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The Institutional Balance: a Janus-faced concept of EU constitutional law

Abstract

The concept of institutional balance is an original theory associated with the development of the EU institutional structure. This article offers a critical analysis of the different uses of the concept. While doing that, the article provides representative samples of the ways in which the concept has been used in the processes of the European integration, including its practical implementation by the European Court of Justice. Our argument is that, in its current state, the concept of institutional balance serves both reactive and transformative functions within the EU law. It emphasises the necessity to periodically check and adjust the power distribution architecture in response to new challenges of the EU evolution process. Moreover, it serves as a conceptual vehicle through which different power configurations within the EU context may be both criticized and legitimized.

Key words: Institutional balance, European integration, representative theory, checks and balances, separation of powers theory

I. Introduction

The Lisbon Treaty *marks a new stage in the process of creating an ever closer union among the peoples of Europe.*[1] The changes it introduced include, *inter alia*, the emergence of new positions such as the President of the Council and the High Representative of the Union for Foreign Affairs and Security Policy as well as the alterations to the legislative and decision-making processes. The formation and development of the post-Lisbon institutional architecture raises the issue of the core principles and design underlying the distribution of powers within the EU institutional framework. In particular, the concept of institutional balance seems to have a crucial role.[2]

[1] Art. 1 TEU.
[2] Th. Christiansen, 'The European Union after the Lisbon Treaty: An Elusive "Institutional Balance?"' in A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law after Lisbon*, Oxford 2011, pp. 228-247.

However, both the content and concrete functions of the concept of institutional balance have remained far from clear.[3] Academic literature offers a variety of definitions from the rather simplified *who (which institution) and how (according to what procedure)*[4] to *a euphemism which 'masks an inherent institutional tension between the intergovernmentalism and supranationalism'*,[5] to mention just a few. Such a broad use of the concept implies variability and complexity of the problem in focus. And indeed it is used with several different meanings, with different conceptual and normative backgrounds.

The aim of this article is to offer a critical analysis of the multi-facial concept of institutional balance, including its practical implementation by the European Court of Justice (henceforth ECJ). In providing the analysis, the article is not limited by traditional instruments of legal research, but also utilises findings in public administration and governance theory. The article does not study separate EU institutions; instead it provides a critical analysis of major ways in which the concept of institutional balance has been used in the dynamic context of the EU evolution.

The article argues that in its current state, the concept of institutional balance serves both reactive and transformative functions within the EU law. As such, it does not only emphasise the necessity to periodically check and adjust the power distribution architecture in response to new challenges of the EU evolution process. More importantly, it serves as a conceptual vehicle through which different power configurations within the EU context may constantly be both criticized and legitimized. Due to its own openness to contradictory aims, the concept of institutional balance does not provide any single coherent ground for active development of the design of distribution of powers within the EU institutional framework. Instead it opens up different argumentative possibilities readily available to anyone willing to either lock in or change the current power structures of the EU.

The article is comprised of introduction, four sections and conclusions. Section II focuses on the idea, and specific justificatory features of balancing in the unique context of the European Union. Section III offers an analysis of the institutional balance concept from the perspective of power distribution between the EU institutions. Section IV studies institutional balance as a legal principle as it emerges from the ECJ's case-law. Finally,

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[3] G. Guillermin, 'Le principe de l'equilibre dans la jurisprudence de CJCE', *Journal du Droit International*, Vol. 19, No. 2 (1992), pp. 319-346; S. Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Content' in T. Heukels, N. Blokker, M. Brus (eds.), *The European Union after Amsterdam. A Legal Analysis*, The Hague 1998, pp. 273-294.

[4] A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, The Hague 2002, p. 205 (*European Monographs*, 38).

[5] P. Craig, G. de Búrca, *The Evolution of EU Law*, Oxford 1999, p. 21.

section V examines representative theory commonly viewed as the basis underlying the concept of institutional balance.[6]

II. Balancing between extremes – a pendulum that never stops

In its traditional forms, constitutional balancing has been used with at least two different meanings and contexts. On the one hand, it has been widely used to connote a certain form of conflict solution between different material interests by weighing and balancing them.[7] On the other hand, the concept of balancing has played a significant role in the legal structures of constitutional states. In this context, the concept of balancing usually refers to ideas like "checks and balances" and other forms of solutions pertaining to the division of powers between different government organs or between states and the federal government.[8]

However, balancing in terms of the EU institutional system embodies a process, which is different from those applied at the national level. The European integration process can hardly be associated with either any pre-existing plan,[9] or any clear final destination.[10] Meanwhile, the formation and development of the European Union have constantly been associated with numerous dilemmas to be resolved. In fact, the contemporary institutional architecture is a reflection of the *en route* compromises.[11] Moreover, the natural state of the Union's institutional framework is a permanent constitutional tension between:

- supranationality and intergovernmentalism;
- decision-making efficiency and national veto rights;

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[6] K. Lenaerts, A. Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in C. Joerges, R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, Oxford 2002, p. 47 (*Collected Courses of the Academy of European Law*, 11/2).

[7] T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing', *Yale Law Journal*, Vol. 96, No. 5 (1987), p. 943, at <http://dx.doi.org/10.2307/796529>; R. Alexy, *Theory of Constitutional Rights*, transl. by J. Rivers, Oxford 2010.

