**Chapter 10. Chernobyl and the Inter-institutional Balance**

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## 1. History and doctrinal content: a matter of institutional balance *and* of judicial protection

In 1990, when the Court issued its *Chernobyl* judgment, the standing rules in actions of annulment were still the ones that the Treaties of Rome had defined in 1957. [2] Direct action before the Court was available to a select group of privileged applicants – the Member States, the Council and the Commission – and to natural and legal persons against decisions addressed to them or of individual or direct concern to them.[3] The original lack of capacity of the Parliament to sue and be sued went hand in hand with its weak powers in the original institutional set up.[4] It, thus, reflected the deeply executive nature of the European Communities. Yet, the continued absence of the Parliament from Article 173 EECT and Article 146 Euratom contrasted with the enhanced powers it had been given in the Single European Act in 1986.

The immediate significance of the judgment in *Chernobyl* lies here: it granted standing to the Parliament in actions of annulment, even if limited to instances where it sought "to safeguard its prerogatives" and grounded "only on submissions alleging their infringement."[5] The Court thus created an intermediate category of "semi-privileged applicants" in actions of annulment. Shortly after *Chernobyl*, the Treaty incorporated this limited standing of the Parliament in the 1992 revision of Article 173, which also extended such conditional standing to the ECB. In the Amsterdam revision of 1999, the Court of Auditors would join this group of semi-privileged applicants.

But if *Chernobyl* was a matter of legal protection, institutional balance was what made that result possible. In the absence of any written norm and faced with a "procedural gap" that prevented the Court from protecting the Parliament's institutional prerogatives,[6] the Court considered that the principle of institutional balance required the recognition of a legal remedy in case of breaches that impinged on the prerogatives of the institutions as established in the Treaty.[7] *Chernobyl* would become known because of the role it gave to the principle of institutional balance:

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[2] Judgment of 22 May 1990, *Parliament v Council,* C-70/88, EU:C:1990:217 (hereafter, '*Chernobyl*'), para 27.
[3] Treaty Establishing the European Economic Community, 25 March 1957, art. 173 at 129 <https: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT> (hereinafter 'EECT').
[4] Opinion of AG Van Gerven of 30 November 1989, *Parliament v Council,* C-70/88, EU:C:1989:604, para 3.
[5] '*Chernobyl*', para 27.
[6] Ibid, para 26.
[7] Ibid, paras 21-23.

it was not only the foundation of the Parliament's standing, but also a means to enable the Court to change that balance, despite the voices that insisted that the Court was merely spelling out the institutional balance as it resulted from the Treaties. It thus seemed to give this principle a "dynamic character",[8] even if with hindsight *Chernobyl* was the single instance in which the Court resorted to this principle as a means to "supplement" the text of the Treaties.[9]

*Institutional balance before Chernobyl*

Institutional balance had become a principle of EU law in *Meroni*. Based on the ECSC Treaty Article that defined the binding character of the objectives of the Community on the institutions, within the framework of their respective attributions and in the common interest, the Court considered that this norm reflected the "balance of powers which is characteristic of the institutional structure of the Community" and held it to be "a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies".[10] As Jacqué noted later, this element of protection of legal persons subsided in the subsequent judgments.[11] It was mostly relevant in judgments involving only the institutions – an aspect that *Chernobyl* confirmed.[12] Before *Chernobyl*, that was notably the case in *Köster*, where the Court had framed the legality of the controls over comitology committees as a question of institutional balance, and in *Roquette Frères*. Here, the Court had equated the Parliament's consultation in the legislative procedure to "an essential factor in the institutional balance intended by the Treaty[,]" which "[a]lthough limited, … reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."[13]

As will be seen in more detail below, institutional balance has been termed a constitutional law principle and has been invoked to establish both the constitutional parallels between the EU law and national constitutional law, on the one hand, and the specificity of the Union, on the other. In *Chernobyl*, specifically, the principle of institutional balance stressed the distinctive character of EU law, since at stake was, in essence, the ability of the Parliament to act judicially to protect its prerogatives, an odd element for political parliamentary institutions. As Advocate General van

[8] Jean Paul Jacqué, 'The Principle of Institutional Balance' (2004) 41 CML Rev 383, 386.
[9] Bruno de Witte, 'The Role of the Court of Justice in Shaping the Institutional Balance in the EU' in Joana Mendes and Ingo Venzke (eds) *Allocating Authority: Who Should Do What in European and International Law?* (Hart Publishing, 2018) 148.
[10] Judgment of 13 June 1958, *Meroni v High Authority*, 9/56, EU:C:1958:7, 152.
[11] Jacqué (n 8), 385-386.
[12] Judgment of 26 May 2005, *Tralli v European Central Bank*, C-301/02 P, EU:C:2005:306, para 46.
[13] Judgment of 17 December 1970, *Köster*, Case 25/70, EU:C:1970:115, para 4; Judgment of 29 October 1980; *Roquette v Council*, C-138/79, EU:C:1980:249, para 33.

