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THE SEPARATION OF POWERS IN THE GLOBAL ARENA: PROMISES AND BETRAYALS

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The separation of powers and the administrative branch in the European Union

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An Introduction

These working papers were borne from the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (Istituto di ricerche sulla pubblica amministrazione - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration.

This paper serves as Introduction to the seminar on *The Separation of Powers in the Global Arena: Promises and Betrayals* that was held on December 16th, 2022 at the LUISS Guido Carli University in Rome.

The seminar's purpose has been to collect the contributions by international legal scholars to the study of the principle of the separation of powers and its transformations in a global context, and namely when adopted international and supranational institutions and challenged by global crises.

The seminar has gathered scholars with different legal backgrounds -history of institutions, international law, administrative law, environmental law- and with expertise at various levels, i.e. international, supranational and domestic.

The presentations discussed during seminar have resulted in seven papers, in addition to the present Introduction.

The principle of separation of powers, as theorized by Montesquieu, has been at the basis of modern democracies. With the evolution of democratic governance, however, it seems to have gained more a formal and normative value than a heuristic capacity as a principle capable of providing an interpretative key of the existing reality. Gradually that model, explicitly or implicitly adopted by democratic Constitutions, has suffered exceptions and deviations which the Covid-19 pandemic has even worsened.

In Western democracies the executive branch has often vested itself with legislating powers through decree-laws or equivalent. Parliaments have allowed this invasion, at the same time adding subsequent lengthy changes to these laws to meet local, sectorial, or corporate needs. In other instances, Parliaments have aimed at making the rules and applying them, through "self-executive" laws which are so detailed that they leave no room for any exercise of discretion by the administrations. The judicial branch has exercised regulatory powers in many sectors, expanding or shrinking principles or creating new rights and duties.

Exceptions and deviations are such as to make some scholars observe that the separation of powers no longer exists and has been replaced by different balances. Already in 1984 Lijphart argued, for example, that majoritarian democracies have been characterized by the concentration of powers on the executive, by the fusion of legislative and executive powers, and by the cabinet dominance over the legislative branch[1].

Although the literature on the separation of powers and on its crisis is very rich, the perspective from which this symposium intends to delve into the phenomenon is relatively novel as it aims to combine four elements.

First, the objective of the symposium is to analyse the phenomenon mainly through the lens of administrative law and from the point of view of public administrations. The articles deal with the principle of separation of powers and include the analysis of all the three branches and investigate the relationships among them. However, the focus of the symposium is mainly on exploring the *transformations in the exercise of administrative power* as a result of the intrusion by

[1] A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven / London: Yale University Press, 1984, *passim*.

the other branches into the administrative arena or, on the contrary, as a result of the appropriation by the executive branch of functions that are typically attributed to the other branches.

Second, the chosen perspective combines *different time planes*. The symposium looks, on one hand, at the origins of the principle of separation of powers, by identifying the "good promises" that through the principle were intended to be fulfilled. On the other hand, it should try to grasp the current trends, long-term o short-term, which militate in the direction of "betraying" the principle of separation of powers in its original meaning.

Third, in the analysis of "betrayals", the perspective will focus on the interaction between the principle of separation of powers and the direct and indirect *impact of globalization on this principle*. This interaction is examined under two respects: the first is that of the application of the principle by international and supranational organizations, established and operating to deal with global problems; the second is that of the impact that international and supranational bodies (and the regulation dictated by these bodies to address global problems) have had on the interpretation of the principle of separation of powers by the States. In this regard, without claiming to be exhaustive, three sectors have been chosen in which globalization, and the crises connected to it, have induced an alteration of the principle of separation of powers, determining a concentration of powers in the executive branch to the detriment of the legislative and the judiciary branch or, vice-versa, a subtraction of these powers from the executive branch by the judiciary. These sectors are democracy (and the democratic crisis, taking as case studies Poland and Hungary), health (and the consequences of the health crisis), and environment (and the consequences of the environmental crisis).

Finally, the perspective is mainly focused on the experience of American and European democracies.

More in detail, the first part on the promises and, thus, on the history of the principle of separation of powers includes two articles. *La constitution de l'Angleterre": Montesquieu and the reasons for separating the powers* by Pasquale Pasquino explores the historical evolution and interpretations of the separation of powers, from Montesquieu's influential work to contemporary political-constitutional systems. It examines Montesquieu's trinity of powers—legislative, executive, and judicial —and its role in shaping modern constitutionalism. The American

Constitution's system of checks and balances is analysed as a refinement of Montesquieu's doctrine. Challenges to this system, such as political party control and the growing power of executives, are discussed, along with the evolving role of constitutional courts. The article concludes by highlighting the need for a re-evaluation of the separation of powers in the 21st century, considering the dispersal of power among elected and non-elected entities in modern political systems.

Along these lines, the following article entitled *Montesquieu's legacy in the construction of American democracy* by Noah A. Rosenblum stems from the observation the most recent evolution of American constitutional law. While Montesquieu's ideas on separating government powers were central to late 18th-century American constitutional debates, the current Supreme Court majority, despite claiming fidelity to the Founders, largely overlooks his influence, opting instead for a selective and formalist interpretation of history.

This absence of Montesquieu prompts inquiries into the original meaning of separation of powers and its alignment with the Court's recent rulings. Thus, the article reconstructs the Supreme Court's evolving formalism on the separation of powers, tracing its roots back to opposition to the New Deal in the 1930s. It explores how this doctrine has reshaped American administrative law, particularly in recent years.

It, then, examines the Court's reliance on historical practices in recent cases but points out its selective disregard for historical evidence contradicting its formalistic interpretation of the separation of powers.

Finally, it delves into the pragmatic approach of the Founding Fathers towards separation of powers, suggesting they prioritized governance outcomes over rigid doctrinal adherence. It argues that Montesquieu's influence on American democracy lies in his understanding of how institutions shape political practices, a concept embraced by the Framers but overlooked by the modern Supreme Court.

The second part of the symposium, then, moves to analyse the role that the principle of separation of powers has in international and supranational organizations. The article entitled *Of Cheques and Balances: Separation of Powers in International Organizations Law* by Jan Klabbers explores the application of separation of powers principles within international organizations, a topic notably absent in current literature, especially if one excludes the European Union.

