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The Institutional Balance, an Ill-Fated Principle of EU Law?

Merijn CHAMON*

The institutional balance is a concept often used in EU legal doctrine as well as being regularly invoked by parties before the Court. In theory, it is a genuine self-standing principle of EU law as recognized by the Court of Justice, in practice however it is simply used as an easy shorthand for the (Treaty-defined) rules governing the relations between the institutions. An analysis of the Court's jurisprudence indeed shows that despite having qualified the institutional balance as a legal principle, the Court is unreceptive towards arguments based thereupon. In combination with recent developments, inter alia *related to the political responses to the euro crisis, flouting the EU's institutional balance, it may be questioned whether the institutional balance really is an actionable principle of EU law. The Court should clarify the situation by actually enforcing the institutional balance or by reconsidering its qualification of that balance as a legal principle.*

1 INTRODUCTION

The institutional balance is a well-known but elusive concept in EU legal literature: it is not mentioned let alone defined in the Treaties but it was introduced by the Court in its case law. A number of legal authors are highly critical of the added value of the notion and questions its status as a principle of EU law. The function of the institutional balance is furthermore obscured by the parallels often drawn between the notion itself and the principle of separation of powers. This contribution aims to add to the debate by clarifying the possible scope and function of the institutional balance. In this, the Court's jurisprudence will also be taken into account since if the notion of institutional balance indeed amounts to a principle of EU law, as the Court has asserted, it should also use it as such.

Therefore, in a first section some brief remarks on the relation between the institutional balance and the separation of powers will be formulated. In the following section the critical reception of the institutional balance in legal literature is discussed and the possible content and function of a principle of

* Doctor of Law and Academic Assistant at the Ghent European Law Institute (Jean Monnet Centre of Excellence), Ghent University.

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institutional balance will be explored. The existing jurisprudence of the Court of Justice on the institutional balance is then turned to in order to determine whether the institutional balance indeed functions as an actionable principle, i.e., whether it is useful and invokable before a judge. The analysis of the Court's jurisprudence casts doubt on this and together with the current developments in European law resulting from the euro and financial crises, the institutional balance is found to be at an important crossroads.

2 INSTITUTIONAL BALANCE AS SEPARATION OF POWERS?

The interconnectedness of the 'principle of institutional balance' with that of the separation of powers is often noted.[1] However, how both precisely relate to each other is not clear. Jacqué notes that the principle of institutional balance is no less to the Court than a substitute for the principle of separation of powers.[2] According to Barnett, the arrangements between the institutions in the EU are not governed by the separation of powers, but by the institutional balance.[3] Prechal suggests that the principle of institutional balance prevents the concentration of powers at European level and may therefore 'be considered to be an equivalent to the doctrine of separation of powers, or rather "checks and balances" as they exist in national systems'.[4] According to de Búrca, the institutional balance takes the place of the notion of separation of powers in the EU.[5] Guillermin, however, claims both principles, notwithstanding their analogies, cannot simply be assimilated.[6] Apart from this dissenting view, there seems to be a general consensus, perhaps based on the multi-interpretable phrasing, that both principles are strongly related.

Because the principle of separation of powers mainly applies to national polities Achterberg questioned whether it was at all sensible to try to apply it to the EU.[7] Ipsen claims the principle is not even adequate anymore to structure the

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1 The fact that this relationship has not been studied in depth was remarked by Majone who found it surprising '*that students of European integration have devoted so little analytic effort to comparing the two principles in order to get a better grasp of the elusive constitutional nature of the EC*'. See G. Majone, 'Delegation of Regulatory Powers in a Mixed Polity', (2002) 8 *ELJ* 3, p. 323.

2 J. P. Jacqué, 'The Principle of Institutional Balance', (2004) 41 *CMLRev.* 2, p. 348. See also G. Conway, 'Recovering a Separation of Powers in the European Union', (2011) 17 *ELJ* 3, p. 319.

3 H. Barnett, *Constitutional & Administrative Law*, New York, Routledge, 2011, p. 210.

4 S. Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Contents', in Heukels, Blokker & Brus (eds), *The European Union after Amsterdam*, The Hague, Kluwer Law International, 1998, p. 280.

5 G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in Craig & de Búrca (eds), *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, p. 58.

6 G. Guillermin, 'Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de justice des Communautés européennes', (1992) 119 *Journal du droit international* 2, pp. 319–20.

7 N. Achterberg, 'Rezension: Die Gewaltenteilung in den Europäischen Gemeinschaften', (1968) 3 *Europarecht* 2, pp. 240–245.

exercise of public power in modern states and should for this reason alone be rejected as a guiding principle for the EU. Furthermore he notes the radically new method and form of economic integration in the EU, relieving the national state of certain of its tasks,[8] which would be another argument in favour of rejecting a separation of powers in the EU.

However, looking at the ratio of the principle, these objections do not seem forceful. The principle of separation of powers aims to prevent arbitrary rule,[9] hence arguing that it is only relevant to national states would be tantamount to saying arbitrary rule is only a risk in the national state. Furthermore, as a basic rule, the principle simply refers to the exercise of public authority, which means that the principle may be applied whenever public authority is exercised. Ipsen's observations on the novelty of European integration are not disputed here, but his deductions are. No matter how revolutionary the EU polity may be, it remains a hierarchic polity with partially centralized powers, creating a risk of power abuse and arbitrary rule. This is something Dehousse also seems to overlook when he observes that the principle is enshrined in liberal constitutions to protect political freedom and that this concern was completely absent when the Treaties were drafted.[10] Instead, the checks and balances in the Treaties are inspired by a concern to prevent excessive power slippage to independent institutions such as the Commission. It seems Dehousse then takes on a rather idealized view of the past when he juxtaposes the 'sheer power logic' which supposedly guided the Treaty drafters with the liberal political philosophy which allegedly guided the drafters of national constitutions in the nineteenth and twentieth century.