Gerven wrote in his opinion, "the choice made in the Treaties of having the scope of powers subject to review also by the courts, even when the legislature [at the time, the Council] is affected thereby, is a choice which departs from that adopted in more than a few Member States – especially those where there is no federal structure".[14]

*The Parliament at the Court: a politically delicate issue*

*Chernobyl* must be understood against the legal background of two judgments that immediately preceded it, both issued after the adoption of the Single European Act: *Les Verts* and *Comitology*. In *Les Verts*, rule-of-law arguments had supported the judicial recognition of the Parliament's capacity to be sued, despite Article 173 EECT's continued exclusion of the Parliament from the group of privileged applicants. The Court anchored this result in the necessity of subjecting "intended to have legal effects vis-à-vis third parties" to judicial review and added one of its most famous proclamations: the Community is "based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[15] In *Comitology*, on the contrary, the Court had blocked the Parliament's attempt to have standing in an action for annulment on rather peremptory grounds: "the applicable provisions, as they stand at present, do not enable the Court to recognize the capacity of the European Parliament to bring an action for annulment".[16]

The contrast between the position the Court had assumed in *Les Verts* – drawing on a general principle in the absence of a written Treaty norm and against the wording of the Treaty norm – and the position it took in *Comitology* was noted by many commentators at the time.[17] Both judgments had been issued just after the Single European Act (*Les Verts* a few months after the Treaty revision had been signed, *Comitology* two and a half years later) but only in *Comitology* did the Court explicitly invoke the contrast between the unchanged wording of Article 173 EEC and the revised Parliament's enhanced powers as one reason to deny granting the Parliament powers to defend judicially its institutional prerogatives.[18]

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[14] Opinion of AG Van Gerven (n 4) para 3.
[15] Judgment of 23 April 1986, *Les Verts v Parliament*, C-294/83, EU:C:1986:166, paras 25, 23.
[16] Judgment of 27 September 1988, *Parliament v Council*, C-302/87, EU:C:1988:461, para 28 (hereafter, '*Comitology*'). The *Comitology* judgment was issued roughly seven months after the Parliament registered its application for *Chernobyl* (4 March 1988).
[17] For a strong critique of *Comitology*, based on the constitutional role of the Court of Justice, see Gerhard Bebr, 'Case C-70/88, *European Parliament v Council*, Judgment of the Court of Justice of 22 May 1990' (1991) 28 CML Rev 663. For a more sober analysis, see Jean-Paul Jacqué, 'La légitimation active du Parlement européen ou il n'était pas nécessaire d'espérer pour entreprendre' (1990) 26 Revue Trimestrielle de Droit Européen 620; and Massimo Condinanzi, 'Il ruolo del Parlamento europeo nel contenzioso comunitario. Una nuova pronuncia della Corte di giustizia' (1991) *Rivista italiana di diritto pubblico comunitario* 127, 134 (pointing out "an evident logical contradiction").
[18] *Comitology* (n 16) para 26.

The matter was politically rather delicate: in the revision of 1986 the Council had refused to approve a proposal by the Commission to include the Parliament in the group of privileged applicants.[19] The sign that the Treaty revision had given seemed clear: at the very least there was no unanimity among the Member States to support the inclusion of the Parliament in the group of privileged applicants. While that had not prevented the Court from mitigating this blockage in *Les Verts*, the same Court had been unwilling to take a step further in *Comitology*. As a result, it struck a balance between respecting the Treaties and ensuring legal protection for the Parliament's prerogatives that satisfied neither the Commission nor the Parliament. According to *Comitology*, the Commission had the duty to protect the prerogatives of the Parliament, which was contrary to the Parliament's autonomy of decision-making and placed the Commission in an impossible position when, in a case such as this, it did not support the Parliament in substance.[20]

*Comitology* stood out as an apparent exception to the Court's consistent jurisprudence of building "an adequate and coherent system of legal protection",[21] and to the "tendency to extend the Parliament's right to bring actions", while respecting the "principle of restrictive attribution of judicial powers".[22] Before *Les Verts*, the Court had recognised the Parliament's capacity to bring an action for failure to act, its general right to intervene before the Court (i.e. not dependent on proof of interest in the result of the case), the Court's ability to ask the Parliament to provide information in direct actions and in preliminary reference procedures.[23] Before still, measures of the Parliament had been the object of references for preliminary ruling, both of interpretation and validity.[24]

*Chernobyl*, at the end, provided a legal solution to a deeply political issue. The judicial recognition of the Parliament's *locus standi* in actions for annulment would mean a self-attribution of review powers by the Court, following the presumed lack of agreement between the Member States to amend Article 173 EECT. One option out of the conundrum was a principle-based position; namely, the Court could draw on the adequacy and coherence of the system of legal protection, as in *Les Verts*. That was the path that AG van Gerven set in his opinion: limited attribution of judicial powers was justified as "an inalienable task of the courts".[25] Institutional