While international organizations are traditionally viewed as entities delegated tasks by member states, the paradigm of separation of powers, common in domestic governance, does not easily align with their collaborative nature. Unlike states, international organizations pursue specific goals outlined in their constitutive instruments, fostering cooperation among organs rather than checks and balances. Despite this, examining international organizations through the prism of separation of powers may offer insights into their evolving governance structures. The paper argues that while the autonomy of international organizations from member states is increasing, the development of a separation of powers doctrine remains limited, with recent funding practices further complicating the prospect. By exploring the impact of market-based funding on separation of powers, the paper underscores the challenges in controlling international organizations' activities, ultimately questioning the feasibility of implementing separation of powers within their governance frameworks. The analysis intentionally excludes the European Union and financial institutions due to their unique funding mechanisms and evolving roles beyond traditional international organization frameworks.

Indeed, a specific article of the symposium deals with the European Union. *The separation of powers and the administrative branch in the European Union* by Marta Simoncini explores the application of the principle of separation of powers to EU institutions. It examines how the EU's interpretation of this principle by the Court of Justice of the EU shapes the functioning of its administrative arm and argues that the principle has not contributed to framing the accountability of the EU administrative branch.

The analysis focuses on the limitations of the current framework in ensuring accountability within the administrative sphere, with specific attention to the non-delegation doctrine as interpreted by the Court of Justice. Despite efforts to uphold the principle of separation of powers, challenges remain in framing administrative accountability effectively within the EU context.

The third part of the symposium aims to provide a selective overview of the areas -democracy, environment, health- in which the principle of separation of powers has been especially challenged by global crises and it does so by focusing on some case studies.

With reference to democracy, the proliferation of democratic backsliding in many countries has been characterised *inter alia* precisely by the torsion of the principle of separation of powers. The decline of democracy globally has reverberated within the traditional structures of separation of powers, with authoritarian transitions notably emerging within the European Union, particularly in Hungary and Poland. The article entitled *The Dismantling of Power Sharing in Hungary and Poland. Two Roads to the Same Destination?* by Zoltán Szente and Wojciech Brzozowski shows that, despite their constitutional systems being labeled as "abusive constitutionalism", "illiberal democracy", or "populist constitutionalism", these countries share characteristics of anti-democratic transformations that undermine the system of checks and balances. This article delves into the nuanced constitutional changes in Hungary and Poland, examining how these regimes, while maintaining the facade of constitutional democracy, have weakened the division of power. It explores the methods employed by these governments to consolidate power while ostensibly adhering to democratic norms. Furthermore, the study investigates how contemporary challenges to separation of powers, such as the expansion of judicial power and multi-level constitutionalism, are addressed in these contexts. Through a comparative analysis, it seeks to discern whether the paths taken by Hungary and Poland represent distinct trajectories or share fundamental similarities. Ultimately, the paper aims to draw lessons from these experiences and their implications for the future of democratic governance.

Alongside with the democratic crisis, the climate change crisis has impacted the principle of separation of powers. *Climate Change, Narrative, and Public Law Imagination* by Liz Fisher argues that the interaction between climate change and public law presents a complex narrative landscape, shaping the imagination of legal frameworks and responses. Current narratives predominantly emphasize strategic litigation as a means to achieve low carbon futures, yet these narratives oversimplify the role of public law and often lead to narratives of promises and betrayals. By taking the separation of powers as an example of narrative in action, the article explores alternative narratives that present law as offering institutional and reasoning capacities necessary for the large-scale transformations demanded by climate change. It argues for a broader engagement with the substance of public law in addressing climate change and highlights the importance of understanding narrative dynamics in shaping public law imagination. It examines the prevailing narrative surrounding

public law and climate change, and proposes an alternative narrative. It concludes by considering the implications of these narratives for administrative law imagination. While primarily focusing on examples from administrative law in the US, UK, and Commonwealth, the insights presented resonate across legal cultures and public law contexts.

The impact that the global health crisis, following the Covid pandemic, has had on the principle of separation of powers is analysed in the last article of the symposium. *Following in the footsteps of Ginsburg &Versteeg. The bound executive during the pandemic: Italy as a case study* by Elisabetta Lamarque examines the impact of the COVID-19 pandemic on constitutional guarantees by comparing the findings of a recent comparative law study with developments in the Italian legal system. The study largely confirms the hypothesis that despite the pandemic's centrality to policymaking, the Italian Executive faced democratic constraints from an independent judiciary and efficient parliamentary oversight. However, contrary to expectations, regional and local authorities did not significantly constrain the national Executive due to Italy's small size and the global nature of the health threat. The article argues that Italy lacked democratic safeguards against technical-scientific power, emphasizing the need to integrate such powers into checks and balances for safeguarding individual rights.

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The separation of powers and the administrative branch in the European Union

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Abstract

The interpretation of the principle of separation of powers in the EU has assumed specific character through the principle of institutional balance. The Court of justice (CJEU) has been playing a leading role in the assessment and oversight of the principle. This paper aims to analyse how the EU interpretation of the principle of separation of powers has shaped the functioning of the EU administrative branch. It focuses on how the CJEU has interpreted the principle of institutional balance through the so-called non-delegation doctrine limiting the delegation of powers to the administration. I argue that the principle has not contributed to framing the accountability of the EU administrative branch.

1. Introduction

The limitation of public powers realised by modern democracies through the rule of law applies to the European Union (EU) "on which the Member States confer competences to attain objectives they have in common".[1] As Regulation 2020/2092/EU has pointed out recently, the principle of separation of powers is a key component of the rule of law, which refers to the values common to the Member States as enshrined in Article 2 TEU.

The interpretation of the principle of separation of powers in the EU has assumed specific character through the principle of institutional balance. The Court of justice (CJEU) has been playing a leading role in the assessment and oversight of the principle. This paper aims to analyse how the EU interpretation of the principle of separation of powers has

[1] Art. 1 TEU.

shaped the functioning of the EU administrative branch. I argue that the principle has not contributed to framing the accountability of the EU administrative branch.

The analysis will proceed as follows. Firstly, the combination of the principles of conferral and institutional balance will be examined as the key features designing the separation of powers beyond the Member State level (section 2). On these grounds, the paper will discuss how the application of these principles should legally structure the horizontal relations among EU institutions, but it fails to frame the accountability of the administration. The analysis will specifically focus on how the CJEU has interpreted the principle of institutional balance through the so-called non-delegation doctrine limiting the delegation of constitutional powers (section 3). The balance of powers will thus be understood under the non-delegation doctrine as non-interference of powers among EU institutions (section 4) and as limits on the delegation to the administrative branch (section 5). With regard to the exercise of administrative powers, the principle of institutional balance has limited administrative action in two important ways: by excluding the delegation of policy choices (section 5.1) and by prohibiting administrative rulemaking (section 5.2). Section 6 will conclude on the theoretical limits and the pragmatic implications of the distribution of powers in the EU.