More recently, Lenaerts and Desomer have claimed that the Court of Justice has rejected the principle as unknown in the EU legal system in the joined Cases 188 to 190/80.[11] According to Nicolaysen as well this ruling by the Court affirmed the original character of the EC to which the classic separation of powers does not apply.[12] In this case however, the Court merely rejected the UK's claim that all original law-making power is vested in the Council, clarifying both the Commission and Council can lay down measures of general application, depending on the specific Treaty provisions in question.[13] What this case does

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8 H.P. Ipsen, *Europäisches gemeinschaftsrecht*, Tübingen, Mohr, 1972, p. 318.

9 This is taken as the core function of separation of powers. While it is not disputed that the principle may strengthen other principles such as the rule of law and the principle of democracy, these three principles should be kept distinct and do not depend on or require each other.

10 R. Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis', (1994) 42 *Am. J. Comp. L.* 4, pp. 776–777.

11 K. Lenaerts & M. Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures', (2005) 11 *ELJ* 6, p. 764.

12 G. Nicolaysen, 'Rechtsprechung: Öffentliche Unternehmen, Transparenz der finanziellen Beziehungen zum Staat', (1983) 18 *Europarecht* 1, p. 61.

13 Joined Cases 188 to 190/80, *France, Italy & UK v. Commission*, [1982] ECR 2545, para. 6.

show however, is that powers in the EU have not been functionally and institutionally separated along the same lines.

The confusion over the question whether the principle of separation of powers is relevant to the EU may probably be traced back to two implicit assumptions. Pescatore's conclusion on the relevance of the principle for the EU is illustrative in this regard: 'la doctrine "tripartite" de la séparation des pouvoirs n'est pas un principe d'explication valable pour un ensemble transnational tel que les Communautés européennes'.[14] First, this assumes that the principle of separation of powers dictates the functional tripartite should be matched by an organic tripartite. Second, the principle is taken to be an explanatory principle. However, both assumptions may be questioned. First, the principle merely dictates that the three different functional powers should be separated, but not that this functional separation should be matched by an identical organizational separation. Second, the principle is not explanatory but prescriptive in nature. Whether or not one can make sense of the EU, looking at it from a separation of powers perspective has no bearing on its relevance for the EU.

Therefore, even if the Court would rule that the principle of separation of powers does not exist in the EU legal order, this would still not solve in the negative the question of the principle's relevance for the EU. However, it would be an important element in answering the question whether the EU pays respect to the principle, a question which will not be dealt with here.[15]

As regards the relation between the separation of powers and the institutional balance, the viewpoint of Guillermin, is endorsed here. The analogy between both concepts centres around their objective of power-sharing. Both the separation of powers and the institutional balance have a normative dimension mandating that public authority should be dispersed among a number of actors.[16] The reason why both may nevertheless not be assimilated is twofold. First, on a substantive level, the institutional balance aims to represent different interests united in the EU polity and therefore divides public authority between different institutions representing different interests. The separation of powers, however, aims to secure individual freedom by dividing public authority between a number of different actors. Second, both concepts operate at different levels. Whereas the separation of powers is a politico-philosophical principle relevant to every polity conceivable, the institutional balance is the product itself of a specific polity. Thus, where in a comparative law exercise different polities may be gauged by the abstract principle

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[14] P. Pescatore, 'L'Executif Communautaire: Justification du Quadripartisme institue par les Traités de Paris et de Rome', (1978) 14 *CDE* 4, p. 388.

[15] On this, see Conway, *supra* n. 2; K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', (1991) 28 *CMLRev.* 1.

[16] Guillermin, *supra* n. 6, p. 344.

of separation of powers, this is not the case for the institutional balance. Since the institutional balance flows from the Treaties, it does not exist in the abstract, but is a product of the EU legal order, which as a result cannot be gauged using an independent notion of institutional balance.

Both concepts should therefore be kept distinct and as a result, both are relevant to the EU independently from each other. Whereas the separation of powers is relevant to evaluate both the legal architecture and political functioning of the EU, the institutional balance is only useful in evaluating the political functioning of the EU and the resulting legal architecture laid down in secondary law. Now that it is determined that both notions are relevant to the EU, it is necessary to look more closely into the notion of institutional balance.

3 THE NOTION OF INSTITUTIONAL BALANCE

The 'notion' of institutional balance which may be found in Article 13 TEU refers to 'a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community'.[17] However, this notion, also called the 'principle of institutional balance' has not been spared from academic critique. Indeed it has even been raised that in fact it is no principle at all.

According to Tridimas, 'a principle must be judged on the basis of two parameters: the intrinsic value of the right that it embodies, and how well it structures the judicial inquiry'.[18] These two parameters signify that if the institutional balance is to be a genuine principle of EU law, it should have a sufficiently clear content which guides the Court and helps it in solving legal issues brought before it. The requirement of a sufficiently clear content should not be understood as a rejection of the traditional differentiation between a rule, which if applied automatically results in a solution, and a principle, which underpins and justifies concrete rules but does not in itself and automatically result in a solution to a given problem. Rather it should be seen as conditional to the principle's workability for the European judge.

Obviously the institutional balance should not only have a sufficient content which guides the judiciary in order to qualify as a principle. It should also be shown that a principle of institutional balance, while in itself unwritten and rather abstract, underpins certain specific rules.

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17 Case C-316/91, *Parliament v. Council*, [1994] ECR I-625, para. 11.

18 T. Tridimas, *The General Principles of EU Law*, Oxford, Oxford University Press, 2006, p. 2.

According to von Bogdandy, the institutional balance guarantees the 'strings of accountability' (*Verantwortungsstränge*) and the observance of procedural rules without it being a genuine clear principle (yet), since the provisions on the competences and the cooperation between the different institutions are too complex and divergent.[19] Chalmers does not claim as forcefully as von Bogdandy that the institutional balance is not a principle but he is of the opinion that the Court of Justice should take on a more assertive stance in inter-institutional conflicts to uphold the institutional balance and be more receptive when it is raised in preliminary procedures, if the institutional balance is to be deserving of the title of legal principle rather than 'a bat for EU institutions to swat each other with'.[20] According to de Witte, the Treaties give very detailed guidance in respect of the horizontal relations between the institutions, so much so that it might be said there is no place for a (judge-made) principle governing these horizontal relations. This would imply that the institutional balance is not a principle but a mere shorthand for the rules which apply in a specific case.[21] Similar observations were made by Prechal although she still sees an important role for the institutional balance as gap-filling principle, since the rules governing the position of the separate institutions and the relations between them are not always clear.[22]

De Witte and Prechal seem diametrically opposed on the clarity of the rules governing the inter-institutional relations. Although it is true that the horizontal relations between the institutions are detailed, this is foremost so for the legislative process and because this process is quite complex. This complexity necessitates detailed guidance in primary law, but it still leaves 'grey zones' (cf. *infra*). Furthermore the guidance is much less detailed when looking at the horizontal relations in the executive sphere, e.g., the external representation and implementation of legislation. What is more, given the fast pace of successive Treaty revisions, there does seem to be some potential in the gap-filling function as proposed by Prechal.