[19] Opinion of AG van Gerven (n 4) para 5.
[20] 'Report for the Hearing', *Parliament v Council,* Case C-70/88 [1986] ECR I-2042 (hereafter '*Chernobyl* Hearing Report') I-2049, I-2051 (para 3).Obviously, having refused to change the proposal following the opinion of the Parliament, the Commission could not, in Court, support its position, a point which the Parliament used to argue the existence of 'a legal vacuum'. Ibid, I-2050.
[21] Opinion of AG van Gerven (n 4) para 5.
[22] Ibid, para 4.
[23] See, respectively, Judgment of 22 May 1985, *Parliament v Council*, Case 13/83, ECLI:EU:C:1985:220; *Roquette Frères* (n 13); Judgment of 10 July 1988, *Wybot v Faure*, Case 149/85, EU:C:1986:310.
[24] Opinion of AG van Gerven (n 4).
[25] Opinion of AG Van Gerven (n 4), para 6.

balance – be it by "establishing (or [by] re-establishing)" it – in the opinion of the AG, was "*not* the province of the courts".[26] As is well-known, this was not the path the Court followed.

## 2. Facts and judgment

*An institutional play of catch-up*

One year after the Chernobyl nuclear accident, the Commission, concerned about the contamination of foodstuffs and of feedingstuffs, submitted to the Council a proposal to adopt a regulation setting maximum permitted levels of radioactive contamination, to apply also to "any other case of radiological emergency".[27] The proposal would enable the Commission to adjust those levels, in line with "the latest scientific advice" and international regulatory practice, "to the circumstances of any particular nuclear accident" or emergency, and ban from circulation within the internal market foodstuffs and feedingstuffs in breach of the defined levels.[28] At stake was the protection of the health of the population, the reassurance of the public, and the unity of the internal market, as to "avoid deflections of trade within the Community".[29] The legal basis chosen was Article 31 of the Euratom Treaty, which stipulated that basic standards for the protection of the health of the general public and workers against the dangers arising from ionizing radiation (envisaged in Article 30 of that Treaty) are, first, "worked out" by the Commission, subsequent to the opinion of a group of Member states' scientific experts and the opinion of Economic and Social Committee, and, second, are established by the Council, after consultation of the Parliament.[30]

The facts of the case point to a clear marginalization of the Parliament during this process and document a strong political reaction against that marginalization. The Parliament was officially informed of the proposed regulation only through the Council's request of consultation. Yet, in the immediate aftermath of the nuclear accident, it had been rather swift in requesting "the competent Community authorities to protect the health of the general public by setting, on a uniform basis, the maximum radiation limits applicable to foodstuffs".[31] In a resolution adopted by an impressive majority (232 votes to 2 with 9 abstentions), the Parliament disputed the

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[26] Ibid.
[27] Council Regulation (Euratom) No 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency [1987] OJ L371/11, Preamble, arts 1 and 2.
[28] Ibid, Preamble.
[29] Ibid.
[30] These provisions remain in force: *see* Consolidated Version of the Treaty Establishing the European Atomic Energy Community [2012] OJ C327/1.
[31] *Chernobyl* Hearing Report, I-2043, para 4 (referring to European Parliament resolutions adopted on 15 May 1986 and 11 September 1986.

appropriateness of the legal basis that the Commission had chosen.[32] In its view, the contested regulation should be adopted on the basis of Article 100a of the EEC Treaty, the clause on the harmonization of internal market which provided for the cooperation procedure for the adoption of Community acts. The Parliament requested the Commission to revise its proposal accordingly. Two weeks later, it voted the amendments to the Commission's proposal, including an amendment to the legal basis. This resolution, too, was approved by an absolute majority.[33]

The Commission, however, kept Article 31 of the Euratom Treaty as the legal basis of the regulation, prompting the Parliament to adopt a strong re-statement of its position. Before the Christmas break of 1987, the Parliament passed yet another resolution (again adopted by a very strong majority of 348 votes to 26, with 9 abstentions) entitled "legislative resolution (cooperation procedure)".[34] It rejected the Commission proposal and, procedurally, it instructed the President of the Parliament to "forward [that] legislative resolution to the Council and Commission as Parliament's opinion".[35] But, two days before, the Council had reached an agreement on the original Commission's proposal. Taking "note" of the Parliament's opinion, the Council adopted Regulation No 3954/87 just in time for the Christmas' closure.

The matter, naturally, ended up in Court. The Council, supported by the Commission and by the UK, contested that the Parliament had standing to bring the action of annulment, given the wording of Article 173 EEC. Admissibility on grounds of standing became the only issue of the judicial dispute.