[8] D. Shapiro, *Federalism. A Dialogue*, Evanston 1995.

[9] It may sound like a paradox, but the famous R. Schuman Plan for integrating Europe was to have no plan. *Europe will not be made at once, nor according to a single master plan of construction. It will be built by concrete achievements, which create de facto dependence, mutual interests and the desire for common actions* – '*Schuman Declaration* and the Birth of Europe. Speech of 9 May 1950', Schuman Project, at <http://www.schuman.info>, 1 September 2015.

[10] J.-P. Jacqué, 'The Principle of Institutional Balance', *Common Market Law Review*, Vol. 41, No. 2 (2004), p. 387.

[11] As L. Hoffmann notes: *The European Union's constitutional structure is not a kafkaesque construct that just metamorphosed overnight from a treaty-based intergovernmental organisation into an indefinable legal-political institution with its own legal personality. Rather it is the result of a long, sometimes tedious, sometimes fascinating, and seemingly open-ended process, driven forward by political institutions and courts* – L. Hoffmann, 'Constitutional Expectations and the European Union: The Issue of Executive Opacity in the Union's Continuous Constitutionalisation Process', at <http://www.uaces.org/documents/papers/1102/hoffmann.pdf>, 1 September 2015.

- the protection of smaller Member States and traditional power politics.[12]

Therefore, in shaping the EU institutional architecture balancing has been used to find some kind of equilibrium in a manner, which is closer to the checks and balances system, with its postulate of control of one department over another to avoid abuse of power.[13] However, *only functional analogies can be really depicted*, as the EU institutional system is based on a hybrid institutionalised concept.[14]

In the national legal systems, checks and balances have become a part of the separation of powers concept. In contrast, the idea of balancing in terms of the EU has become an independent dynamic method applied to respond to challenges faced *ad hoc*. Moreover, if the general idea of division of powers may be understood to have a constitutive and in that sense also foundational role in the framework of modern constitutionalism, the idea of institutional balance tends to be used as a corrective tool instead of having a constitutive meaning. Institutional balance provides a convenient conceptual framework for counteracting something that is considered as legally or politically harmful or undesirable in the development of the European Union. Balancing between the extremes of technocratic guidance – democracy is a practical example of this observation, as will now be discussed.

Originally, the European Community project was largely set up as a technocratic project that would work under the guidance of an independent High Authority,[15] staffed by highly qualified officials.[16] As P. Craig writes, for Monnet and kindred spirits the legitimacy of the Community was to be secured through outcomes, peace and prosperity. Democracy was, by way of contrast, a secondary consideration, since it was felt that the best way to secure peace and prosperity was by technocratic elite-led guidance.[17] That approach was reflected by the role of the Commission as *the engine and voice of the Union* […] *to play a leadership role within the Union*.[18] With democracy becoming an issue of primary importance, the pendulum was shifted in this direction by the gradual amendment of the founding Treaties. These changes are well known with no need to be discussed here.[19]

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[12] Yu. Devuyst, 'The European Union's Institutional Balance after the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed', *Georgetown Journal of International Law*, Vol. 39, No. 2 (2008), p. 253.
[13] Federalist paper # 48 and # 51 in A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, New York 1961, pp. 308- 313 and 320-325.
[14] Th. Georgopoulos, 'The "Checks and Balances" Doctrine in Member States as a Rule of EC Law: The Cases of France and Germany', *European Law Journal*, Vol. 9, No. 5 (2003), p. 542, at <http://dx.doi.org/10.1046/j.1468-0386.2003.00191.x>.
[15] Name of the Commission in early stages of the integration under the Treaty establishing the ECSC.
[16] Yu. Devuyst, 'The European Union's...', p. 302.
[17] P. Craig, G. de Búrca, *The Evolution...*, p. 16.
[18] A. Warleigh (ed.), *Understanding European Union Institutions*, London 2002, p. 52.
[19] A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law…*

However, one of the outcomes of the reforms was the change of the Commission's status, whose political and legislative role deteriorate as the European Council became a *true policy maker of the EU proving the general political impetus and setting the legislative directions and priorities*.[20] Moreover, the rise of the European Parliament's authority as a response to the "democracy deficit" problem facilitated the decline of the Commission's role.[21] As J.-P. Jacqué remarks, *the institutional balance shifted to its (the Commission's) disadvantage*.[22] On the other hand, the new status of the Commission is now viewed as a threat to the EU system with *risks of a poor leadership, a weak control on the common rules and a scare consideration of the EU general interest*[23] with strong voices insisting upon the restoration of the power of the Commission[24] aimed *to ensure its independence both with regards to the Council and the Parliament*.[25] Discussing advantages of a parliamentary model, L. Hoffman comes to the conclusion that the advantages of an independent Commission outweigh any potential gains in democratic legitimacy by politicizing its composition and thereby its actions.[26]

This example shows practical aspects of balancing being used to fine-tune the EU institutional machinery. The general contradictions built into the conceptual framework of the functioning of institutional balance are typically further specified at a smaller scale for utilization in development of the structures of the EU decision-making. However, the general rule inferred from the experience of the European integration is that every major shift in the rules of decision-making is counterbalanced in one way or another. This rule is reflected in a suggestion to counterbalance further development of the parliamentary model in the EU with the possibility of the European parliament dissolution,[27] or counterbalancing the Council's decision-making powers with the Commission's exclusive right of legislative initiative.[28] A

