Industry and Space; Digital Leadership; Biotech, Agriculture and Bioeconomy.

Commission in implementing acts, after (mere) consultation of the Member States and with no direct involvement of the European Parliament.<sup>23</sup> Again, the enhanced flexibility gained as a result of the budgetary reform goes hand in hand with an increase of the Commission's decision-making power.

Second, turning from the carrots of the EU budget to the stick the Commission carries as enforcer of the competition rules, we have already noted a significant shift in the approach of the von der Leyen 2 Commission in previous Editorial Comments.<sup>24</sup> By placing competition policy in a large portfolio of tasks entrusted to Executive Vice-President Teresa Ribera and stressing the need in her mission letter to the Executive Vice-President to 'support companies scaling up in global markets' and to be 'better geared to our common goals, including decarbonization and a just transition',<sup>25</sup> the Commission President indicated that the protection of competition, pure and simple, should not exclusively guide the application of the competition rules, but that a balancing with other economic (industrial policy) and non-economic goals is required. Without rehearsing the extensive debate about the goals of EU competition law, it is safe to say that such a concept gives the Commission significantly larger discretion in interpreting and applying the competition rules than a 'competition only' approach.

Third, the role of the Commission as a regulatory authority may in the future not be confined to sector-specific regulation. As some may recall, inspired by the UK market investigation tool,<sup>26</sup> the Commission briefly considered the introduction of a New Competition Tool (NCT) as a horizontal regulatory instrument with sweeping powers of intervention before settling for the DMA as a limited piece of sector-specific legislation.<sup>27</sup> Although the Commission has not yet revisited the idea of an NCT, the Draghi Report and the European Parliament have recommended its introduction.<sup>28</sup> Depending on its design, such a tool could equip the

23. Hansum and others (n 21).

24. Editorial Comments, 'Competition Policy in the von der Leyen 2 Commission: Diluted or Integrated?' (2025) 62 CML Rev 1, doi: 10.54648/cola2025001.

25. Ursula von der Leyen, Mission Letter – Teresa Ribera (17 September 2024). This, and all other Mission Letters are available at <[commission.europa.eu/about/commission-2024-2029/commissioners-designate-2024-2029\\_en](https://commission.europa.eu/about/commission-2024-2029/commissioners-designate-2024-2029_en)>.

26. Richard Whish, *New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems with a particular focus on the UK's market investigation tool* (Expert study for the European Commission, 2020).

27. In 2020, the Commission launched a public consultation on an initiative for a new complementary tool to strengthen competition enforcement, <[ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en)>.

28. Draghi (n 18) Part B, 303–304 (see also Alessia D'Amico and Inge Graef, 'Draghi's New Competition Tool Promises To Revamp Competition, but Comes With Challenges',

Commission with considerable discretion to remedy market failures wherever they occur.

All of these (actual and potential) developments towards discretionary decision-making enable and contribute to the much-noticed ‘politicization’ of the Commission.<sup>29</sup> To draw a comparison with prominent predecessors, the von der Leyen Commission certainly acts in a different, more political way than the Delors Commission, which probably marked the height of the technocratic approach to building the single market, or the Barroso Commission, which managed the difficult transition of the Union before and after the entry into force of the Lisbon Treaty. This is noticeable, for example, in the scaling back of the Green Deal, which is due to the fact that in von der Leyen’s second term, the Commission has to deal with an alternative right-wing majority in the European Parliament that is sceptical or even hostile toward rapid reforms to protect the climate.<sup>30</sup> Regardless of whether we share this view, this is fundamentally a development that proves the effectiveness of European democracy: changing political majorities produce changing policies. Beyond necessities in times of crisis, the discretionary powers enjoyed by the Commission therefore help it to keep pace with democratic change. However, as already noted, discretionary decision-making requires trust, which is built and maintained by legal rules that define the limits of discretion and create accountability for its use.

*Building and maintaining trust through law: Some preliminary observations*

Despite its increasingly political role, the Commission remains the guardian of the Treaties. To be sure, this job title is only used to describe the Commission’s task of ensuring the correct implementation and application of Union law by the Member States.<sup>31</sup> However, the Commission itself is

<[www.promarket.org/2024/10/04/draghis-new-competition-tool-promises-to-revamp-competition-but-comes-with-challenges/](http://www.promarket.org/2024/10/04/draghis-new-competition-tool-promises-to-revamp-competition-but-comes-with-challenges/)>; European Parliament resolution of 16 January 2024 on competition policy – annual report 2023 (2023/2077(INI)) para 7.