*Behind legal protection: a dispute on the role of the Parliament*

Institutional balance came in forcefully in the Council's argumentation before the Court. Two years before *Chernobyl* was brought to Court, *Les Verts* had recognised the Parliament's capacity to be sued in actions of annulment, and the Council's argumentation was, naturally, directed at disentangling standing from the case law that had, until then, strengthened the Parliament's position as a litigant. In the Council's view, standing would be not only in breach of the Treaty's system of remedies. Granting standing to the Parliament was contrary the principle of institutional balance (understood as "accordance with legal rules"), as it would place the Parliament "in direct

[32] Resolution on the legal basis for the proposal from the Commission of the European Communities for a Council regulation (Euratom) laying down maximum permitted radioactivity levels for foodstuffs, feedingstuffs and drinking water in the case of abnormal levels of radioactivity or of a nuclear accident [1987] OJ C305/1, 33.
[33] *Chernobyl* Hearing Report (n 20) I-2044 (quoting the October 1987 Resolution on Legal Basis (n 32)).
[34] Ibid, I-2045 (quoting Legislative Resolution (Cooperation procedure) embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a regulation laying down maximum permitted radioactivity levels for foodstuffs, feedingstuffs and drinking water in the case of abnormal levels of radioactivity or of nuclear accident [1988] OJ C13/61).
[35] Ibid.

competition" with the Commission as guardian of the Treaties. It would, then, "split in two" the power of "political review".[36] The Council recalled that the Parliament was not the legislature. That was the role of the Council. If recognized, the ability to sue the Council, would give the Parliament the ability to intervene in the legislative procedure in addition to the opportunities enshrined in the Treaties.[37] The Council saw, therefore, a direct link between the possibility of the Parliament to trigger judicial review in actions of annulment and the change that such judicial such recognition would mean in the institutional balance set by the Treaty.[38] *Comitology* supported its plea. Issued while *Chernobyl* was pending, that judgment had explicitly rejected the Parliament's argument that institutional balance required a parallelism between legal remedies (action for annulment and action for failure to act) and between the capacity to be sued and capacity to sue.[39]

The Parliament, in turn, argued that the Court, in *Comitology* had recognised the Parliament as "a political institution equipped with the power of political review".[40] Unlike the Council, the Parliament attached the label "political review" to the "right to participate in the legislative procedure".[41] The Parliament did not fail to notice that, while being "an eminently political institution" that must "defend its prerogatives by political means", it was nevertheless obliged to defend them judicially, unlike national parliaments.[42] In the circumstances of *Chernobyl*, the Parliament had been precluded from enforcing its institutional prerogatives of participation in the legislative procedure. The Commission, who, according to *Comitology*, had "the responsibility for ensuring that the Parliament's prerogatives are respected and for bringing for that purpose such actions for annulment as might prove to be necessary", had not supported the Parliament in this specific case.[43] The circumstances underlying *Chernobyl*, therefore, showed, in the Parliament's view, that the "concept of a complete system of legal remedies" required a recognition of its ability to bring an action of annulment.[44] Only then would the existing "legal vacuum" be closed.[45]

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[36] *Chernobyl* Hearing Report, I-2048.
[37] While this is not stated as such, it seems implicit in the Council's line of argumentation.
[38] Ibid, I-2048.
[39] Opinion of AG Van Gerven (n 4) para 9 (mentioning only the latter point).
[40] *Chernobyl* Hearing Report (n 20), I-2048- I-2049.
[41] The Parliament's argument was the following: "in [*Comitology*] the Court stated that the European Parliament was a political institution equipped with powers of political review, that is to say its motion of censure *and* its right to participate in the legislative procedure" (emphasis added). Indeed, in Court in *Comitology* specifically stated that 'As is apparent from Articles 143 and 144 the European Parliament is empowered … to exercise political control over the Commission … and … to censure the Commission, where necessary, if the latter should fail properly to discharge that task.' *Comitology* (n 16) para 12. Aside from the power of censure (EECT art 144), those norms only referred to the Parliament's competence to discuss the Commission's annual report (EECT art 143).
[42] *Chernobyl* Hearing Report (n 20) I-2049.
[43] *Comitology* (n 16) para 27 and *Chernobyl* (n 5) para 6.
[44] *Chernobyl* Hearing Report (n 20), I-2051.
[45] *Chernobyl* (n 5) para 8.

*Legal protection, rather than institutional balance?*

The facts of the case made legal protection a compelling argument. The Court started by stating the obvious: under the Treaty, the Parliament did not have the right to bring an action for annulment.[46] Yet, unlike the position it had taken in *Les Verts* - where the Court had found no obstacle in the exclusion of the Parliament from Article 173 EECT to recognize its ability to be sued – the Court now considered that the letter of the Treaty was *not* an obstacle that it could overcome. As we will see below, this premise was consequential.