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[20] L.S. Rossi, 'A New Inter-Institutional Balance: Supranational vs. Intergovernmental Method after the Lisbon Treaty', Global Jean Monnet-ECSA WORLD Conference "The European Union after the Treaty of Lisbon", Brussels, 25-26 May 2010, at <http://www.astrid-online.it/static/upload/protected/Ross/Rossi-Global-Jean-Monnet-paper.pdf>.
[21] Ibid.
[22] J.-P. Jacqué, 'The Principle...', p. 390.
[23] L.S. Rossi, 'A New Inter-Institutional Balance...'
[24] For instance A. Menon, S. Weatherill, *Democratic Politics in a Globalising World. Supranationalism and Legitimacy in the European Union*, London 2007 (*LSE Law, Society and Economy Working Papers*, 13/2007).
[25] J.-P. Jacqué, 'The Principle...'
[26] L. Hoffmann, 'Constitutional Expectations...'
[27] J.-P. Jacqué, 'The Principle...', p. 391.
[28] P. Pescatore, 'Les travaux du "groupe juridique" dans la négociation des traités de Rome', *Studia Diplomatica*, Vol. 34, No. 168 (1981), p. 159.

more refined example is counterbalancing *legislative paralysis that unanimity may engender* with enhanced cooperation option.[29]

To sum up this section, three things should be emphasised. First, with the European integration being an open-ended process, balancing is widely used as a method to deal with *ad hoc* challenges met *en route*. Second, balancing regarding the European Union is accompanied by a definite tendency to counterbalance each step in a manner similar to the "checks and balances" concept, although the counterbalancing measures can be installed in various levels of the EU system or have a non-proportional character. Third, distribution or re-distribution of powers between the EU institutions is a part of a wider process of constant fine-tuning the decision-making procedures, to balance the permanent contradictions of the European integration process.

To introduce sections three and four of the article, it should be noted that the concept of institutional balance is usually framed in terms of a legal and a political principle.[30] In terms of a legal principle, the emphasis of the concept is on the procedure. In contrast, the political aspect of the concept deals with the actual powers allocated between the EU institutions.

III. Political aspects of Institutional balance concept – principle of dynamic development of power distribution

With the EU based on the founding treaties as the *constitutional charter,*[31] and the Member States being the *Herren der Verträge*, these are the decisions made by the Member States in the negotiation process, which set the institutional framework and determine the distribution of the powers between the EU institutions. In fact, it is during the negotiation process that the parties try to balance the most suitable configuration of the power distribution.[32] In this regard there is a rather useful observation by E.U. Petersmann. Discussing European integration as a dynamic functional integration process where *form follows function*, he emphasised the reality

[29] A. Rosas, L. Armati, *EU Constitutional Law. An Introduction*, Oxford 2010, p. 120.
[30] K. Lenaerts, A. Verhoeven, 'Institutional Balance...', pp. 44-47; D. Curtin, *Executive Power in the European Union. Law, Practices, and the Living Constitution*, Oxford 2009, p. 57 (*The Collected Courses of the Academy of European Law*).
[31] Para 23 ECJ Case 294/83 *Parti ecologiste "Les Verts" v European Parliament* ECR 1986.
[32] P. Craig, G. de Búrca, *The Evolution...*, p. 60.

– the fact that the final word in the amendment of the founding treaties belongs to the Member States.[33]

During the decades of the European integration process, the distribution of power between the institutions has had various configurations. These shifts of power distribution reflect shifts of emphasis, as well as tendencies. In an open-ended process of the EU evolution these changes reflect new understanding of the institutions' roles. The unique nature of the European Union accompanied by unique challenges it has to overcome lead to some kind of ping-pong game – challenge-response. Therefore, all the Member States can do is to respond to the new challenges met *en route*. The responses include re-distribution of powers between the institutions. Thus, institutional balance as a political principle should be viewed more, or even primarily, as a principle of dynamic development rather than a static principle of power distribution as described by A. Fritzsche.[34]

P. Craig defines three temporal periods while analysing the changes in power distribution within the EU institutional framework.[35] This approach reflects both the necessity to re-distribute competences between the EU institutions and the mechanism for the introduction of these changes – through the amendment of the founding Treaties. However, there is a remark to be made. Institutional balance is often described in terms of balancing between intergovernmentalism and supranationalism.[36] But, the creation of a steady institutional system on such a general conceptual scale is hardly possible. Certainly, it demands decision-making on a much smaller scale, with many exact issues to be addressed. Therefore the offered periodization is rather general, and may differ depending upon the specific issues involved. Many scholars emphasise numerous *ad hoc* compromises that were incorporated into the Treaties during the 1990s, thus creating an institutional regime *that hangs somewhere between the strong foundations of the Community's original integration method and the intergovernmental influences of the past decade*.[37] These compromises