2. The key features of the separation of powers in the EU

The principle of separation of powers in the EU builds upon two interconnected principles: the principle of conferral and the principle of institutional balance. The combination of these two principles shows how the principle of separation of powers has been developed beyond the State level. In a nutshell, Member States, through the Treaties, conferred on EU institutions specific public powers, which each institution shall exercise in sincere cooperation with other institutions. To understand how the separation of powers applies to the EU polity, both principles are relevant, because the horizontal distinction of powers among EU institutions is based on the vertical conferral from the Member States, which designed how powers need to be allocated. On the grounds of the Treaties, the interpretation of the CJEU contributes to shaping the implementation of

these principles in the EU and designing the effective reach of the separation of powers beyond the State level.

The principle of conferral holds that EU institutions may legally exercise only expressly attributed powers. This means that as a rule implied powers are not accepted under the Treaties. Only by explicit derogation, art. 352 TFEU allows the unanimity of the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament, to adopt the appropriate measures if action by the Union in the internal market should prove necessary to attain a Treaties' objective and the Treaties have not provided the necessary powers.

Through the principle of conferral, Member States have renounced some national sovereignty in favour of EU institutions to pursue common values and shared objectives of integration aimed at peace, security and prosperity in the European continent.[2] On these grounds, the Treaties limit the reach, the content and the procedures of EU institutions' powers. Article 5 (2) and Article 13 (2) of the TEU lay down these constitutional limitations to the exercise of powers, by setting the limits of competence respectively on the Member States and on EU institutions. In short, those provisions transfer some public powers beyond the States, and the Treaties organise them at the supranational level. As a result, every EU institution cannot act beyond the powers conferred by the Treaties and the exercise of the related functions is only possible according to the rules as envisaged in the Treaties. On these grounds the principle of institutional balance protects the distribution of the conferred competence and tells how it should be exercised by each institution. As the EU case law clarified, this means that "each institution must exercise its powers with due regard for the powers of other institutions",[3] so that according to Article 13 (2) TEU "mutual sincere cooperation" should guide the exercise of conferred powers. Recent case law has however clarified that sincere cooperation may not alter the allocation of powers as conferred by the Treaties, so that "the obligation resulting from Article 13 (2) TEU is therefore not such as to change those

[2] Art 3 TEU.

[3] C-70/88 *European Parliament v Council (Chernobyl case)* [1991] ECR I-04529, para 22; C-403/05 *European Parliament v Commission* [2007] ECR I-09045, para 49; C-133/06 *European Parliament v Council* [2008] ECR I-03189, para 57; C-409/13 *Council v Commission (MFA case)* [2015] ECLI:EU:C:2015:217, para 64; C-73/14 *Council v Commission (ITLOS case)* ECLI:EU:C:2015:663, para 61; C-660/13 *Council v Commission (Swiss MoU case)* ECLI:EU:C:2016:616, para 32.

powers".[4] The principle of conferral thus outlines an ultra vires doctrine of legality, while the principle of institutional balance develops the separation of powers through this doctrine.[5] The key issue in the application of the principle of institutional balance however is that no clear criteria define how that balance should be stricken.[6] As Carolan and Curtin pointed out, the notion does not set the boundaries of public powers and "lacks genuine explanatory and analytical power", while its indeterminacy justifies changes in the distribution of powers and political bargains.[7] Craig also highlighted that institutional balance may work "a device which enables the Community to move forward in an incremental manner, without ever really resolving the issues of democracy and legitimacy which lie at the heart of the debate about its future".[8]

This sets remarkable differences with the Montesquieu's principle of separation of powers. Firstly, although Montesquieu founded the separation of powers on the principle of legality as a constitutional principle aimed at preserving liberty,[9] his approach was based on the organisational division of powers among the legislative, the executive and the judiciary branches.[10] EU Treaties, instead, do not structure EU public powers on such organic distinction, but they rather focus on the distinction of the public functions distributed among EU institutions.[11] As the AG Trstenjak observed in the Opinion in *Audiolux*, institutional balance concerns "a principle of separation of functions, whereby the Community's functions are intended to be exercised by the organs which are best placed to perform them under the Treaties".[12] According to Lenaerts and Verhoeven, the ratio of the institutional balance can therefore be interpreted against Montesquieu's

[4] C-48/14 *Parliament v Council* ECLI:EU:C:2015:91, paras 57-58; C-73/14 *ITLOS case*, para 84.
[5] See G Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 *European Law Journal* 304, 319.
[6] Ibid., 319.
[7] E Carolan and D Curtin, 'In Search of a New Model of Checks and Balances for the EU: Beyond Separation of Powers', in J. Mendes and I. Venzke (eds), *Allocating Authority* (Hart Publishing 2018), 53-76, 56.
[8] P Craig, 'Democracy and Rulemaking Within the EC: An Empirical and Normative Assessment' (1997) 3 *European Law Journal* 105-130, 113.
[9] Baron de Montesquieu, *The Spirit of the Laws*, English Edition by Thomas Nugent (Hafner Publishing Company 1949), Vol. 1, Book XII, para 1, 183.
[10] Ibid., Book XI, para 6, 151-152.
[11] See K Lenaerts, 'Some reflections on the separation of powers in the European Community' (1991) *Common Market Law Review* 11, 13-14; G Guillermin, 'Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de justice des Communautés européennes' (1992) 119 Journal de droit international 319, 344. See also M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?' (2015) *European Public Law* 371, 374-375.
[12] C-101/08 *Audiolux and others* [2009] ECR I-9823, Opinion of AG Trstenjak, para 104.

approach only if it is considered "as the necessary institutional frame within which different interests can discuss with each other in order to achieve solutions that are acceptable to all and do not unduly abridge the liberties of anyone".[13]

Secondly, Montesquieu specifically aimed at protecting individual liberty against the abuse of public powers.[14] The principle of institutional balance, instead, points to the maintenance of the distribution of powers between EU institutions but individual actionability is not featured.[15] If the principle of conferral is a justiciable rule on the validity of EU acts, in the '90s the Court expressly excluded the justiciability of the principle of institutional balance and limited the reach of the principle to the distinction of competences among EU institutions.[16] It is true that in the *Chernobyl* case the CJEU left some room for potential individual actionability, as it held that the principle of institutional balance "requires that it should be possible to penalize any breach of that rule which may occur".[17] However, in the following case law, the CJEU has used the principle only to support its (teleological) interpretation of Treaties' rules and did not apply it as an autonomous ground of review.[18] This approach consolidates the interpretation that institutional balance should mainly help to contextualise the settlement of conflicts when issues of competence among EU institutions arise.