In essence, the facts *Chernobyl* required that the Court revise the position it had adopted in *Comitology*. It was clear that the various legal remedies available to the Parliament to defend its prerogatives could "prove to be ineffective or uncertain"; manifestly, they were not sufficient to guarantee "with certainty and in all circumstances" that judicial review could ensure respect of those prerogatives.[47] The action for failure to act would be of no avail when, as in this case, an act had been adopted. The Parliament could not rely on other litigants bringing a preliminary reference on validity or an action of annulment. In particular, the protection by the Commission, which the Court had invoked in *Comitology*, could clash with the Commission's position on the legislative procedure. The Court could not oblige the Commission to bring proceedings that were not in its own interest.[48]

The Court was clearly convinced by the case that the Parliament had mounted to show the existence of "a legal vacuum", as, without standing, "the choice of legal basis could not be challenged and the Parliament could not ensure that its own institutional prerogatives were respected."[49] The matter was, like in *Les Verts*, a matter of rule of law or of securing "a complete system of legal remedies". AG Van Gerven had forcefully made the point: "The essential question which has arisen with perfect clarity in this case is … this: should the Parliament be offered less extensive legal protection than that enjoyed by individuals (…) whenever it is necessary to safeguard through the courts own rights, powers or prerogatives?"[50] By using a broad definition of legal protection – as covering rights, powers and prerogatives – the AG had established a direct comparison between the Parliament and individuals; he noted also that Les Verts was political party (hence, with "a public law vocation") that had not claimed "subjective rights', but electoral

[46] Ibid, paras 12-14 (the later aspect had been analysed by the Council in its submissions).
[47] Ibid, paras 16, 20.
[48] Ibid, paras 17-19, where the Court rejects the position it had defended in *Comitology* (n 16) para 27.
[49] *Chernobyl* Hearing Report (n 20) I-2050.
[50] Opinion of AG van Gerven (n 4) para 9.

funds.[51] Yet, if it was clear that the Parliament needed to be released of its position of "tutelage" under the Commission,[52] the Court reached that result without even mentioning *Les Verts*.

*The "apotheosis" of institutional balance*

The Court was convinced by the correction that the AG asked for, but not by its reasoning. In the absence of a written norm that could support the standing of the Parliament, institutional balance was the foundation on which it justified the need to enable the Parliament to protect its prerogatives in an action for annulment. *Chernobyl* ended up meaning "the restoration, not to say the apotheosis, of the concept of 'institutional balance' as a benchmark in identifying the legal obligations governing relationships between the institutions in the decision-making process, and in defining the Court's own role in settling disputes in this area."[53]

That "apotheosis" was made possible by three main steps: the prerogatives of the Parliament are "one of the elements of institutional balance";[54] observance of this balance requires that "it should be possible to penalize" any breaches thereof through remedies that are "suited" to the result sought by the Parliament, and can be deployed in "a certain and effective manner";[55] this is a duty of the Court.[56] Having framed the problem in these terms, the Court could argue that the lack of written support for the Court to deploy this role was "a procedural gap" – and no longer, as in *Comitology*, a choice of the Member States – which could not "prevail over the fundamental interest in the maintenance and observance of the institutional balance".[57] As one commentator pointed out, the adjective "procedural" minimized the importance that the Court attributed to what it characterized as a silence of the Treaty in the same paragraph where it stressed the importance of institutional balance.[58] Still, the absence of the Parliament from Articles 173 EEC and 146 Euratom was meaningful. Given the grounds of the judgment, the Parliament's ability to bring an action of annulment would be admissible on conditional grounds: only to safeguard the prerogatives of the Parliament and only based on submissions alleging their infringement.[59]

The Court thus took one step back from its constitutional-like reading of the Treaty, of which *Les Verts* remains a hallmark, while still taking an important step in the Community

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[51] Opinion of AG van Gerven (n 4) paras 6-12.
[52] Opinion of AG van Gerven (n 4) para 12. Jean-Claude Bonichot, "Recueil Dalloz Sirey (1990) Jur., p. 446-449, at 447.
[53] Kieran Bradley, 'Sense and Sensibility: *Parliament v Council* Continued' (1991) 16 EL Rev 245, 254.
[54] *Chernobyl* (n 5) para 21.
[55] Ibid, paras 22, 23, 25.
[56] Ibid, paras 23, 25.
[57] Ibid, para 26.
[58] Vlad Constantinesco, 'Chronique de jurisprudence de la Cour de justice des Communautés européennes. Institutions et ordre juridique communautaire'(1991) *Journal du Droit International* 451, 454.
[59] C*hernobyl* (n 5) para 27.

institutional evolution. By relying on a procedural lacuna and on its duty that the "law be observed",[60] the Court took the cue that the some of the Member States reportedly had left it: develop the law, as needed, also by settling a point - the standing rights of the Parliament – on which the Member States had not been able to reach an agreement.[61]