Bieber also criticized the notion of institutional balance as an unworkable concept for the purpose of interpreting EU law as it presupposes a definitively and completely ordered system of treaties, which they were not at the time (or today).[23] This of course assumes that the 'balance' in the institutional balance is

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19 A. von Bogdandy, *Europäische Verfassungsrecht*, Berlin, Heidelberg, 2003, p. 199.

20 D. Chalmers, 'Justifying Institutional Accomodation', (2008) 33 *ELRev.* 4, p. 456.

21 B. de Witte, 'Institutional Principles: A Special Category of General Principles of EC Law', in Bernitz & Nergelius (eds), *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, pp. 150–151. However, de Witte does make an exception for the *Chernobyl* case law of the Court.

22 Prechal, *supra* n. 4, pp. 277–278.

23 R. Bieber, 'The Settlement of Institutional Conflicts on the Basis of Article 4 of the EEC Treaty', (1984) 21 *CMLRev.* 3, p. 509.

somehow exogenous to the Treaties, while in fact the institutional balance only exists because and through the Treaties.

Lenaerts and Verhoeven, however, do make the case for the institutional balance as a principle of EU governance, although they see more potential in the institutional balance as a political principle than as a legal principle. That political principle 'requires the makers of the European constitution to shape institutions and the interactions between them in such a manner that each interest and constituency present in the Union is duly represented and co-operates with others in the frame of an institutionalized debate geared towards the formulation of the common good'.[24]

The institutional balance as a political principle put forward by Lenaerts and Verhoeven again shows the difficult relation between the notion of institutional balance and the principle of separation of powers. Essentially Lenaerts and Verhoeven propose there is an abstract balance which the Treaty Drafters themselves should take into account when drafting new Treaties or Treaty amendments. Because of the resemblance with an abstract separation of powers which may serve as a guide to drafters of constitutional law, this political 'institutional balance' has a certain appeal but Lenaerts and Verhoeven do not clarify how this political principle would work in practice. How does one decide which interests should participate in the institutionalized debate and how much weight they should be accorded? It is unclear how a self-standing political principle of institutional balance would resolve these issues. In the following parts, any reference to the institutional balance then is a reference to the legal notion or principle of institutional balance.

According to Lenaerts and Verhoeven, there is a legal principle of institutional balance but its function is more limited than that of its political counterpart. The three rules which they derive from the principle are the following: (i) each institution should enjoy a sufficient independence in order to exercise its powers; (ii) institutions should not unconditionally assign their powers to other institutions and (iii) institutions may not in the exercise of their own powers encroach on the powers and prerogatives of other institutions.[25]

Following Lenaerts and Verhoeven, these rules can be distilled from the case law of the Court, even if this exercise is troubled by the terminology of the Court which is still in flux. Thus Lenaerts and Verhoeven claim that '[t]he term institutional balance was used for the first time by the Court of Justice in

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[24] K. Lenaerts & A. Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance', in Joerges & Dehousse (eds), *Good Governance in Europe's Integrated Market*, Oxford, Oxford University Press, 2001, p. 47.

[25] *Ibid.*, pp. 44–45.

Meroni'.[26] In reality the Court in *Meroni* referred to the term 'the balance of powers'[27] and how both relate to each other may be debated.[28] At the same time, the Court's more recent settling on the 'institutional balance' could perhaps be seen as proof of its maturing case law on the institutional balance. Even if the substantive content of the notion remains an open question, it might be said at least its name has 'crystallized'.

3.1 A vertical dimension to the institutional balance?

So far, Lenaerts and Verhoeven have been among the few to try and map out the content of the institutional balance in detail, making it unclear whether the three rules they deduced are accepted by other authors. Some, however, have implicitly argued for a fourth rule to be added to those of Lenaerts and Verhoeven, arguing that there is also a vertical dimension to the institutional balance. According to Vos the institutional balance enshrines a strict division of powers between the institutions which can be seen as a reflection of the Member States' concern that the integrity of their powers be maintained. The notion of institutional balance should then be defined widely, encompassing the vertical relation between the Union and the Member States. According to Vos, this would explain why Member States and their national institutions do not only need a say over the legislative process at EU level, but also over the implementation of EU law.[29] However, given that the institutional balance would be a judge-made principle such a function of the institutional balance may be deemed doubtful. Even if the reference to the institutional balance in the Protocol on the application of the principles of subsidiarity and proportionality added to the Amsterdam Treaty could have been interpreted as supporting such a vertical dimension of the notion,[30] it should be noted this reference has been deleted by the Lisbon Treaty.[31]

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[26] *Ibid.*, p. 36.

[27] Case 9/56, *Meroni & Co., Industrie Metallurgische S.p.A. v. High Authority*, [1957-1958] ECR 133, p. 151.

[28] The Court did appear to use both concepts interchangeably in para. 41 of the *FNAB* judgment (see *infra*) but only to refute an argument of the applicant which has not been reproduced in the Court's judgment. Furthermore, in relation to another plea it is clear from the judgment the applicant relied on the Court's definition of 'institutional balance' in *Chernobyl* and not the 'balance of powers'. This because even if one assumes both concepts are linked, the Court added important 'content' to the concept in *Chernobyl*, which was not clear from *Meroni* and which was necessary for the applicant's case.

[29] E. Vos, 'The Rise of Committees', (1997) 3 *ELJ* 3, p. 223.