More recently, when distinguishing the powers of the Commission under Article 291 TFEU and the competence of the European Securities and Markets Authority (ESMA) in the so-called *ESMA short selling* case, the CJEU has not even referred to the principle of institutional balance.[19] This demonstrates that the principle would not help clarify the reach of institutional competence in the absence of clear provisions in the Treaties about

[13] K Lenaerts and A Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 35, 42-43.
[14] Baron de Montesquieu, *The Spirit of the Laws*, cit., Book XI, para 6, 152.
[15] J-P Jacqué, 'The principle of institutional balance' (2004) 41 *Common Market Law Review* 383, 384-385.
[16] C-282/90 *Vreugdenhil BV v Commission* [1992] ECR I-1937, paras 20-22.
[17] C-70/88 *Chernobyl case*, para 22.
[18] See M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?', cit., 386.
[19] C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* ECLI:EU:C:2014:18.

EU agencies' powers. According to Chamon, this is further proof of the fact that the principle of institutional balance is not actionable under EU law.[20]

3. The non-delegation doctrine

The principle of institutional balance produces legal effects on the separation of powers at the horizontal level; that is, among EU institutions. It specifically affects the capability of institutions to delegate their responsibilities and tasks to other institutions and bodies. The CJEU has developed the horizontal effects of the principle of institutional balance through the so-called non-delegation doctrine, according to which constitutional bodies cannot abdicate their public functions and delegate their constitutionally protected powers to other bodies.

EU case law characterises the non-delegation doctrine as a constitutional principle aimed at keeping any delegation of powers within the constitutional boundaries set in the Treaties. In the silence of the Treaties, the judicial interpretation of the constitutional framework on the distribution of powers has been crucial. As I analysed elsewhere,[21] the principle of institutional balance affects two different, but complementary aspects of delegation. As the CJEU expressly emphasised, delegation should not be a means neither to seize further competences not envisaged in the Treaties nor to abdicate to the competence allocated by the Treaties.

In order not to seize undue powers either from other EU institutions or from Member States, secondary law adopted by the competent EU institutions cannot amend or change the decision-making procedures as established in the Treaties. This has thus structured the relationships between the different public powers, because each EU institution should not interfere with the exercise of powers by other EU institutions. To be lawful, delegation

[20] M Chamon, 'The empowerment of agencies under the Meroni doctrine and Article 114 TFEU: comment on United Kingdom v. Parliament and Council (Short selling) and the proposed Single Resolution Mechanism' (2014) *European Law Review* 380, 397; M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?', cit., 389-390.

[21] M Simoncini, *Administrative Regulation beyond the Non-Delegation Doctrine. A study on EU agencies* (Hart Publishing 2018) 16 ff.

needs to comply with the principle of conferral and not alter the vertical and horizontal distribution of powers.

In addition, in order not to abdicate their mandate, EU institutions should not transfer their conferred competence to other entities. This means that clear limits need to be set on the delegation of powers involving policy choices or the balance of different interests at stake. This has particularly affected the exercise of administrative functions at the supranational level by enforcement authorities that are not expressly empowered by the Treaties. Unlike in the Member States, administrative powers have not been theoretically justified within the framework of the separation of powers.[22] For this reason, secondary law that generally regulates enforcement cannot delegate rulemaking to administrative bodies and agencies that would risk changing the balance of powers as set in the Treaties. This has structurally affected the performance of administrative functions at the EU level. The following sections will analyse these complementary aspects of the non-delegation doctrine.

4. The balance of powers as non-interference of powers between EU institutions

Insofar as the competence of each EU institution is set by the Treaties, any substantive or procedural change not explicitly authorised in the Treaties would impair the balance of powers. Secondary law should not unduly redistribute legislative power beyond the limits of the Treaties' constitution-like framework.[23] This means that the choice of the legal basis is key to ensuring compliance with the principle of institutional balance,[24] and that practice cannot deviate from the Treaties nor change the institutional balance derived from the Treaties.

[22] E Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?' (2016) 22 *European Law Journal* 5, 576-596, 577.
[23] 68/86 *UK v Council* [1988] ECR 855, para 24; C-316/91, *Parliament v Council*, para 14; C-327/91 *France v Commission*, para 36; C-426/93 *Germany v Council* [1995] ECR I-3723, para 21; C-363/14 *European Parliament v Council* ECLI:EU:C:2015:579, para 43; C-133/06 *European Parliament* v *Council (Refugee status case)* EU:C:2008:257, paras 54-56; C-317/13 and C-679/13 *Parliament* v *Council* EU:C:2015:223, paras 42-43; C-540/13 *European Parliament* v *Council* EU:C:2015:224, paras 32-33; C-660/13 *Swiss MoU case*, para 43.
[24] See J-P Jacqué, 'The principle of institutional balance', cit., 386.

The CJEU has consistently held that the choice of the legal basis for EU action must be based on "objective factors which are amenable to judicial review" and which "include in particular the aim and content of the measure".[25] The resort to a dual legal basis is possible "where an institution's power is based on two provisions of the Treaty",[26] but not where "the use of both provisions as a joint legal basis would divest the (...) procedure of its very substance".[27] Each legal basis provision specifies the domain of competence, the legal instruments that could be used for that purpose, the institution that could adopt those instruments, and the decision-making rules that should be followed. As De Witte emphasised, "the Court accepted and approved the phenomenon of institutional variation across policy fields", meaning that "the allocation of powers between the European institutions is not determined in sweeping terms (as is typically the case in national constitutions) but is determined in a piecemeal fashion and varies from one policy sector to the next".[28]

The CJEU has also consistently affirmed that mere institutional practice "cannot therefore create a precedent binding on Community institutions with regard to the correct legal basis".[29] Institutional practice "cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves".[30] These limits also apply to the adoption of soft law, which should both comply with both the principle of conferral and take into account "the division of powers and the institutional balance established by the Treaty".[31]

The infringement of essential procedural requirements also leads to frictions in the institutional balance. In the words of the CJEU, the decision-making rules set in the