## 3. Academic reception

Most of the judgments that drew directly on *Chernobyl* were either occupied with refining the conditional aspect of the Parliament's standing or involved legal bases disputes, which had been the background of *Chernobyl*. Yet, the relatively modest references to *Chernobyl* in subsequent case law contrast with the academic reception of the judgment. Most academics greeted *Chernobyl* with enthusiasm. Some stressed its constitutional significance, more because of the role that the Court itself had assumed in shaping the EU's institutional balance in a "dynamic way" than of what the standing of the Parliament could mean for the transformation of the EU institutional set up in support of a more democratic Community. A few, more soberly, preferred to stick to a limited legal-dogmatic analysis and emphasized the technical relevance of the judgment in two respects: the explication of the traits of the principle of institutional balance and the creation of a new category of semi-privileged litigants. They pointed out that, as significant as the judgment was, the Court had remained within the boundaries of its judicial role and respected the will that the Member States had expressed in the Treaty. Others, still, emphasized the political significance of the judgment, in articulation with the legal novelty of standing, and assessed it in view of the possible contribution of the judgment to the democratic legitimacy of the Union (then Community) . These three positions will be presented next.

*One view: a further step in the construction of a "constitutional order"*

Influential academics in the French legal world saw *Chernobyl*. as a sign that the Court was assuming a role akin to that of a domestic constitutional court.[62] For some, this was the main contribution of this judgment. Jacqué was adamant: "the judgment is of capital importance since the Court, at the cost of a 'creative interpretation', recognises itself as the guardian of the *Community constitutional order* and confirms its function as a *constitutional court*".[63] The constitutional reading of the judgment was shared by Bradley, at the time member of the Legal Service of the European Parliament. He

[60] See Bradley (n. 53) 251.
[61] Opinion of AG van Gerven (n 4) para 5, fn 16 (citing a declaration by then-Commission President, Jacques Delors, on the lack of unanimity of the Council on the Commission's proposal to extend standing of the Parliament during the revision of the Treaties in 1985).
[62] Constantinesco, (n 58) 455.
[63] Jacqué (n 17) para 12, emphasis added.

praised the Court for protecting the prerogative of the Parliament, correcting its "defective or incomplete" reasoning in *Comitology* and for being responsive to "the desirability of an extensive view of its own duties as constitutional arbiter",[64] noting that the Court had "returned to the *spirit* of *Les Verts*".[65] Still in the constitutional vein, the rather emphatic – if not fervent – terms by Gerhard Bebr, contrast with the mostly cautious constitutional reading of the judgment of other commentators. Writing in his capacity as former legal advisor to the Commission and member of that journal's advisory board, he took the constitutional role of the Court as a premise and not as a consequence of the judgment and welcomed *Chernobyl* as reflecting "a sense of constitutional realism and responsibility sorely missed in *Comitology*".[66] He rejected *Comitology* as a "precipitated, unreflected ruling" where "the Court largely abdicated … its mission as a Community constitutional court" and "unfortunately failed to demonstrate boldness and vision it had shown in instances crucial for the development of the Community legal order in the absence of any explicit, formal Treaty provision".[67] This reasoning begged the unanswered question of when it is that the lack of Treaty provision means a lacuna.

The constitutional role of the Court was shared even by scholars whose analyses of *Chernobyl* did not turn on a constitutional argument, but stressed the relevance that the judgment gave to institutional balance.[68] Yet, the authors who took this position simply identified the constitutional character of the judgment in the fact that the Court arbitrates inter-institutional conflicts, through the principle of institutional balance. The relative position of the Court while filling in what the Court identified as a lacuna (following, in part, the Parliament), on the one hand, and of the Member States, who had recently refused a proposal to include the Parliament in Article 173 EEC, on the other, did not weigh in their characterization of the judgment as "constitutional".[69]

It was the preeminence that the Court gave to the principle – as a justification for the recognition of a limited standing that must prevail over a "procedural gap" – that led

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[64] Bradley (n 53) 245.
[65] Ibid, 250 (emphasis added).
[66] Bebr (n 17) 676.
[67] Ibid, 666 (in the footnote he drew the parallelism with 'supremacy', direct effect, and fundamental rights' protection; the qualification of *Comitology* as "precipitated, unreflected" can be found on p 667).
[68] Marc Thill, 'Jurisprudence récente de la Cour concernant le Parlement européen' (1994) 1 *Tendances actuelles et évolution de la jurisprudence de la Cour de justice des Communautés européennes: suivi annuel* (Ed. Institut européen d'administration publique - Maastricht) 1,- 10 (*Chernobyl* 'underlines forcefully - if it were still necessary - that the Court ... has the nature of a constitutional Court'); Bonichot (n 52) 448 ('the Court is increasingly asserting itself as the Communities' Supreme Court').
[69] This point is, however, noted, in very different terms by Jacqué ((n 17) point 13), on the one hand, who speculates whether the Court had realized that the "silence of certain Member States" during the 1985 intergovernmental conference meant that they thought that the question would be settled by the Court, and Bebr ((n 15) 679-680)), on the other, for whom, 'the fundamental requirement of the rule of law had to prevail in this instance over the inertia of the Member States',.