[33] E.-U. Petersmann, 'Proposals for a New Constitution for the European Union: Building Blocks for a Constitutional Theory and Constitutional Law of the EU', *Common Market Law Review*, Vol. 32, No. 5 (1995), p. 1130.
[34] A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *Common Market Law Review*, Vol. 47, No. 2 (2010), p. 381.
[35] P. Craig, G. de Búrca, *The Evolution...*, p. 42.
[36] P. Craig, G. de Búrca, *The Evolution...*, p. 21.
[37] P. Magnette, 'La grande transformation de l'Europe' in P. Magnette, E. Remacle (eds.), *Le nouveau modèle européen*, Vol. 1: *Institutions et gouvernance*, Bruxelles 2000, pp. 7-13 (*Études Européennes*); H. Wallace, 'The Institutional Setting: Five Variations on a Theme' in H. Wallace, W. Wallace (eds.), *Policy-Making in the European Union*, Oxford 2000, pp. 3-33 (*The New European Union Series*).

resulted in the emergence of *a composite legal patchwork*,[38] described by Romano Prodi as a series of *constructive ambiguities and increasingly complex formulae*.[39]

To explain this development, emphasis should be placed on the uniqueness of the European Union as well as the challenges it encounters. Therefore, the responses to these challenges resemble hit or miss measures, since there is no certainty what the outcome of the measures in the specific condition of the European Union will be. Against this background, balancing should be viewed as an important method for ensuring the further sustainable development of the European integration, by stressing the need of instruments for mutual control within the EU institutional framework. However, this dynamic equilibrium periodically needs tuning because it is too fragile, and even slight changes in the system may lead to increasing disproportions.

Another illustration of balancing comes from the initial architecture of the Community, which was designed, *inter alia, to guarantee that* [...] *reconciliation between the larger [states] will not be at the expense of the smaller*.[40] Such protection measures included weighting votes in the Council of Ministers and the strong position of the European Commission (including the exclusive right of legislative initiative).[41] However, the Lisbon treaty introduced changes to both of these mechanisms. As it has already been noted above, the Commission lost some of its initial political powers. Furthermore, with the intention to increase the efficiency of the decision-making process, the Lisbon Treaty introduced the double-majority system for Council voting.[42] The introduction of population as a criterion for both the distribution of seats in the European Parliament and votes in the Council impacted upon the pre-existing balance of the system.[43] The new qualified majority method *shifts the equilibrium between smaller and larger countries to the advantage of the latter*, thus putting *the smaller and medium-sized Member States on the defensive in comparison to what they were used to under the original Community method*.[44] This new situation is certainly a new challenge to the European Union, creating a further need for counter-balancing with adequate

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[38] D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *Common Market Law Review*, Vol. 30, No. 1 (1993), p. 17.
[39] R. Prodi, 'The State of the Union in 2001, address before the European Parliament', *Bulletin of the European Union*, No. 1/2 (2001), pp. 169-170.
[40] Ch. Tugendhat, *Making Sense of Europe*, London 1986, p. 36.
[41] J.T. Lang, E. Gallagher, 'The Commission, the "Community Method", and the Smaller Member States', *Fordham International Law Journal*, Vol. 29, No. 5 (2006), p. 1029.
[42] Art. 16 TEU.
[43] R. Corbett, Í.M. de Vigo, Report on the Treaty of Lisbon (European Parliament, Committee on Constitutional Affairs, A6-0013/2008), Jan. 29, 2008, p. 29.
[44] Yu. Devuyst, 'The European Union's...'

measures. And these measures are still to be found and agreed upon, by the Member States, which continue to remain *Herren der Verträge*.

From this perspective, the Lisbon treaty certainly is not the final configuration of the European Union's political architecture, but only one of the checkpoints. Therefore, it is no wonder that there are already voices demanding its revision,[45] although it was signed only a few years ago.

IV. Institutional balance as a legal principle

The concept of institutional balance as a legal principle was mostly developed by the European Court of Justice. Its case-law reveals another aspect of the use of the concept, which is quite remote from its mainstream political application, as the ECJ itself views the concept of institutional balance in a much more narrow and pragmatic way – as a set of rules to be followed by the institutions in the legislative process.

In early *Meroni*[46] and *Köster*[47] cases the ultimate question for the Court was if the Community institutions had exceeded the limits of their Treaty-based powers in an indirect way by vesting extra powers in the auxiliary bodies. In the *Meroni* case, the Court came to the conclusion that the limits of the Treaties were exceeded as the document in question[48] *in reality gives the Brussels agencies*[49] *more extensive powers than those, which the High Authority holds from the Treaty*.[50] In the *Köster* case[51] the Court did not find any infringement, as the Management Committee did not have the power to make decisions instead of the Commission or Council; therefore *without distorting the Community structure and the institutional balance, the Management Committee machinery enables the Council to delegate to the Commission an impending power of appreciable scope, subject to its power to take the decision itself if necessary*.[52]

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[45] Following problems are usually mentioned among the faults of the contemporary configuration of the distribution of powers: Disproportions in favour of the intergovernmentalism versus supranationalism (L.S. Rossi, 'A New Inter-Institutional Balance...'); Reduced protection to smaller and medium-sized Member States (Yu. Devuyst, 'The European Union's...', p. 317); Ambiguous "multi hats" position of the High representative for Foreign Affairs and Security Policy (P. Craig, G. de Búrca, *The Evolution...*,, p. 84), etc.
[46] ECJ Case 9/56, *Meroni & Co., Industrie Metallurgiche SpA.* v *High Authority*, [1958] ECR 133, 152.
[47] ECJ Case 25/70, *Einfuhr- und Vorratsstelle für und Getreide Futtermittel* v *Köster*, [1970] ECR 1161.
[48] Decision of High Authority of 24 October 1956.
[49] Joint Bureau of Ferrous Scrap Consumers and Imported Ferrous Scrap Equalization Fund.
[50] ECJ Case 9/56, *Meroni & Co., Industrie Metallurgiche SpA.* v *High Authority*...
[51] ECJ Case 25/70, *Einfuhr- und Vorratsstelle für und Getreide Futtermittel* v *Köster*...
[52] Ibid., para 9.