29. Most recently, Desmond Dinan and Sophia Russack, ‘The Formation of the Second Von der Leyen Commission: Nomination, Organisation and Confirmation’ (2025) *Journal of Common Market Studies*, Early View <[doi.org/10.1111/jcms.70015](https://doi.org/10.1111/jcms.70015)>.

30. Karl Mathiesen, ‘Ursula von der Leyen Amputates the Green Deal to Save its Life’ (*Politico*, 25 June 2025) <[www.politico.eu/article/ursula-von-der-leyen-green-deal-eu-politics-economy-policy/](http://www.politico.eu/article/ursula-von-der-leyen-green-deal-eu-politics-economy-policy/)>.

31. In this regard, the problem of a politicized use of the Commission’s discretion also occurs. See R Daniel Kelemen and Tommaso Pavone, ‘Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union’ (2023) 75 *World Politics* 779, doi: 10.1353/wp.2023.a908775.

also bound by the Treaties. In particular, the establishment of an internal market, including a ‘highly competitive social market economy’ (Article 3(3) TEU), and the duty to ‘uphold and promote’ the Union’s ‘values and interests’ ‘[i]n its relations with the wider world’, including ‘the strict observance ... of international law’ (Article 3(5) TEU), are not at the disposal of the Commission. While this statement is a truism, the consequences that follow from it are anything but trivial. On the one hand, the old ordoliberal vision of a depoliticized, rules-based internal market which would gradually expand into a global economic order is no longer in tune with the Union’s constitution under the Treaties. The balancing of the multi-faceted goals and policies set out in the Treaties is not merely a technocratic exercise in optimization, but requires political discretion. Only then can the Union’s claim to be founded on representative democracy (Article 10(1) TFEU) – and not just to set limits to Member States’ democracies, as is the ordoliberal belief – be fulfilled. On the other hand, the discretionary decisions taken by the Commission in pursuit of the Union’s goals and policies cannot remain judicially unchecked if the limits set by the Commission’s obligation to the Treaties are not to be rendered meaningless, and trust in the Commission as a constitutional institution of the Union is not meant to be eroded. This puts the Court of Justice into the delicate position of defining limits to the Commission’s discretionary powers, while not jeopardizing its ability to respond to democratic change and to preserve the resilience of the Union in times of crisis.

The starting-point of our brief *tour d’horizon* is an apt illustration of this problem. When striking a tariff deal with the US, the Commission is not free to ignore WTO law, to which it is bound under Article 216(2) TFEU. However, while treating WTO law as integral part of EU law and accepting jurisdiction for violations of WTO rules by Member States,<sup>32</sup> the Court of Justice has generally not allowed individuals to invoke WTO provisions to set aside EU measures<sup>33</sup> or to claim compensation from the EU for losses caused by measures in breach of WTO law.<sup>34</sup> As the Court of Justice has also denied Member States from seeking the annulment of EU measures for a breach of WTO law,<sup>35</sup> non-compliance with WTO law by the EU and its institutions, as opposed to its Member States, remains non-actionable before the Court, thus inviting the criticism of a double

32. Vasiliki Kosta and Darinka Piqani, ‘Where trade and academic freedom meet: Commission v. Hungary (LEX CEU)’ (2022) 59 CML Rev 813, doi: 10.54648/cola2022053.

33. Case C-377/02, *Van Parys*, EU:C:2005:121.

34. Joined Cases C-120/ & C-121/06 P, *FIAMM and Fedon v Council and Commission*, EU:C:2008:476, para 111.

35. Case C-268/94, *Portugal v Council*, EU:C:1996:461; Case C-377/98, *Netherlands v Parliament and Council*, EU:C:2001:523.

standard ('do as I say, not as I do').<sup>36</sup> Whilst undeniably having a hint of hypocrisy, the pragmatic reasoning of the Court now seems prescient in view of the decline of the WTO: '[T]o accept that the Community courts have the direct responsibility for ensuring that Community law complies with the WTO rules would effectively deprive the Community's legislative or executive organs of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.'<sup>37</sup> This scope for manoeuvre has now been used by the Commission, with the participation of the Council (Article 207(3) TFEU), to avoid grave disadvantages for the Union's export industry and, indirectly, its economy as a whole, although possibly at the expense of the Union's constitutional commitment to the observance of international law and the remaining hope of reviving a multilateral economic order. Ultimately, it will not be courts, but Union citizens as voters who will decide whether this balance was struck appropriately.