[30] Paragraph 2 of the Protocol provided: '*The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the acquis communautaire and the institutional balance.*'

[31] Vos is not alone in her claim. See for instance D. Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft: eine Studie zu Rechtsproblemen, Legitimation und Kontrolle europäischer Agenturen mit interdisziplinären und rechtsvergleichenden Bezügen*, Berlin, Duncker & Humblot, 1999, p. 169.

Since the principle of attribution of powers applies to both the legislative and the executive sphere, it is unclear why recourse to the institutional balance would be necessary to solve these vertical power-delimitation problems. It could of course be argued that the notion of institutional balance is the horizontal expression of the principle of attribution of powers,[32] but this would not sit well with the Court's apparent emphasis on that notion being a principle in its own right.[33]

A vertical dimension to the institutional balance is not immediately clear from the Court's jurisprudence either. In *Région Wallone v. Commission*, the Court by reasoned order noted that subnational entities of Member States did not have the same status as the Member States themselves in proceedings since otherwise 'it would undermine the institutional balance provided for by the Treaties, which, *inter alia,* govern the conditions under which the Member States, that is to say, the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions'.[34]

However, the reference to the institutional balance in this passage was criticized by Le Bot who rightly found that the institutional balance is ill-suited to deal with an issue which actually relates to a problem of the unity of the national state.[35]

Any hopes that this would allow the Member States to successfully rely on the institutional balance in Court were also soon shattered. In the *Tobacco* case, the German government argued that the institutional balance was jeopardized because Directive 2001/37 had been adopted under the co-decision procedure while it was also based on Article 133 EEC. AG Geelhoed dealt with the argument on the institutional balance in an unconvincing manner,[36] while the Court simply held that the Directive could have been adopted on the single legal base of Article 95 EC and proceeded by dismissing the argument of the German government, stating:

> The argument that application of the co-decision procedure in the adoption of a measure concerning the common commercial policy is contrary to the separation of powers between institutions intended by the Treaty is in any event without any bearing in the

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32 Priebe has put forward such an argument, see R. Priebe, *Entscheidungsbefugnisse vertragsfremder Einrichtungen im Europäischen Gemeinschaftsrecht*, Baden-Baden, Nomos, 1979, pp. 75–78.

33 The Court did so in Case C-133/06, *Parliament v. Council*, [2008] ECR I-3189, para. 57.

34 Case C-95/97, *Région wallonne v. Commission*, [1997] ECR I-1787.

35 F. Le Bot, Le principe de l'équilibre institutionnel en droit de l'union européenne, Paris, Université Panthéon-Assas, 2012, PhD Thesis, pp. 126–129.

36 The AG found that through the institutional balance '*the Court establishes a direct link with the prerogatives of the European Parliament and the democratic principles underlying them*'. The conclusion which flows from this premise obviously is that the co-decision procedure was correctly used, since enforcing such an institutional balance would resolve any and every conflict in favour of the Parliament.

> circumstances since […] the Directive is not an act which must be adopted on the basis of Article 133 EC.[37]

In *Commission v. Portugal*, the defendant relied on the institutional balance to argue that each Member State is itself responsible for defining the measures which it considers necessary for the protection of the essential interests of its security, so that it need not pay customs duties on imported armaments, pursuant to Article 346 TFEU.[38] If such a direct vertical dimension of the institutional balance had been accepted, this would have come close to Vos' argument for a direct vertical dimension to the institutional balance,[39] but the Court dismissed this argument, without commenting on the institutional balance, by stating that Article 346 TFEU cannot be read as allowing a Member State to derogate from the Treaties by relying on no more than its essential security interests.[40]

A vertical function of the institutional balance was also rejected by AG Poiares Maduro in his conclusion to the *Waste Shipments* case. In that case the correct legal basis of Regulation 1013/2006 on shipments of waste was at issue. The Commission argued that the Regulation should have been adopted on the basis of Articles 175 and 133 EC (current Articles 192 and 207 TFEU) instead of solely on the former Article as the legislator had done. The AG remarked that the disagreement on the legal basis did not affect the institutional balance because either way, the procedure to adopt the Regulation would have remained the same.[41] However, he remarked that the true repercussions of the problem lay in the distribution of competences between the Union and the Member States, which would be greatly altered if the measure should also have been adopted on Article 133 EC conferring exclusive competence on the Union.[42] By neatly distinguishing the legal consequences hidden behind the controversy between the Commission and the Council and Parliament, the AG in effect excluded a possible direct vertical dimension to the institutional balance. Furthermore, his strict reasoning also argues against the view that the institutional balance is (merely) a horizontal expression of the principle of attribution of powers.[43]

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37 Case C-491/01, *The Queen v. Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd and others*, [2002] ECR I-11453, para. 110.
38 Case C-38/06, *Commission v. Portugal*, [2010] ECR I-1569, para. 49.
39 See *supra* n. 29.
40 Case C-38/06, *Commission v. Portugal*, [2010] ECR I-1569, para. 64.
41 Opinion of AG Poiares Maduro in Case C-411/06, *Commission of the European Communities v. European Parliament and Council of the European Union*, [2009] ECR I-7585, para. 6.
42 *Ibid.*, para. 7.
43 See Priebe *supra* n. 32.

4 THE INSTITUTIONAL BALANCE: AN ACTIONABLE PRINCIPLE IN THE EU LEGAL ORDER?

The Court's judgments in cases such as *Isoglucose*[44] and *Chernobyl* in the 1980s appeared to make a link between the institutional balance and a principle of democracy, but as Le Bot has argued, while enforcing the institutional balance might promote democratic decision-making in certain cases, this is only incidentally so.[45]

Still, *Chernobyl* is arguably the most important institutional balance case to this date. In *Comitology* the same question as the one in *Chernobyl* had been put to the Court, but the Parliament was denied active *locus standi* under Article 173 EEC. In reply to the Parliament's claim that it would not be able to defend its prerogatives without the power to bring action for annulments, the Court declared that other means for review were still available.[46] In *Chernobyl*, two years later, the Court reconsidered its earlier judgment and followed the Parliament's original reasoning. The Court then also further clarified the notion of institutional balance, stating:

> Th[e] prerogatives [of the European Parliament] are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.
>
> Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.
>
> The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve.[47]