Constantinesco and Jacqué to attach the label "constitutional" to the *principle*. For Constantinesco, the Court expressed in *Chernobyl* "a coherent overall vision of the Community's institutional order and of its structuring principles", specifically of the principle of institutional balance that it "established as a 'constitutional principle'".[70] While the inverted commas still denote a certain reservation over the use of 'constitutional' attribute, Constantinesco did not hesitate to conclude that the principle thereby became the expression of separation of powers at the EU level.[71] Jacqué, in turn, while noting the due differences between separation of powers and institutional balance, concluded that the *Chernobyl* invited "a reflection on the constitutional principles of EU law", which "the Court will carry out at the rhythm of the cases that it will receive".[72]

By labelling these developments "constitutional", and drawing the parallels with separation of powers, these academics were stressing an evolution that "[seemed] to lead Communities increasingly towards techniques of national law".[73] But they were also agents in slowly opening the way for the "theoretical schemes" that would in the future shape an institutional system which, in essence, was still largely a product of institutional practice.[74] Yet, the explicit analogy between institutional balance and separation of powers was far from unanimous. Separation of powers was mentioned also to deny any analogy with institutional balance. Boulois argued forcefully in his handbook: "the division of powers characteristic of the Community's institutional system is not ... a modality of such a separation and *cannot become one for the reason that the institutions do not derive from the same legitimacy*".[75] This was the reason that, in his view, rendered the legal protection of the scope of competences so crucial.

Those who resisted the too easy likening of institutional balance to separation of powers preferred to point the specific traits of institutional balance and the contribution of *Chernobyl* in this regard. The Court had identified the "substantive content" of the principle: it simply meant that "each institution must respect the competences of the others, and that breaches of the rule imposing such respect must be open to judicial sanction".[76] Yet, while this was affirmed explicitly for the first time in *Chernobyl*, this content was hardly noteworthy. Bradley associated this notion of institutional balance to the principles of conferred powers and rule of law, which he identified as "respectively … the political and the jurisdictional elements" of institutional balance.[77] The

[70] Constantinesco (n 58), 453.
[71] Ibid, 454.
[72] Jacqué (n17) point 21.
[73] Constaninesco (n 58) 455.
[74] Contrasting the Community system to internal constitutional law, see Claude Blumann and Louis Dubois, *Droit Institutionnel de l'Union Européenne* (Litec 2004) 123.
[75] Jean Boulois, *Droit Institutionnel de l'Union Européenne* (5th edn, Montchrestien 1995) 143-144.
[76] Bradley (n 53) 255.
[77] Ibid, 255-256.

mandate that the Treaty defined for the Court – "to ensure that the law is observed" – invoked explicitly in the judgment, enabled the Court "to take account of structural considerations" and, hence, to create "new means of recourse".[78] Not going this far, Jacqué noted that the institutional balance is composed of a series of specific balances, expressed in the legal bases, which depend on the interests at stake, that the Court must preserve.[79] He stressed the dynamic side of the principle, which enabled the institutions, through loyal cooperation, to mutually adjust their relationships within the powers assigned by the Treaty.[80] Nevertheless, Jacqué pointed out the limits of the Court as *guardian* of the institutional balance, and attached this dynamism to the role of the other institutions.[81] Bradley also invoked this dynamic character and noted its clear consequence: "far from being an 'empty formula'", institutional balance has "both allowed, and defined the limits of, a significant development in the Community's institutional structure".[82] The Court's "creative" reliance on the principle of institutional balance was evident. At the same time, the Court itself claimed to be bound by the "balance created by the Treaties" and saw its duty as ensuring that "the provisions of the Treaties concerning the institutional balance *are fully applied*".[83] Manifestly, the line between, on the one hand, preserving the institutional balance – a task that AG van Gerven considered to be outside of the purview of the Courts – and, on the other, changing it is a very fluid one. More accurately, Blumann and Dubois indicated the "constant tension between the need of changing and the need of preserving the existing order", a tension which institutional balance reflects.[84]

*Another view: the Parliament as a litigant in a reversal of jurisprudence*

While the commentaries cited so far indicate the constitutional leaning of some of the doctrine, this was not a uniform reading of the judgment. The analysis of Chambault in the *Revue du Marché Comum* is illustrative of a different stance. Chambault's general approach was that the judgment represented "a reversal of case law, but one that [was] both limited and strongly reasoned".[85] He