The decision in the *Meroni* case was used to link institutional balance with the separation-of-powers principle.[53] But this link reflects a somewhat superficial similarity rather than deep conceptual connections: the determination of the external limits of competences of the EU institutions has little in common with the division of power into three functional branches. A. Fritzsche offered a much better comment on the decision: *The institutional balance is infringed whenever the ultimately deciding body differs from the institution declared to be responsible by the Treaties*.[54]

This comment reflects the essence of these two cases, which initiated the creation of the formula, articulated later in the joint case *France, Italy and UK v Commission*:[55] *The Commission is to participate in carrying out the tasks entrusted to the Community* ***on the same basis as the other institutions, each acting within the limits of the powers conferred upon it by the Treaty***.[56]

The transformation of the "Meroni doctrine" in the light of the Lisbon innovations was in the focus of the opinion of Advocate General Jääskinen in the UK v Council and Parliament case.[57] He thinks that the "Meroni doctrine" still remains relevant at least in two issues:

- the powers cannot be delegated to an agency that are different from the implementing powers the EU legislature has conferred on the delegating authority;
- the delegated powers must be sufficiently well defined to preclude arbitrary exercise of power.

The breach of the principles would lead to inability to safeguard the effective judicial control of the use of implementing powers as well as the existing institutional balance.[58]

The other group of the ECJ's cases concentrated more on legislative procedures and usually included the triangle of the Council, Commission, and the European Parliament. In the *Isoglucose*[59] cases the ECJ defended the legislative prerogatives of the European Parliament as an *essential factor of the institutional balance intended by the Treaty*,[60] emphasizing its new role as the only democratically elected Community institution. However, it took the

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[53] J.-P. Jacqué, 'The Principle...', p. 384.
[54] A. Fritzsche, 'Discretion...', p. 382.
[55] ECJ Cases 188/80, 189/80 and 190/80 *France, Italy and United Kingdom* v *Commission*, ECR 1982.
[56] Ibid., para 6. (*Emphasis added*).
[57] ECJ Case C-270/12 *United Kingdom* v *European Parliament & Council* [2013].
[58] Para 88, 92, Opinion of Advocate General Jääskinen delivered on 12 September 2013 (1), Case C-270/12 *United Kingdom* v *European Parliament and Council of the European Union*, at <http://curia.europa.eu/juris/document/document.jsf?docid=140965&doclang=EN>, 1 September 2015.
[59] ECJ Case 138/79, *Roquette Frères* v *Council*, [1980], and Case 139/79, *Maïzena* v *Council*, [1980] ECR 3333.
[60] Ibid., para 33-34.[what is proper ECJ Case 138/79 or Case 139/79?]

Court certain time to grant the Parliament the right to file annulment cases as a procedural tool to secure its privileges. The discussion began in the *Les Verts* case,[61] as the Court broadly interpreted Art. 173 of the EEC Treaty for both applicant and defendant.[62] It extended the rights of the privileged applicants[63] to a political party, but refused to grant the same right to the European Parliament.[64] The Court declined the appeal to institutional balance as a separate theoretical concept and instead based its decision on the rule of law principle, undermining the Parliament's attempt to gain a vital right for filing the annulment claims.[65] In the *Comitology* case,[66] the Court also had to deal with appeals to equality and the balance between the institutions made by the European Parliament.[67] But the ECJ remained persistent in its conviction to comply rather with the letter of the Treaty than with its spirit in the way Parliament perceived it. Therefore it demonstratively rejected the Parliament's claims twice in this case.[68]

However, the issue of the Parliament's right to file annulment claims was not over. It was further elaborated in the famous *Chernobyl* case.[69] Supporting the Parliament's submission that *there is a legal vacuum, which the Court has to fill by recognising that the European Parliament has capacity to bring an action for annulment, but only to extent necessary to safeguard its own prerogatives*,[70] the Court finally agreed to grant this right to the Parliament.[71] Yet, the problem the Court had to overcome after an explicit decision in the *Comitology* case[72] was the legal ground for such a drastic change of mind. For this purpose the Court used the concept of institutional balance, although in its own original interpretation.[73] Commenting upon this decision K. Lenaerts and A. Verhoeven remarked that the question is, however, how far the Court can go in this respect, as it is also bound by the principle of the institutional balance.[74]

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[61] ECJ Case 294/83, *Parti ecologiste...*
[62] Ibid., para 22, 23, 30.
[63] At that time mostly Council, Commission and Member States
[64] Para 22 ECJ Case 294/83, *Parti ecologiste...*
[65] Ibid., para 23.
[66] ECJ Case 302/87, *European Parliament* v *Council* [1988] ECR 5615.
[67] Ibid., para 19.
[68] Ibid., para 21, 28.
[69] ECJ Case 70/88, *European Parliament* v *Council*, [1990] ECR I-2041.
[70] Ibid., para 8.
[71] Ibid., para 27.
[72] ECJ Case 302/87, *European Parliament* v *Council* [1988] ECR 5615.
[73] Para 21, 22, 26 ECJ Case 70/88, *European Parliament* v *Council*, [1990] ECR I-2041.
[74] K. Lenaerts, A. Verhoeven, 'Institutional Balance...', p. 45.