Interestingly enough, the Court justified this *contra legem* (or *praeter legem*)[48] interpretation of the Treaties by pointing to the need to *maintain* the institutional balance while AG Van Gerven in his opinion to the case took special effort to avoid this issue by making a distinction between adjusting or re-establishing the institutional balance and upholding an adequate and coherent system of legal protection. According to the AG, *Comitology* constituted a 'refusal by the Court to

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44 Case 138/79, *SA Roquette Frères v. Council*, [1980] ECR 3333, para. 33.
45 Le Bot, *supra* n. 35, p. 243.
46 Case 302/87, *Parliament v. Council*, [1988] ECR 5615, para. 27.
47 Case 70/88, *Parliament v. Council*, [1990] ECR I-2041, paras 21-3.
48 See AG Mengozzi's juxtaposition of an enlarged jurisdiction of the Court in *Chernobyl* through a wide or *praeter legem* interpretation of the Treaties against a *contra legem* interpretation of the Treaties which would give the Court jurisdiction over JHA matters pre-Lisbon. Opinion of AG Mengozzi in Case C-354/04 P, *Gestoras Pro Amnistía, and others v. Council*, [2007] ECR I-1579, paras 168–173.

accede to the Parliament's request to alter the institutional balance in its favour' because such a move did not belong to the province of the courts. However, ensuring the Parliament enjoys effective legal protection was a task for the Court. Thus, by narrowing the issue down to a problem of legal protection, AG Van Gerven cleverly succeeded in presenting a workable solution without having to get into the repercussions of his solution on the institutional balance.[49] The Court reached more or less the same result but did not rely so much on the narrowed down argument of effective legal protection, rather it emphasized the fundamental interest in maintaining and observing the institutional balance. Thus, granting the European Parliament (limited) *locus standi* against the wording of the Treaties did not upset the institutional balance, a question the AG was keen on avoiding, but was actually necessary to uphold the institutional balance.

Following the ground-breaking ruling in *Chernobyl*, a lot of private parties then started to invoke the institutional balance in their pleadings.[50] Because the Court in *Meroni* had emphasized the protective function of the balance of powers between the institutions, holding that the 'balance of powers which is characteristic of the institutional structure of the Community [is] a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies'[51] it would seem that the institutional balance as a principle could indeed be invoked by private litigants to safeguard their interests.

However, the hopes of these private litigants were quickly shattered,[52] since in *Vreugdenhil* the Court ruled that 'the aim of the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained, and not to protect individuals'.[53]

The institutional balance losing its protective function to the benefit of private parties was further confirmed in *British Steel v. Commission*.[54] This was of

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[49] Opinion of Advocate General Van Gerven in Case C-70/88, *Parliament v. Council*, [1990] ECR I-2041.

[50] Apart from *Vreugdenhil* and *British Steel*, private parties unsuccessfully relied on the institutional balance in, i.a., the following cases: Case C-452/98, *Nederlandse Antillen v. Council*, [2001] ECR I-8973; Case C-345/00 P, *FNAB and others v. Council*, [2001] ECR I-3811; Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 & T-272/01, Phillip *Morris International and others v. Commission*, [2003] ECR II-1, para. 87. Case C-301/02 P, *Carmine Salvatore Tralli v. ECB*, [2005] ECR I-4071.

[51] Case 9/56, *Meroni & Co., Industrie Metallurgische S.p.A. v. High Authority*, [1957–1958] ECR 133.

[52] In this vein see also V. Constantinesco, 'Jurisprudence – Recours en indemnité', (1993) 120 *Journal du droit international* 2, p. 405.

[53] Case C-282/90, *Industrie- en Handelsonderneming Vreugdenhil BV v. Commission*, [1992] ECR I-1937. See also Opinion of AG Darmon in Case C-282/90, *Industrie- en Handelsonderneming Vreugdenhil BV v. Commission*, [1992] ECR I-1937, para. 38.

[54] Case T-243/94, *British Steel plc v. Commission*, [1997] ECR II-1887.

course a significant shift, since this protective function was the institutional balance's original core function.

In *Tralli*, where the applicant's argument was much less convincing than that in *British Steel*, the Court dismissed the plea concerning the institutional balance by noting that 'it is sufficient to recall that that principle is intended to apply only to relations between Community institutions and bodies'.[55] Although this would not *a fortiori* mean that Member States might not have an interest in requesting the Court to uphold the institutional balance, the Court has treated them much the same like private litigants invoking the institutional balance, rejecting or ignoring their arguments.[56] What is more, despite its statement in *Tralli*, the Court has even been equally unreceptive to institutional balance arguments put forward by the institutions themselves.[57] In fact, the only time where the institutional balance has played any meaningful role in the Court's reasoning is where the Court invoked it itself to substantiate its reasoning.[58]

It requires no explanation that the Court's treatment of these institutional balance arguments raised by different kinds of parties, privileged and non-privileged alike, does not sit well with the Court's own explicit confirmation of the existence of a '*principle* of institutional balance'.[59] It is granted, a significant number of the institutional balance arguments raised before the Court appear rather frivolous, last-ditch attempts by a party to swing the case in its advantage. However, this does not relieve the Court of the duty to deal in a satisfactory manner with such arguments. Quite the opposite, if the Court stands by its qualification of the institutional balance as a principle of EU law, it should deal forcefully with these arguments, since parties should not be allowed to trifle with fundamental legal principles.

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55 *Tralli v. ECB*, para. 46. That EU bodies are required to respect the institutional balance seems clear, whether EU bodies which are not EU institutions should themselves come under the institutional balance is a different matter. In *Elio Fiorucci v. OHIM* the General Court appeared to rule so, see Case T-165/06, *Elio Fiorucci v. OHIM*, [2009] ECR II-1375, para. 67. However since the Court in *Chernobyl* has ruled that the institutional balance is laid down in the Treaties it would *a fortiori* not encompass bodies which are not explicitly provided for under the Treaties.

56 See *i.a.*, Case C-240/90, *Germany v. Commission*, [1992] ECR I-5383; Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1996] ECR I-1029; Case C-58/94, *Netherlands v. Council*, [1996] ECR I-2169; Case C-239/01, *Germany v. Commission*, [2003] ECR I-10333; Case C-491/01, *The Queen v. Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd and others*, [2002] ECR I-11453.