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[25] 45/86 *Commission v Council* [1987] ECR 1493, para 11; C-70/88 *Chernobyl case*, para 9; C-300/89 *Commission* v *Council (Titanium dioxide case)* [1991] ECR I-2867, para 10; C-338/01 *Commission* v *Council* [2004] ECR I-4829, para 54; C-176/03 *Commission v Council* [2005] ECR I-7879, para 45; C-94/03 *Commission v Council* [2006] ECR I-1, para 34; C-155/07 *European Parliament v Council* [2008] ECR I-8103, para 34; C-130/10 *European Parliament v Council* [2012] ECLI:EU:C:2012:472, para 42.
[26] 165/87 *Commission v Council* [1988] ECR 5545, para 11.
[27] C-300/89 *Commission of the European Communities v Council of the European Communities* (*Titanium dioxide case)* ECLI:EU:C:1991:244, para 18.
[28] B. De Witte, 'The Role of the Court of Justice in Shaping the Institutional Balance in the EU', in J. Mendes and I. Venzke (eds) *Allocating Authority*, cit., 143-157, 146.
[29] 68/86 *UK v Council*, para 24; C-426/93 *Germany v Council*, para 21; C-271/94 *European Parliament v Council* [1996] ECR I-1689, para 24; C-84/94 *UK v Council* [1996] ECR I-5755, para 19; C-133/06 *European Parliament* v *Council*, para 60.
[30] 149/85 *Roger Wybot v Edgar Faure* [1986] ECR 2391, para 23; 68/86 *UK v Council*, para 24; C-426/93 *Germany v Council*, para 21; C-133/06 *Refugee status case*, para 60.
[31] C-233/02 *France v Commission* [2004] ECR I-2759, para 40.

Treaties "are not at the disposal of the Member States or of the institutions themselves"[32] and "the Treaty alone may (...) empower an institution to amend a decision-making procedure established by the Treaty".[33] The relationships between institutions are thus governed by the procedures set in the Treaties and shall be informed by the principle of sincere cooperation among institutions.

This becomes particularly relevant when infringements concern the breach of institutional prerogatives. The CJEU interpreted this issue in different cases, showing a substantive approach to the protection of institutional balance and the preservation of conferred powers. In *Köster*, the CJEU held that the comitology procedure applicable to the implementing powers of the Commission was compatible with the principle of institutional balance, because it was not made "to take a decision in place of the Commission or the Council", but rather "to ensure permanent consultation in order to guide the Commission in the exercise of the powers conferred on it by the Council and to enable the latter to substitute its own action for that of the Commission".[34]

In the *MFA* case, the CJEU also pointed out that the power of the Commission to withdraw legislative proposals "ha[s] to be supported by cogent evidence or arguments" insofar as "such a decision prevents the Parliament and the Council from exercising, as they would have indeed, their legislative functions under Articles 14(1) TEU and 16(1) TEU".[35] In the *SA Roquette Frères v Council* case, the Court also recognised the substantive prerogative of the Parliament to consultation under the EEC Treaty as "an essential factor in the institutional balance intended by the Treaty" that "reflects at the Community level the fundamental democratic principle that people should take part in the exercise of power through the intermediary of a representative assembly".[36] Similarly, the prerogatives of the European Parliament in the co-decision procedure have been

[32] 68/86 *UK v Council*, para 38.
[33] C-133/06 *Refugee status case*, para 55.
[34] C-25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster* [1970] ECR 1161, para 9.
[35] C-409/13 *Council of the European Union v European Commission* (*MFA case)* ECLI:EU:C:2015:217, paras 76-77.
[36] 138/79 *SA Roquette Frères v Council* [1980] ECR 3333, para 33 and 139/79 *Maizena v Council* [1980] ECR 3393, para 34; C-65/93 *European Parliament v Council* [1995] ECR I-00643, paras 21-23. See also C-317/13 and C-679/13 *European Parliament* v *Council* EU:C:2015:223, para 63; C-540/13 *European Parliament* v *Council* EU:C:2015:224, para 53; C-363/14 *European Parliament v Council*, para 82.

recognised against the implementing powers of the Council under Article 202 EC Treaty.[37]

In order to maintain the institutional balance, in the *Chernobyl* case the CJEU also went beyond the black letter of the Treaties and affirmed the standing rights of the European Parliament in the action for annulment as long as the protection of its own prerogatives was at stake and no other effective legal remedy was available to ensure that the parliamentary prerogatives were defended.[38] Because of the principle of institutional balance, therefore, the formal rules of the Treaties needed to be interpretatively changed to preserve substantive powers. Even if this does not mean that the CJEU can act in favour of a particular institution, the dynamic character of the principle is exposed to the changes in the conceptions of the Treaties.[39]

In the current framework of the Treaties, the European Parliament and the Council have equal powers under the ordinary legislative procedure. Legal scholarship has questioned whether the response to the 2008 economic crisis circumvented European Parliament's powers under the ordinary legislative procedure by using international agreements among the Member States outside the EU framework.[40] So far, the CJEU has not brought up the institutional balance as a ground for the review of such intergovernmental powers. In *Pringle*, the CJEU recognised that the European Stability Mechanism (ESM) did not infringe the provisions of EU law on the competence of EU institutions, but it emphasised that nonetheless it should "not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".[41] As Craig observed, if this means that

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[37] C-133/06 *European Parliament v Council of the European Union* (*Refugee status case)* ECLI:EU:C:2008:257, paras 58-59.

[38] C-70/88 *European Parliament v Council of the European Communities (Chernobyl case)* ECLI:EU:C:1990:217, para 20. According to the Court (para 15), this interpretation does not contradict its previous decision in the case 302/87 *European Parliament v Council of the European Communities (Comitology case)* ECLI:EU:C:1988:461, because in that case other legal remedies could ensure the prerogatives of the Parliament. In the 1990 Chernobyl case, the Court realised that "the various legal remedies provided for both in the Euratom Treaty and in the EEC Treaty, however effective and diverse they may be, may prove to be ineffective or uncertain" (para 16).

[39] See K Lenaerts and A Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance', cit., 38-39 and 46.

[40] P Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 *European Law Review* 231, 241-245; F Fabbrini, 'A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance' (2016) 50 *Cahiers de Droit Européen* 285, 298.

[41] C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* ECLI:EU:C:2012:756, para 162.

CJEU hinted at the issue of the institutional balance, the interpretation of the notion of "essential character of the powers"[42] remains unclear.