Other aspects of the legal use of the institutional balance concept deal with the choice of the legal basis for the secondary legislation,[75] which is to be based on such *objective factors*[76] as the aim and the content of the measure[77] and the choice of the legislative procedure.[78]

In several later cases, with the same reference to Article 7(1) of the EC Treaty, the Court repeated the basic formula of the institutional balance – *the Community institutions may act only within the limits of the powers conferred upon them by the Treaty*.[79] In a recent case[80] the Council's separate reference to the principle of institutional balance[81] was ignored by the Court, which instead based its decision on the specific rules of the budgetary procedure.[82]

Interpreting this body of jurisprudence in the light of the concept of institutional balance there are two issues to be emphasized. First, is the specific position of the ECJ, whose political role in the formation of the major concepts of the EU law is well-known. However, it seems to be a different story with the concept of institutional balance. Its role is shifted to a position of a judge or the *guardian of the institutional balance*,[83] rather than an institution enjoying actual rights under the concept. The Court's own legislative role has nothing to do with the "secondary acts", but rather with the interpretation of the Treaties' texts and legal principles. Moreover, the Court does not endeavour to provide any kind of political development with regards to the concept of institutional balance limiting its involvement by the issues of procedure, which is the second point to be stressed.

G. Conway notes that the relevant case-law is open to criticism.[84] It is true if the ECJ's case-law is used to justify any scheme of power distribution. The picture emerging from the ECJ's practice presents institutional balance as a rather narrow concept dealing with the procedural issue of the EU secondary legislation. Thus, the legal aspects of the concept are too far away from any offers of the realm of politics or re-distribution of competences between the main EU institutions. The gap between two major uses of the concept of institutional balance leads to three following consequences. First, the legal basis of the

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[75] ECJ Case 45/86, *Commission* v *Council* ECR 1987.
[76] Ibid., para 11-12.
[77] Para 23 ECJ Case C-22/96 *European Parliament* v *Council* [1998] I-3231.
[78] ECJ Case 68/86 [1988] ECR 855; ECJ Case C-133/06 *European Parliament* v *Council* [2008] ECR I-3189.
[79] Para 39 ECJ Case C-93/00 *European Parliament* v *Council* [2001] ECR I-10119; para 57 ECJ Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801; para 49 ECJ Case 403/05 *European Parliament* v *Commission* [2007] ECR I-9045.
[80] ECJ Case C‑77/11 *Council* v *Parliament* ECR 2013.
[81] Para 21 ibid.
[82] Para 46-72 ibid.
[83] P. Craig, G. de Búrca, *The Evolution...*
[84] G. Conway, 'Recovering a Separation of Powers in the European Union', *European Law Journal*, Vol. 17, No. 3 (2011), p. 320, at <http://dx.doi.org/10.1111/j.1468-0386.2011.00552.x>.

concept does not provide any direct political output, unlike other principles elaborated by the ECJ case-law, like for example principles of proportionality or subsidiarity. Second, politically neutral legal basis of the concept is constantly used as a solid normative reference while providing different power configurations within the EU context. Actually this phenomenal combination of politically neutral normative basis with the balancing as a dynamic political method creates the specific conceptual vehicle for criticizing or legitimizing changes to the EU institutional framework, thus ensuring its adequate development in response to new challenges. And third, the legal and political components of the concept remain rather independent, thus making the entire concept look split.

To conclude this part of the article it is important to emphasize that the legal aspect of the institutional balance concept as elaborated in ECJ case-law constitutes a set of procedural rules, providing no direct political outcome. However, it is also this neutrality of the legal basis of the concept that provides *carte blanche* for diverse interpretations dealing with the development of the EU institutional framework.

V. Institutional balance and representative theory: examining the basis for coherence

Legal and political perspectives to the concept of institutional balance provide two different images of the concept. One might still try to see these two images as a part of a coherent whole. Indeed, representative theory has been suggested to provide this kind of general background framework.[85] However, the attempt of a mere transfer of the representative democracy principles existing in national political systems to the reality of the European Union turns out to be unconvincing. A closer look at the endeavour to apply the representative model to the EU institutional framework reveals an incompatibility between the idealistic theory and the existing practice.

Within the context of the EU, the representative approach is based upon the presumption that the EU institutions fulfil, *inter alia*, a representative role. In the Lisbon Treaty, this approach is reflected in Articles 10 and 17 of TEU. These normative provisions repeat a well-known postulate that the Council represents the interests of the Member States; the European Parliament – interests of citizens of the Member States *brought together in the*

[85] P. Craig introduces his understanding of the institutional balance with the reference to *republican conception of democratic ordering, embodying the ideal that the form of political ordering should encapsulate a balance between different interests, which represented different sections within civil society* – P. Craig, G. de Búrca, *The Evolution...*,, p. 41.