57 See Case C-533/03, Commission v. Council, [2006] ECR I-1025; Case C-77/11, *Council v. Parliament*, ECLI:EU:C:2013:559.

58 See, e.g., Case 415/85, *Commission v. Ireland*, [1988] ECR 3097, para. 9; Case C-95/97, *Région wallonne v. Commission*, [1997] ECR I-1787; Case T-474/04, *Pergan Hilfsstoffe v. Commission*, [2007] ECR II-4225, para. 77; Case C-133/06, *Parliament v. Council*, [2008] ECR I-3189, paras 56-7.

59 See *supra* n. 33 (emphasis added).

5 A POSSIBLE FUNCTION OF A PRINCIPLE OF INSTITUTIONAL BALANCE

Supposing the notion of institutional balance which may be found in Article 13 TEU is indeed deserving of the qualification of being a principle of EU law, what then is the principle's function? There appears to be at least two rivalling contenders.

In *Audiolux*, AG Trstenjak expressed a (modern) function of the institutional balance rather clearly and at the same time setting the principle apart from the separation of powers:

> The institutional balance within the Community is not based on the principle of the separation of powers in the constitutional-law sense, but on a principle of the 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. Unlike the principle of the separation of powers, which seeks partly to ensure that the individual is protected by moderating state power, the principle of the separation of functions is intended to ensure that the Community's aims are effectively achieved.[60]

While the AG's distinction between the two principles can only be supported, it should be noted that the principle of separation of powers could also be traced to a doctrine promoting efficiency.[61] As Le Bot has argued, the function of the institutional balance rather seems to be to protect the fundamental elements in the institutional system of the EU, i.e., a function of systemic protection (*une fonction de protection systémique*).[62]

At least this is what appears from the Court's jurisprudence in which the institutional balance was indeed enforced as a legal principle. Apart from the *Chernobyl* case already discussed above, the institutional balance also figured as a principle in *France v. Commission*. In that case the competence of the Commission under Article 218 TFEU to conclude guidelines on regulatory cooperation with a third state was at issue. Although the Court concluded that the guidelines did not fall within the scope of Article 218 TFEU given they were non-binding, it immediately added:

> Nevertheless, this judgment cannot be construed as upholding the Commission's argument that the fact that a measure such as the Guidelines is not binding is sufficient to confer on that institution the competence to adopt it. Determining the conditions under which such a measure may be adopted requires that the division of powers and the

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60 Opinion of Advocate General Trstenjak in Case C-101/08, *Audiolux e.a.*, [2009] ECR I-9823, para. 104.

61 See, e.g., N. Barber, 'Prelude to the Separation of Powers', (2001) 60 *Cambridge L. J.* 1, pp. 59–88.

62 Le Bot, *supra* n. 35, p. 243.

> institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account, since in this case the measure seeks to reduce the risk of conflict related to the existence of technical barriers to trade in goods.[63]

Lavranos and van Ooik have called this part of the Court's judgment 'mystical',[64] the Court commenting on a plea which was not raised. According to Mortelmans, the Court did so to make clear that it does not wish to extend the Commission's external powers.[65] The Court probably also wished to prevent a 'grey zone' from emerging as regards to the possibility to adopt 'soft law'. Although the Court saw its intervention as a clarification, it actually raised more questions than were answered. Pitschas notes that the Court accorded legal significance to the Guidelines even though they were non-binding, without clarifying what the nature of this legal significance is.[66] The Court probably feared that *in casu* the Commission, but in general also other institutions, could construct a whole system of acts which were non-binding given the lack of formal competence for the adoption of such acts but which, as a result from their non-binding nature, would also be immune from scrutiny. An elaborated body of such non-binding acts could also upset the institutional balance because it could pre-empt the de facto, but not *de iure*, discretion which other institutions enjoy in subsequent rulemaking. According to Baroncini, the Court also wanted to secure its own jurisdiction over such instruments of international administrative cooperation, notwithstanding their non-binding nature.[67]

In both *Chernobyl* and *France v. Commission,* the Court therefore used the institutional balance as a gap-filling principle. Generally two situations may be thought of where the institutional balance could then be relied upon. This is the case following a new Treaty (amendment) where the Treaty only lays down general rules and no consensus can be agreed on how these rules should be understood, resulting in litigation before the Court. In deciding between rival interpretations the Court could then refer to the institutional balance. A second type of situation is when a given institutional practice or development does not find its origins in the Treaties but finds itself in a 'grey zone'.[68] In the past this has for instance been

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63 Case C-233/02, *France v. Commission*, [2004] ECR I-2759, para. 40.

64 N. Lavranos & R. van Ooik, 'Zaak C-233/02 Franse Republiek t. Commissie van de Europese Gemeenschappen ("EG-VS Richtsnoeren")', (2004) *Tijdschrift voor Europees en economisch recht* 12, p. 447.

65 K. Mortelmans, 'De handelspolitieke bevoegdheden van de Europese Commissie', (2004) *Ars Aequi*, p. 455.

66 C. Pitschas, 'Keine Verletzung des Monopols zur Gesetzesinitiative der Kommission durch nicht bindende Leitlinien', (2004) 15 *EuZW* 14, p. 435.

67 E. Baroncini, 'La Cour de Justice et le treaty making power de la Commission européenne', (2006) *RDUE* 2, p. 417.

68 In relation to the ECJ's powers under the TSCG (cf. *infra*) Beukers has made the argument to apply the principle (instead of the notion) of institutional balance, to conclude on the compatibility of the

the case for the comitology system, which the Court sanctioned in a number of cases, starting with *Köster*.[69] Since such institutional practice often rests on an inter-institutional consensus, challenging it will depend on private parties (or Member States), again stressing the need to allow private parties (and Member States) to rely on the institutional balance as a principle before the Court.

Because the principle's function would be gap-filling, as Prechal suggested (cf. *supra*) one would not need to rely on it to solve certain common problems. For instance, in inter-institutional conflicts on the correct legal base of a legislative measure, the Court will almost never have to rely on the principle of institutional balance to rule on the case, given that the provisions of the Treaties are often detailed and relatively clear on this issue, and need only to be applied by the Court together with the centre of gravity and absorption doctrines, something which de Witte alluded to.[70] Any references to the institutional balance in such cases are superfluous then. However, the institutional balance could be used as a defining principle in those cases for which the express Treaty provisions do not give sufficient guidance.