5. Balancing powers by setting (clear) limits on the delegation to the administrative branch

The principle of institutional balance does not preclude that EU institutions can delegate some powers to administrative bodies, but requires some limitations aimed at preventing EU institutions from handing over their conferred functions through the substitution of the acting authority. The CJEU has expressed the key tenets on the limits of delegation to administrative bodies in two leading cases: *Köster*, concerning comitology and *Meroni*, regarding agencies. Even though the CJEU has never addressed the relations between these two cases in a comprehensive doctrine, they set remarkable principles that should guide the EU administrative action.

5.1 The non-delegation of policy choices: the *Köster* case

The *Köster* case affirmed that EU institutions cannot delegate policy choices, because the legislator has no right to renounce its power to legislate.[43] In the words of the CJEU, "the basic elements of the matter" shall be reserved for the appraisal of the delegating authority in the act authorising the delegation of powers, in accordance with the relevant Treaty rules on the procedure for their adoption.[44] The untransferable character of policy choices has been confirmed in the Lisbon Treaty under Article 290 (1) TFEU, which holds that "the essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power" from the legislative branch to the executive one.

[42] See P Craig, '"Pringle" and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 *European Constitutional Law Review* 263, 277-281.
[43] J-P Jacqué, 'The Evolution of the Approach to Executive Rulemaking in the EU' in C F Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 21, 31.
[44] C-25/70 *Köster*, para 6. See also C-46/86 *Romkes* [1987] ECR 2671, para 16; C-417/93 *European Parliament v Council* [1995] ECR 1-1185, para 30.

The principle under *Köster*, however, is broader as it also reasonably applies to the delegation of powers contained in non-legislative acts.[45] As the Court clarified in *Germany v Commission*, the *Köster* "classification must be reserved for provisions which are intended to give concrete shape to the fundamental guidelines of Community policy".[46] The very issue contained in the *Köster* doctrine is the material identification of the essential elements of a policy, as it may vary according to the specific policy area, the legal framework and the delegated tasks. By and large, the case law has been swinging between a generous identification of these essential elements, leaving to the legislative branch the determination of what might be essential and restraining its review of the conditions for delegation, and a more restrictive approach aimed at strictly reviewing the validity of the enabling provisions.[47]

For instance, common agricultural policy allowed more extensive interpretation of the reach of the implementing powers of the Commission,[48] placing limits directly in the "basic general objectives of the organization of the market" and not exclusively "the literal meaning of the enabling word".[49] In addition, with regard to the interpretation of the legislative framework, the CJEU came to pass that in competition law the rules laying down the hearing procedure, "however important they may be", were considered to be legitimately adopted by the Commission as long as the Council has recognised the right to be heard as a principle in Regulation 17/62.[50] In addition, in risk regulation the CJEU admitted that the inclusion of genetically modified micro-organisms (GMMOs) under some conditions in preparation of organic foodstuffs by the Commission regulation 207/93/EEC implementing the Council Regulation 2092/91/EEC on the protection of organic did "not go beyond the framework for the implementation of the principles laid down by the basic regulation adopted following consultation of the Parliament".[51]

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[45] See D Ritleng, 'The Reserved Domain of the Legislature. The Notion of "Essential Elements of an Area"' in C F Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 133, 147.
[46] C-240/90 *Germany v Commission* [1992] ECR I-05383, para 37.
[47] See H C H Hofmann, G C Rowe and A H Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 227-230.
[48] 22/88 *Vreugdenhil and others v Minister van Landbouw en Visserij* [1989] ECR 2049, paras 16-17.
[49] 23/75 *Rey Soda v Cassa Conguaglio Zucchero* [1975] ECR 1279, para 14.
[50] 41/69 *Chemiefarma v Commission* [1970] ECR 661, para 65.
[51] C-156/93 *European Parliament v Commission* [1995] ECR I-02019, para 22.

In other cases, the CJEU circumscribed the reach of delegation by setting validity limits on the enabling provision. *Central-Import Münster* held that enabling provisions "must be sufficiently specific — that is to say, the Council must clearly specify the bounds of the power conferred on the Commission".[52] The Court went on, clarifying that "those provisions thus determine the situations in which protective measures may be taken, the criteria for assessing whether such a situation exists, the kind of measures to be adopted and the period of their validity. The power conferred on the Commission is delimited by those factors in a sufficiently specific manner".[53]

This approach has been upheld in *Alliance for Natural Health*, where the CJEU specified that if the Community legislature wishes to delegate its power to modify the list of vitamins and minerals which can be used in food supplements as set out in Annex I of Directive 2002/46, "it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria (see, to that effect, Case 9/56 *Meroni v High Authority* [1958] ECR 133, at p. 152) because otherwise it may confer on the delegate a discretion which, in the case of legislation concerning the functioning of the internal market in goods, would be capable of impeding, excessively and without transparency, the free movement of the goods in question".[54]

After the Lisbon Treaty, the Court has fully embraced this stricter interpretation of the scope of delegation, so that today the identification of the inalienable political choices cannot be left only to the political appreciation, but it should be based on "objective factors amenable to judicial review" and on "the characteristics and particular features of the field concerned".[55] In later judgments, the protection of fundamental rights has been explicitly included under the shelter of the essential elements. In the *Schengen Borders Code* case the Court recognised that the provisions on conferring powers of public authority on border guards may interfere with the fundamental rights of the persons

[52] C-291/86 *Central-Import Münster GmbH & Co. KG v Hauptzollamt Münster* [1988] ECR 3679, para 13.
[53] C-291/86 *Central-Import Münster*, para 15.
[54] Joined cases C-154 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, para 90.
[55] See also C-355/10 *European Parliament v Council (Schengen Borders Code case)* EU:C:2012:516, paras 64-68; C-363/14 *European Parliament v Council*, para 47.

concerned “to such an extent that the involvement of the European Union legislature is required”.[56]

Similarly, the *Europol* case recognised the delegation to this Agency of the power to amend the list of police and judicial cooperation with third countries, as long as amendments comply with the objectives and take place in the legal framework that were defined by the EU legislature.[57] Particularly, the transmission of personal data must remain subject to an authorisation agreement to be adopted by the Council, as it “may interfere with the fundamental rights of the persons concerned, and some of those interferences may be so serious that intervention by the EU legislature becomes necessary”.[58] The Court admitted that when performing the tasks conferred by secondary law, some discretion involving “certain compromises with technical and political dimensions” may be allocated to EU agencies.[59] Political choices that cannot be delegated therefore covered the interference with the exercise of fundamental rights (i.e., data protection) and not the sensitive establishment of cooperative relations with third countries.