However, it is submitted that such a generous approach to the legal limits of the Commission's discretion is not open to generalization. Turning from the external to the internal sphere of the single market, due to the lack of trade negotiations, there is obviously no need to avoid disadvantages from tying the Union to legal obligations that its counterparts may not respect. Here, the argument that the Union and its institutions should in principle obey the same standards as the Member States definitely holds more appeal and helps spell out the meaning of the commitment of the Union and its institutions to the establishment of an internal market (Article 3(3) TFEU). There is, for instance, good reason to believe that the Union should not be allowed to take measures that discriminate between goods or services from different Member States in a way that would be forbidden to Member States under the fundamental freedoms, as the Court has in principle accepted the binding nature of the fundamental freedoms for the Union and its institutions.<sup>38</sup> Turning to our current example of the Commission's increased discretion under the future MFF, a similar argument could be made that the Commission should not be allowed to allocate subsidies from the new Competitiveness Fund that would distort competition in the internal market in a way that would be incompatible with (and not exemptable under) Article 107 TFEU if the same subsidy were granted by a Member State. Otherwise, a shift of economic subsidies from the level of (financially strained) Member States to the Union budget would have the undesirable

36. Marco Bronckers and Pieter Jan Kuijper, 'WTO Law in the European Court of Justice' (2005) 42 CML Rev 1313, 1348, doi: 10.54648/cola2005050.

37. Joined Cases C-120 & C-121/06 P, *FIAMM and Fedon v Council and Commission*, para 119.

38. Case C-620/18, *Hungary v Parliament and Council*, EU:C:2020:1001, para 104.

consequence of undermining the protection of the internal market from distortive subsidies by the State aid rules.

Yet, this is only the starting point for further considerations. When examining the compatibility of Union measures with the fundamental freedoms, the Court has granted the EU legislature ‘a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations’, and therefore merely examined whether the restrictive measure enacted by the EU legislature is ‘manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue’.<sup>39</sup> If the Commission acts on its own, a similar argument could be made. A suitable example is the Commission’s intention of reorienting competition policy by embedding the application of the competition rules in a broader spectrum of economic and non-economic goals. On the one hand, there are indeed justiciable limits to the Commission’s discretion in this area. As the Court held in *Orlen*, when accepting commitments by firms in competition cases, the Commission is neither free to ignore the principle of energy solidarity laid down in Article 194(1) TFEU nor allowed to pursue energy solidarity under the false flag of competition law enforcement.<sup>40</sup> On the other hand, the Court has consistently granted the Commission a margin of discretion in competition cases for the appraisal of ‘complex economic matters’.<sup>41</sup> While this formula does not cover balancing between the protection of competition and other – potentially conflicting – goals, it is open to discussion whether the discretion can be extended to these matters, considering that the Court has accepted the role of the Commission as the driver of European competition policy.<sup>42</sup> However, as this issue concerns the meaning and scope of Treaty provisions with direct effect and a decentralized enforcement by Member State courts and authorities, there is a risk of a disintegration of competition law if the Court refrains from making its own assessment of the relationship between the protection of competition and other goals and policies of the Union.

As these Editorial Comments merely serve the purpose of inviting reflection rather than answering these and other questions relating to our topic, we may conclude with a general observation. As has rightly been

39. *ibid*, para 112.

40. Case C-225/22 P, *Orlen v Commission*, EU:C:2024:790, paras 95–96. See also Editorial Comments (n 24) 6.

41. Since Case C-42/84, *Remia v Commission*, EU:C:1985:327, para 34; see also Case C-376/20 P, *Commission v CK Telecoms*, EU:C:2023:561, para 84.

42. Case C-344/98, *Masterfoods*, EU:C:2000:689, para 46.

said,<sup>43</sup> issues of discretion are a matter of institutional balance. Achieving and maintaining institutional balance is never an easy task if the constitutional allocation of legislative, executive and judicial functions leaves gaps and grey areas, as is certainly the case in the EU. When striking this balance, the Court itself is part of the equation. The Court must not only balance the relationship between the other EU institutions, but also define its own relationship with these institutions. Superficially, crises are a reason to loosen the legal reins in order to give political decision-makers in the Parliament, in the Council, but also in the Commission room for quick and effective measures. However, paradoxically as it seems, the trust that these institutions, and in particular the Commission, need in order to be able to act quickly and effectively also depends on whether they visibly adhere to the limits of the discretion granted to them. This is where the Court is required to step in and help sail the ship through troubled waters – so that the Union achieves what is aptly expressed in the coat of arms of Paris: *Fluctuat nec mergitur*.

43. Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 CML Rev 361, doi: 10.54648/cola2010018.