Under an institutional balance analysis the first step should thus be to determine whether the principle of institutional balance may be invoked at all. If the Treaty provisions themselves provide sufficient guidance, reference to the institutional balance is unnecessary and the Court should resolve the case by applying and interpreting the specific Treaty provisions.

However, if the Court concludes that the Treaty provisions provide insufficient guidance it could proceed by putting the contested power into the legal context as it results from the Treaties. Here the Court could employ its whole arsenal of interpretative techniques and especially those of systemic, purposive interpretation also taking into account 'genetic' and historical arguments, by relying on the genesis of Treaty provisions and the *travaux préparatoires*.[71]

Next it could be verified what the effect would be if the contested power would be sanctioned or rebuked: whether this would unduly restrict the independence of other institutions in the exercise of their powers, whether it would result in an impermissible delegation or whether it would encroach upon the powers and prerogatives of other institutions.

This approach is also confirmed in the two cases in which the institutional balance figured as a principle. In *Chernobyl,* the Court was confronted with a

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TSCG with the EU Treaties. See T. Beukers, 'The Eurozone Crisis and the Legitimacy of Differentiated Integration', in de Witte, Héritier & Trechsel, *The Euro Crisis and the State of European Democracy*, EUI, p. 21.

69 Case 25/70, *Köster* [1970] ECR 1161.

70 See *supra* n. 21.

71 On the different techniques see G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Oxford, Hart Publishing, 2013, pp. 187–233.

discrepancy between the Treaty provisions following the SEA. On the one hand, Article 100a EEC provided in the cooperation procedure to adopt legislation, granting new powers to the Parliament. On the other hand, Article 173 EEC still did not allow the Parliament to challenge acts of the Council and Commission, potentially rendering nugatory its new prerogatives in the legislative procedure. The Court had to put this power claimed by the Parliament in its context. This is something AG Darmon did extensively in his opinion in *Comitology*,[72] presenting an overview of the position (at that time) of the European Parliament in proceedings before the Court: the Parliament's right to intervene as laid down in *Isoglucose*, the Parliament's privileged position under Article 175 EEC (current Article 265 TFEU) as confirmed in *Common Transport Policy*,[73] the obligation on the Parliament to supply the Court with information in preliminary rulings (although the Statute at that time only laid down this obligation vis-à-vis the Member States, Council and Commission)[74] and the Parliament's passive *locus standi* under Article 173 EEC as established in *Les Verts*.[75] In a third step the Court looked at the effect of, in this case, withholding such a power to the Parliament and had to conclude that this would result in the inability of the European Parliament to safeguard the prerogatives it had acquired under Article 100a EEC.

In *France v. Commission,* the possibility for the Commission to autonomously conclude non-binding agreements with third countries was at issue, since it had already been decided that the Commission could not autonomously conclude binding agreements. This power had to be put further into the context of the Commission's autonomous international function. Undoubtedly the possibility of some autonomy for the Commission in this field was not completely exotic.[76] The Court therefore had to look further into the effects of granting such a power to the Commission. For the reasons set out above, the Court could have felt such a power might upset the institutional balance, as the Commission could otherwise escape the jurisdiction of the Court by adopting soft law agreements and at the same time narrowing the de facto discretion of the other institutions (*in casu* the Council) to adopt hard law, encroaching on that institution's prerogatives.

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72 Opinion of Advocate General Darmon in Case 302/87, *Parliament v. Council*, [1988] ECR 5615, para. 3.

73 Case 13/83, *Parliament v. Council*, [1985] ECR 1513.

74 Case 20/85, *Roviello v. Landesversicherungsanstalt Schwaben*, [1988] ECR 2805. See also other cases cited by AG Darmon in his opinion referred to *supra* n. 72.

75 Case 294/83, *Parti écologiste 'Les Verts' v. Parliament*, [1986] ECR 1339.

76 See Baroncini, *supra* n. 67, pp. 371–374.

6 PROSPECTS FOR THE PRINCIPLE OF INSTITUTIONAL BALANCE

While the principle of institutional balance qualified as a principle of systemic protection could fulfil an important function, it is under serious pressure.

As discussed above, the Court has treated its own judge-made principle in a rather step-motherly way, or as Le Bot puts it more euphemistically, the Court has not yet drawn all the necessary conclusions from its qualification of the institutional balance as a principle of EU law.[77] In addition to this, there are the significant transmutations which in recent years have affected the very foundations of the EU legal order and this under a manifest absence of any institutional balance considerations.[78]

Although these cases cannot be elaborated, it suffices to note that following and during the continuing euro crisis, the European Council has taken up a role which goes beyond providing 'the necessary impetus for the EU's development' as prescribed in Article 15 TEU, which undoubtedly affects the prerogatives of the institutions which are involved in (legislative) decision-making. To tackle the euro crisis, the Member States have also fallen back on intergovernmental recipes outside the EU Treaties such as the European Financial Stability Facility, the European Stability Mechanism (ESM) and the Treaty on Stability Coordination and Governance in the Economic and Monetary Union (TSCG). Through the Euro-Plus Pact they have relied on the open method of coordination which acts as an alternative to the traditional 'community method' and for which there is only a clear legal basis in the Treaties in the social sphere.[79]

Following the conclusion of the TSCG, Craig forcefully set out why it is not only problematic that EU institutions are granted new powers outside the EU Treaties but why it is also questionable for EU institutions to use already existing powers, under the EU Treaties, in a legal framework exogenous to that of the EU.[80] This issue was dealt with in relation to the ESM in *Pringle*,[81] even if the Court avoided reference to the institutional balance in that case. Still, the Court did set an institutional balance limit since the involvement of EU institutions under an arrangement outside the EU Treaties may 'not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties'.[82]

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77 Le Bot, *supra* n. 35, p. 298.

78 On the side-lining of the institutional balance in the EU's response to the euro crisis, see M. Dawson & F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', (2013) 76 *The Modern Law Review* 5, pp. 828–836.