European Union and Commission – represents the common interests of the European Union.[86] This approach was elaborated with a further connection between the institutional balance concept and the representative basis: *The institutional balance 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*.[87]

This is the key idea behind the concept. In theory, the concept may sound attractive and reasonable. However, the representative theory is under-inclusive, as it ignores vast layers of the EU political processes. Moreover, it is based on a utopian presumption about the mechanism of representation. It is also methodologically vague and as such dubious. Finally, representative theory does not offer a clear output, as there is no connection between the offered representative model and the re-shuffle of competences among EU institutions.

It is the fact that the ***representative theory ignores vast layers of the EU political processes***. The practice of the European Union policy – and decision-making processes is far from transparent. This fact has been constantly repeated in the academic literature,[88] and is usually described in the following way: *Substantial elements of European governance operate in the margins of or wholly outside constitutional frame as defined by the institutional balance. The whole area of executive rule-making within the European Union is characterized by intricate institutional elements such as comitology committees and agencies and operates in a constitutional twilight zone, regulated only by a few and ambiguous Treaty provisions, some case-law of the European courts, incomplete pieces of secondary legislation and a number of declarations and inter-institutional agreements*.[89]

The fact that a substantial part of the EU decision-making is done outside the representative bodies undermines the complete concept, as it simply ignores this part of the process. Indeed, what kind of representation is it when *neither European Parliament nor media is in the position to review, evaluate or monitor what is happening in the committee*

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[86] The Union's institutional framework can be called, a *"balancing act"* between the representation of the interests of the Member States, the representation of the political will of the citizens, and the representation of the general interest of the Union. A. Sbragia, 'The European Community: A Balancing Act', *Publius: The Journal of Federalism*, Vol. 23, No. 3 (1993), p. 23.

[87] K. Lenaerts, A. Verhoeven, 'Institutional Balance...'

[88] S. Smismans, 'Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven' in C. Joerges, R. Dehousse (eds.), *Good Governance*..., p. 92.

[89] K. Lenaerts, A. Verhoeven, 'Institutional Balance...', p. 48.

rooms?[90] The same applies to the numerous agencies which *do not have regulatory functions although the expertise they provide is used by the principal policy-making institutions and actors and affects the implementation process*.[91] The process of 'agencification' in the European Union has significantly intensified since the new millennium, bringing up the total quantity of the agencies operative in the European Union to forty.[92] As emphasized in the opinion of AG Jääskinen the challenge now, and has always been, is to balance the functional benefits and independence of agencies against the possibility of them becoming *'uncontrollable centres of arbitrary power'*.[93] However, even after reforms of two recent decades, including the Lisbon treaty, aimed at developing transparent decision-making process the scholars have to admit – *it is regrettable, however, that the new procedures are not sufficiently transparent to ensure accountability to the public*.[94] From this point of view, the representative model fails to cover a vast number of processes dealing with the initial and preparatory phases of the legislative and decision-making process, where numerous committees and agencies are involved.

The formula, which is the cornerstone of the representative approach,[95] is certainly not a fact, but ***a utopian presumption***. The contrast can be best observed in the example of the European Parliament, which is presumed to represent the people of the Member States *brought together by the Union*. In reality, its representative ability is an issue in question.[96]

The issue of "common good" formation leads to a potential conflict between the European Parliament as a forum to formulate the concept and the Commission, which *is not a representative body, yet its members are called to act in the general interest of the Community*.[97] In fact, this issue has already been raised to some extent by S. Smismans.[98] But

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[90] R. Pedler, G. Schaefer (eds.), *Shaping European Law and Policy. The Role of Committees and Comitology in the Political Process*, Maastricht 1996, p. 204.
[91] A. Kreher, 'Agencies in the European Community: A Step towards Administrative Integration of Europe', *Journal of European Public Policy*, Vol. 4, No. 2 (1997), p. 239.
[92] Listed at <http://www.europa.eu/about-eu/agencies/index_en.htm>, 1 September 2015.
[93] Para 19 Opinion of Advocate General Jääskinen…
[94] S. Peers, M. Costa, 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', *European Law Journal*, Vol. 18, No. 3 (2012), p. 460, at <http://dx.doi.org/10.1111/j.1468-0386.2012.00607.x>.
[95] *The Council represents the interests of the member-states, European Parliament – interests of citizens of the member-states, "brought together in the European Union" and Commission – the common interests of the European Union.*
[96] S. Douglas-Scott, *Constitutional Law of the European Union*, Harlow 2002, p. 132 or K. Lenaerts, A. Verhoeven, 'Institutional Balance...', p. 57.
[97] K. Lenaerts, A. Verhoeven, 'Institutional Balance...', p. 51.
[98] *When 'the general interest of the Community' is understood as the pursuit of the objectives of the Treaty, the Commission could be assumed to represent this interest. Yet could 'the general interest of the Community' not equally be understood as the general interest of all European citizens? And would then, for instance, the European Parliament not be best placed to represent this interest?* – S. Smismans, 'Institutional Balance...', p. 97.

the situation where the concept is formulated in the EP and then is fulfilled by the Commission falls into the scheme of parliamentary republic, which is certainly not the case with the European Union. The Commission, originally designed as the engine and driving force of the European Union,[99] for decades has been the one to determine the "common good", and not just to fulfil the ideas of others. It will hardly yield its authority to determine the direction of the EU further development merely on the grounds that it represents neither the people of Europe nor the Member States.