As Ritleng has pointed out,[60] this case law is not in conflict with the earlier judgment in *Germany v Commission*, where the CJEU accepted that the EU executive (the Commission) and not the EU legislative (the Council) had the power to impose (administrative) penalties on traders. According to Ritleng, the choice of the legal basis for the limitation of fundamental rights depends on the degree of their restriction. The system of penalties in the Commission’s aid scheme was lawfully delegated because it did not seriously affect the protection of fundamental rights. The restriction of fundamental rights can thus be either an essential element to be established by the EU legislature, or a simple measure implementing the principles established in the basic regulations.[61] This points to the need to distinguish between the administrative activity of policy-

[56] C-355/10 *Schengen Borders Code case*, para 77.
[57] C-363/14 *European Parliament v Council of the European Union (Europol case)* ECLI:EU:C:2015:579, para 50.
[58] C-363/14 *Europol case*, paras 53-57.
[59] C-363/14 *Europol case*, para 51.
[60] D Ritleng, ‘The Reserved Domain of the Legislature. The Notion of “Essential Elements of an Area”’, cit., 153.
[61] C-240/90 *Germany v Commission*, para 39.

implementation and the legislative activity of policy-making. Ritleng correctly emphasised that "the threshold beyond which the interference with fundamental rights will be a matter for the legislature may only be determined on a case-by-case basis".[62]

This confirms that what is essential cannot be identified in the abstract but needs to be concretely observed in every single policy-making process and legislative act. This confers a certain degree of flexibility in the assessment of the reach of the non-delegation principle. Broadly speaking, the reserved policy choices will depend on the legal basis of the act concerned and the essential elements will cover both legal and factual aspects of the regulated matter.[63] Only the circumstances of the case will clarify what can be lawfully delegated.

5.2 The non-delegation of regulatory powers: the Meroni doctrine

When applying the non-delegation principle to agencies' tasks and responsibilities in the *Meroni* case,[64] the CJEU set the specific conditions for the lawful delegation of powers. Years later in *Romano* the CJEU explicitly secured that agencies cannot be delegated regulatory powers.[65] Although held in very different stages of growth of the EU legal order, these judgments outlined the constitutional rule about the delegation of powers to agencies, which still represent a strong legacy on the powers of EU agencies.

According to the *Meroni* case, agencies can exercise only "clearly defined executive powers" and should be excluded from the exercise of any "discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy".[66] Otherwise the institutional balance set in the Treaties would be altered insofar as the decision-making responsibility would shift from the delegating authority to the delegated agency. In *Romano*, the CJEU expressly included rulemaking powers in the area of non-delegation and ruled out any power of agencies to adopt "acts having the force of law" and admitted only the adoption

[62] D Ritleng, 'The Reserved Domain of the Legislature. The Notion of "Essential Elements of an Area"', cit., 154.
[63] Ibid 149 and 154.
[64] 9/56 and 10/56, *Meroni & Co., Industrie Metallurgiche s.p.a. v High Authority* [1957-1958] ECR 133.
[65] 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité* [1981] ECR 1259.
[66] 10/56 *Meroni v High Authority*, 173.

of non-binding acts.[67] Through the limitation of agencies' rulemaking powers, the CJEU ensured that the structure of powers as set in the Treaties was kept unchanged.

However, this has pragmatically meant that EU agencies could not exercise any administrative rulemaking task within the framework of the Treaties and in accordance with secondary law. Unlike national authorities and administrations, on the grounds of this case law EU agencies have largely been unable to carry out regulatory tasks. Yet, the growth of technical and specialised administrative tasks in the EU has required greater participation of EU agencies in sector-specific regulation, which could only be realised through non-binding measures of soft law, such as recommendations or guidelines. Although regulatory powers formally belong to national authorities or EU institutions, in reality EU agencies' advice has become difficult to avoid or ignore for competent authorities and has been particularly incisive and usually convincing.

This opened a de facto "erosion" of the Meroni doctrine shaped by sector-specificities and political conditions.[68] More recently, the erosion also occurred on a legal basis, as the CJEU reshaped the Meroni doctrine in the *ESMA short-selling* case.[69] Essentially, the CJEU "mellowed" *Meroni*[70] and dismissed the applicability of *Romano* to ESMA's powers.[71] Although the legacy of the Meroni doctrine is still undeniable, the CJEU recognised some space for the regulatory intervention by the EU authorities established for the supervision of financial markets. In a nutshell, the CJEU held that as long as objective criteria and circumscribed conditions leading the exercise of the powers are amenable to judicial review, delegation could involve some "margin of discretion" when a "high degree of expertise" is required to pursue the objective of financial stability.[72]

The CJEU justified the conferral of some regulatory powers on an EU agency on two sets of reasons. Firstly, the Court considers the changed framework of the Treaties, which recognise EU agencies as legal actors able to adopt acts, including acts of general

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[67] 98/80, *Romano*, para 20.
[68] M Simoncini, 'The erosion of the Meroni doctrine. The case of the European Aviation Safety Agency (EASA)' (2015) *European Public Law* 309-342.
[69] C-270/12, *United Kingdom of Great Britain and Northern Ireland v Council of European Union and European Parliament* ECLI:EU:C:2014:18.
[70] J Pelkmans and M Simoncini, 'Mellowing Meroni: how ESMA can help build the single market', CEPS Commentary, February 2014.
[71] C-270/12 *UK v Council of European Union and European Parliament*, para 65.
[72] Ibid., paras 44-53, 85.

application, that can be challenged in courts.[73] Although the Treaty does not regulate EU agencies' action, it recognises EU agencies as legal actors within the EU institutional framework.[74] Insofar as ESMA is established by the EU legislature and it is not an entity governed by national private law like the *Meroni* agencies,[75] it enjoys the subjective legal status which it makes it able to exercise delegated powers under EU law. Unfortunately, this part of the judgment remains underdeveloped in the reasoning of the Court and did not secure certain legal consequences.[76] In addition, the Treaties also recognise that EU agencies' acts may be challenged before EU courts when "intended to produce" legal effects on third parties.[77] By ensuring the legal accountability of EU agencies' acts, this remarkably changes the objective conditions under which powers are exercised and make them compatible with the rule of law.[78]

Secondly, the CJEU considers that ESMA's powers are framed within a legislative context that secure their exercise to a series of conditions that reduce the discretionary reach of ESMA's action.[79] In short, to be legitimate, EU agencies' powers shall be exercised within the essential principles fixed in the enabling EU legislative acts, and effective guarantees of institutional supervision and judicial review should be in place.[80] This means that the powers conferred on EU agencies shall be accountable in important ways. The instruments of accountability can vary according to the status of the delegated subject, its independence, and the pursued function.