79 See Art. 156 TFEU.

80 P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', (2012) 37 *ELRev*. 3, pp. 241–245.

81 Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756.

82 *Ibid*., para. 162.

However, from an institutional balance perspective it is unclear why this pre-condition is merely limited to the 'essential character' of the institutions' powers and this even apart from the difficult question of distinguishing between the essential and non-essential characteristics of the institutions' powers. Again, this was forcefully noted by Craig in a comment to the *Pringle* case.[83] The Court in *Pringle* further only scrutinized the Commission's and the ECB's powers under the ESM, without verifying how these powers under the ESM would affect the other EU institutions' powers under the EU Treaties.[84]

The same issue may be noted in relation to the EU's tackling of the financial crisis. Here the EU legislator decided in 2010 to establish three agencies, the supervisory authorities in the financial sector. These agencies were provided with unprecedented powers, in themselves questionable under an institutional balance perspective,[85] which have been further extended in subsequent legislation. Under Regulation 236/2012, the European Securities and Markets Authority (ESMA) has even been granted the power to ban, or impose conditions, on the shorting of financial instruments, which led the UK to challenge this specific power before the Court in *Short-selling*.[86] One of the arguments made by the UK was that the ESMA had been empowered to adopt implementing acts, whereas the power to do so is reserved to the Commission by Article 291 TFEU. While this question went to the core of the institutional balance, since it touches upon one of the essential characteristics of the Commission's powers,[87] the Court managed to dismiss this and all other pleas of the UK without referring to the institutional balance one single time. Had it done so it would have been forced to explicitly argue why the Commission's prerogatives under the Treaties are not jeopardized by the legislator when the latter establishes a new executive body, granting it powers which the Treaties prima facie confer on the Commission.[88]

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83 P. Craig, '"Pringle" and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance', (2013) 9 *EuConst* 2, pp. 277–278.

84 On this see also Craig, *supra* n. 83, p. 271; Beukers, *supra* n. 68, pp. 25–27.

85 See M. Chamon, 'EU Agencies between "Meroni" and "Romano" or the Devil and the Deep Blue Sea', (2011) 48 *CMLRev*. 4, pp. 1068–1070.

86 Case C-270/12, *UK v. Parliament and Council*, ECLI:EU:C:2014:18.

87 Article 17 TEU provides that the Commission '*shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them […] It shall exercise coordinating, executive and management functions, as laid down in the Treaties*'. (emphasis added) Even if the Court seems to have ruled otherwise, it seems difficult to deny that Art. 291 TFEU places special importance on the Commission as the primary executive actor at EU level.

88 For a discussion of this case and a critique on the Court's lack of attention to the Commission's prerogatives as protected by the institutional balance, see 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) 39 *ELRev*. 3, pp. 380–403; also published in (2014) *European Current Law* 8, pp. 869–894.

These two recent cases do not provide bright prospects for the principle of institutional balance.[89] However, they would not have been the ideal test cases to experiment with a rigorous institutional balance scrutiny either. As one commentator observed (albeit only in relation to *Short-selling*) such an approach could have amounted to 'foolish judicial disregard for the vital need to ensure continuing financial stability within Europe'.[90] Still, if the Court is serious about its qualification of the institutional balance as an (actionable) principle of EU law, it should allow the institutions, Member States and also private parties to rely on it, treating their arguments seriously.[91] As regards private litigants this would come down to a reversal of *Vreugdenhil*, which was criticized recently again by AG Bot.[92] Alternatively, the institutional balance would just remain a political 'bat for the institutions to swat each other with'.

7 CONCLUSION

In the present contribution the institutional balance was distinguished from the principle of separation of powers and both concepts were found to be relevant to the EU since they operate at different levels. So far the institutional balance has been viewed critically in legal doctrine. According to some authors the notion does not amount to a principle because the rules defining the relations between the institutions are either too complex or already detailed enough, because the notion of balance presupposes a stability which does not yet exist as regards the EU legal order, or because a principle is enforceable before a Court, which has insufficiently been the case for the institutional balance. Yet, Lenaerts and Verhoeven have made a hard case for a legal principle by working out in detail its content. Following Le Bot, the institutional balance was found to be a principle of systemic protection which may be employed as a gap-filling principle, in line with Prechal's observations.

However, the case law of the Court shows that the principle, qualified as such by the Court, has not fulfilled its potential. Not only does the Court refuse private

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89 It should be noted that these cases are not a confirmation of AG Trstenjak's conception of the institutional balance either. In fact, if the institutional balance was about efficacy, the Court could have perfectly relied on it in *Short-selling*: today, the effectiveness of EU regulation in the financial sector depends on the possibility of agencies such as the ESMA to adopt binding measures.

90 M. Everson, 'European Agencies: Barely Legal?', in Everson, Monda & Vos (eds), *European Agencies in between Institutions and Member States*, Alphen aan de Rijn, Kluwer Law International, 2014, p. 50.

91 At the same time, a responsibility of the academic community may be noted as well. For instance, even if it is recognized that the policy responses to the euro and financial crises affect the institutional balance, those policy responses are hardly analysed in depth under an institutional balance perspective. Such an analysis would indeed require a more profound understanding of the principle of institutional balance, something to which this article hopes to contribute to.

92 Opinion of Advocate General Bot in Case C-221/10 P, *Artegodan GmbH v. Commission*, ECLI:EU:C:2011:744, paras 40–44.

parties from relying on the principle, it has further consistently ignored institutional balance arguments made by the Member States and even the institutions themselves. In addition, the recent developments following the financial and euro crisis have put the institutional balance further under pressure. Still the institutional balance might realize its potential as an actionable principle, provided that the Court becomes more receptive to institutional balance arguments brought before it by privileged and non-privileged parties alike, dealing with these arguments in a more structured fashion.

Yet, if such a turn-around in the Court's approach does not materialize the debate on the nature of the institutional balance may also be settled. The notion of institutional balance would then not amount to a principle of EU law but would merely be a shorthand for the idea contained in Article 13 TEU. Either of the two scenarios (a confirmation or a rejection of the institutional balance's status as a principle of EU law) would appear preferable above the current unclear situation.