L. Hoffman adequately emphasised the internal weakness of the representative model, thus trying to draw attention to its essence instead of the façade: *Quite often the institutional balance is viewed as the balance of representation model within which the Commission represents the Union's interests, the Council the member state governments and the Parliament the EU citizens. Each of the stakeholders is adequately represented so the only thing missing is public participation and interest*.[100]

So, with a rather controversial existing system of interest representation for the European Union's institutions, which is far more complicated than the theoretical model it is based upon, the use of the presumption as a cornerstone for power distribution schemes can hardly be convincing.[101]

The attempts to widen the representative concept to all EU main bodies, then to second-level organs, and then still to all institutions and agencies, leads to nowhere; thus creating complete chaos instead of a harmonious system. And the reason for this is the fact that ***the representative approach is methodologically improper***. Commenting upon K. Lenaerts and A. Verhoeven's concentration of the interest representation on the Council and European Parliament, S. Smismans tried to widen the application of the concept to the complete list of the main institutions.[102] Further discussing the idea of defining institutional balance in broader terms by including into the system such bodies as the Economic and Social Committee and the Committee of the Regions, S. Smismans remarks that: *This formulation suggests that the institutional balance could also include the many bodies and representative structures for functional participation established by secondary European law*.[103]

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[99] Ph. Thody, *A Historical Introduction to the European Union*, London 1997, p. 29.
[100] L. Hoffmann, 'Constitutional Expectations...'
[101] As emphasized by G. de Búrca *Even if the "institutional balance" is not treated by the Court as a rigid rule but a more fluid principle safeguarding pluralism within the policy process, there are nonetheless major concerns about those interests exactly are being represented* – P. Craig, G. de Búrca, *The Evolution...*, p. 74.
[102] S. Smismans, 'Institutional Balance...', pp. 96-97.
[103] Ibid., p. 98.

This raises a number of questions. Is the list of institutions to be considered part of the institutional balance thus complete? Or, should organs such as the European Central Bank or the European Investment Bank, which are equally enshrined in the Treaty, also be part of the list?[104] The language of S. Smismans is both accurate and adequate on these fronts: *By including automatically in the institutional balance all organs enshrined in the Treaty, the concept would be reduced to a simple application of the rule of law and would be emptied of its 'legitimating potential'*.[105]

The unfoundedly broad use of the representative model reveals a methodological fault, since instead of a unified representation formula, or a single criterion, there is a line of different ones, varying from people or countries to various ideas, interest groups, etc. And the list can be continued, thus creating one universe of representative bodies and another universe of groups and ideas still to be represented on the EU level. The absence of unified criteria for representation, as well as the absence of clear rules for the representative mechanism, undermines the stability of the complete concept.

Probably the biggest problem of the representative model application is ***its lack of a clear output, as it thus lacks clear logic***. Even if one agrees with either the initial representative model dealing with the Commission–Parliament–Council triangle, or any derived model – from those including only the main bodies to those spreading the representation down to committees and agencies – then there is still no answer to the question which follows – so what? What is the practical outcome of the presumption that the Economic and Social Committee *shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio- economic, civic, professional and cultural areas*,[106] and the Court of Auditors represents *the interest of financial accountability*?[107] What are the criteria to ensure that the powers, entrusted to the body in any way, correspond to the level of representation they are assumed to reflect?

Therefore there is a gap between the concept itself and the actions which are purportedly taken on its basis. The representative model thus looks more like a *post factum* analysis rather than a genuine basis for the actual decision-making process.

To finalise the examination of the representative approach, it should be emphasised that with existing inner flaws and inconsistencies it cannot be viewed as an adequate and steady theory, underlying and unifying the concept of institutional balance. With no other

[104] Ibid., p. 99.
[105] Ibid., p. 100.
[106] Art. 300 TFEU.
[107] S. Smismans, 'Institutional Balance...'

visible possibilities to connect two different parts of institutional balance, the incoherence of the concept becomes even more evident.

VI. CONCLUSIONS

The uniqueness of the European Union leads to the fact that the measures introduced to balance its existing system resemble a "hit or miss" method rather than the fulfilment of a pre-designed plan. However, such a state of affairs is an integral part of the evolution of the European Union as it advances along an unknown road with no exact destination, and with many *ad hoc* challenges encountered *en route*. From this perspective, institutional balance as a dynamic model reflects the necessity to periodically check and adjust the EU power distribution architecture in order to provide adequate responses to new challenges that appear as a result of the evolving nature of the European Union. With its roots in the idea of balancing intergovernmentalism and supranationalism, the concept of institutional balance provides a dynamic conceptual vehicle for criticizing or legitimizing different power configurations within the European Union. However, the concept does not provide any single coherent ground for the design of distribution of powers within the EU institutional framework due to its own flaws.

Firstly, it does not have solid political theory to support it. The representative model behind the institutional balance concept can hardly be viewed as an adequate theoretical basis, since it does not offer a clear and systematic representation rules with their further connection to power distribution schemes.

Secondly, there is a gap between the use of institutional balance concept in terms of legal and political meaning. As a political principle, the concept of institutional balance reflects an intention to balance diverse aspects of the political system of the European Union to ensure mutual control within its institutional framework. As a legal principle the concept of institutional balance is a politically neutral set of procedural rules. However, neutrality in this sense creates too broad gates to provide any single coherent political formula for the power distribution. Therefore, it mostly opens up different argumentative possibilities readily available to anyone willing to either lock in or change the current power structures of the EU.

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