In line with *Köster*,[81] this implies that delegation cannot concern the establishment of the essential elements for the implementation of a policy, as that would consist of a shift of responsibility and the factual exercise of a legislative power. Those essential elements should be established by the delegating authority and should guide and limit the activity

[73] Ibid., paras 79-80.
[74] Art. 298 TFEU.
[75] C-270/12 *UK v Council of European Union and European Parliament*, para 43.
[76] M Simoncini, *Administrative regulation beyond the non-delegation doctrine. A study on EU agencies*, cit., 36.
[77] Art. 263 TFEU.
[78] See 94/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23, which made the principle of judicial review a key condition for the functioning of "a Community based on the rule of law".
[79] C-270/12 *UK v Council of European Union and European Parliament*, paras 46-51.
[80] M Simoncini, 'Legal Boundaries of the European Supervisory Authorities in the Financial Markets: Tensions in the Development of True Regulatory Agencies' (2015) 34 *Yearbook of European Law* 1, 319-350, 334-339.
[81] C-25/70 *Köster*, para 9.

of the delegated authority. The *ESMA short-selling* case thus shows that insofar as EU agencies exercise regulatory tasks within the priorities set and the policy choices made by EU legislative acts, no significant transfer of responsibilities occurs.[82] When reaching these conclusions, the CJEU perpetuated the *Meroni* dichotomy between political and technical tasks rather than introducing at the supranational level the theoretical distinction between legislative and administrative powers well established in national contexts.[83] As a consequence, the identification and the justification of non-political, discretionary powers remain uncertain, while EU agencies' competence firmly rests on technical expertise.

More recently, in the appeals against the resolution of Banco Popular Español, the General Court further relaxed the criteria for lawful delegation.[84] Among others, the General Court considered the informed participation of the Commission in the decision-making powers of the Agency a legitimate ground for delegation.[85] This is a truly new condition, which was not sufficient to save the architecture of the equalisation mechanism in the ferrous scrap market under the *Meroni* case. In the resolution of Banco Popular Español, this becomes a key criterion which displaces the application of the *ESMA short-selling* test.[86] In addition, the General Court admitted the autonomous justiciability of the Single Resolution Board (SRB)'s resolution programme after its approval by the Commission.[87] This means that on the grounds of distinctive technical competence of the SRB, its decision produces legally binding effects; however, they can materialise only after its endorsement from the Commission. The Schrödinger-like paradox is that the resolution programme at the same time produces and does not produce autonomous legal

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[82] M Simoncini, *Administrative Regulation Beyond the Non-delegation doctrine. A study on EU agencies*, cit., 31.
[83] Ibid., 35-36.
[84] T-481/17 *Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v Single Resolution Board* ECLI:EU:T:2022:311; T-510/17 *Antonio Del Valle Ruiz v European Commission and Single Resolution Board* EU:ECLI:T:2022:312; T-523/17 *Eleveté Invest Group, SL and other v European Commission and Single Resolution Board* ECLI:EU:T:2022:313; T-570/17 *Algebris (UK) Ltd e Anchorage Capital Group LLC v European Commission* EU:ECLI:T:2022:314; T-628/17 *Aeris Invest Sàrl v European Commission and Single Resolution Board* ECLI:EU:T:2022:315.
[85] T-510/17 *Antonio Del Valle Ruiz v European Commission and Single Resolution Board*, para 231; T-570/17 *Algebris (UK) Ltd e Anchorage Capital Group LLC v European Commission*, paras 130-140.
[86] T-628/17 *Aeris Invest Sàrl v European Commission and Single Resolution Board*, para 148.
[87] T-481/17 *Fundación Tatiana Pérez de Guzmán el Bueno e Stiftung für Forschung und Lehre (SFL) v Single Resolution Board*, para 120.

effects. Legal effects would apply to the complex technical assessments adopted by the SRB,[88] on which the Commission has no competence,[89] and would not apply to the discretional powers of the Commission on the balance of public interests.[90] It remains to be seen whether the Court of justice will accept these new conditions and updates against the Meroni doctrine.

6. Final remarks

The functioning of the EU legal order relies on the existence of a series of principles that contribute to ensuring the separation of powers. The principle of conferral and the principle of institutional balance set the boundaries for the distinction of public functions at the supranational level. The EU case law filled the content of these principles and contributed to shedding light on their meaning and scope. As seen, it is through the non-delegation doctrine that the CJEU has identified in the notion of institutional balance, the limits for any changes in the allocation of public powers to comply with the Treaties. The emerging conception of the separation of powers reflects the nature and the scope of the powers recognised by the EU administrative branch.

In sum, no theoretical justification of administrative discretion beyond the powers conferred on EU institutions has been provided and no effective accountability regime has been put in place to oversee administrative discretionary action in the framework of the separation of powers. Unlike national administrations, in fact, any decision involving policy choices shall be reserved to the institutions envisaged in the Treaties. Insofar as no distinction between policy-making and administrative rulemaking is outlined, administrative bodies which have not been conferred powers by the Treaties have been excluded from regulatory activities. Despite their different field of application, both the *Köster*-related case law and the Meroni doctrine identified a transmission-belt model of EU administration, which should enforce rules but does not contribute to their elaboration. In the words of Liz Fisher, this reflects a rational-instrumental approach to

[88] Ibid., para 169.
[89] Ibid., para 127.
[90] T-510/17 *Antonio Del Valle Ruiz c v European Commission and Single Resolution Board unico*, para 219.

administrative action as opposed to the deliberative-constitutional model based on the targeted conferral of regulatory powers to the administration on the grounds of intelligible principles.[91] As a result, such a rational-instrumental approach to administrative action has significantly frozen any attempt to develop administrative regulation beyond the State level. Yet, the strong limits on administrative action have generated different models of governance where soft law and coordination among national and supranational bodies contribute to implementing regulatory goals. Although recently the Court of justice has tempered the rigidity of the distinction between policy-making and administrative rulemaking, it has not overruled the inadmissibility of administrative rulemaking and has continued justifying administrative action on the grounds of its technical content.

[91] See E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007), 28-34.