[78] Ibid, 256.
[79] Jacqué (n17), point 17.
[80] Jacqué (n17), point 20. The characterization of institutional balance as having a passive and an active component appears to come from Constantinesco, 'Les institutions. Présentation Géneral' in JCL Europe, Fasc 200, JCL Droit international, fasc 161-10, cited by C. Schmitter, 'Equilibre Institutionnel, Principe de l'-' in Ami Barav and Christian Philip. *Dictionnaire Juridique des Communautés Européennes* (Presses Universitaires de France 1993) 473, 475.
[81] Jacqué (n 17), points 19, 20. See also Jean Paul Jacqué, *Droit institutionnel de l'Union européenne* (Dalloz 2001) 180, who characterised *Chernobyl* as an instance of this dynamism without however discussing whether the Court *had changed* the institutional balance defined in the Treaty.
[82] Bradley (n 53) 255. *Chernobyl* was another instance of "the dynamic, and indeed creative, reliance by the Court on the concept of institutional balance."
[83] *Chernobyl* (n 5) paras 21, 25 (emphasis added).
[84] Blumann and Dubois (n 74) 126.
[85] Jean-François Chambault, 'L'ouverture du recours en annulation au Parlement européen: aboutissement et coherence d'une décennie de jurisprudence', *Revue du Marché Commun* (1991) p.40-48. Similarly, Bonichot (n 52) 446;

noted the passages where the Court stressed the importance of the institutional balance established by the Treaty as evidence that the Court *did not* arrogate to itself the power modify the institutional balance of the Treaty, but instead *acted to improve* that balance.[86] He argued that the principle of institutional balance needed to be sanctioned by the Court because of the judicial powers assigned to it by Treaty. The novelty of *Chernobyl* lied then on the recognition that each institution must have "a legal remedy, among those laid down in the Treaties" that is certain and effective.[87] The conditional recognition of the Parliament's standing meant, he argued, that the Court refused to be a "regulator of a dynamic institutional balance, as can be the diplomatic conference of the Member States".[88] The Court thereby had taken distance from the arguments of the Parliament that, in previous cases, had sought the recognition of institutional balance as equality among the institutions.[89] And yet, he concluded that the judgment was the culmination of an evolution of over a decade that had solidified the standing status of the Parliament.

Chambault further identified the five elements of institutional balance that, in his view, *Chernobyl* had stabilised: institutional balance has a conventional origin (each institution must act within the competences defined in the constitutive treaties), and it evolves if the Treaties change; it presupposes a separation of powers between the institutions that is legally established and its breach must be judicially sanctioned; because such control must be effective, procedural breaches must be filled.[90] In his analysis, *Chernobyl* boiled down to a contribution to the legal-dogmatic construction of the principle of institutional balance, a contribution that also reflected the Court's constant search for the agreement of the Member States. In short, a legal solution to a deeply political matter.

Without this detail of analysis, the handbooks of the 1990s and early 2000s stuck largely to the technical aspect of the standing of the Parliament before the Court. While the relevance that they gave to *Chernobyl* varied, there is little or no echo of the constitutional role of the Court or any constitutional characterization of the principle of institutional balance. Most recognized – even if to different degrees – the fundamental importance that the judgment had for the institutional position of the Parliament.[91] But *Chernobyl* appeared also as just one step in the process of

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and Condinanzi, who stresses that *Comitology* is not "espressamente rinegata" and that the Court in *Chernobyl* only considered that the solution there adopted was not sufficient in all instances (Condinanzi, (n 17) 135)

[86] *Chernobyl* (n 5) paras 21, 25 (see n 83). Chambault (n 85) 43.

[87] Chambolt (n 85) 43.

[88] Ibid, 47

[89] Similarly, Thill (n 68) 9-10.

[90] Chambault (n 85) 41.

[91] Implicit only in Guy Isaac and Marc Blanquet, *Droit communautaire général* (8th edn, Colin 2001) 288, who mention that the *Chernobyl* solution was taken up in subsequent revisions of the EECT Treaty.

progressively defining the content of the principle, without any particular emphasis.[92] In some, the significance of the judgment for the evolution of the EU institutional system is fully absent. *Chernobyl* is then either cited in sections dealing with the action for annulment, losing any constitutional veneer under the categorization of applicants in actions of annulment;[93] or treated as a matter of choice of legal basis, being then just one judgment among others.[94] Others still, mostly ignored the judgment.[95]

*An intermediate position: the political stakes of an important institutional development*

By contrast, the significance of *Chernobyl* to the institutional role of the Parliament in the evolution of EU law and its political stakes were stressed by the English handbook authors, without losing sight of the judgment's dictum on standing. Craig and de Búrca noted the strategic use that the Parliament made of its litigation rights and placed *Chernobyl* in this line of institutional evolution.[96] They indicated too how the Parliament used the position it acquired in *Chernobyl* to advance litigation on legal bases and secure its procedural rights in the legislative process.[97] They noted also the judicial recognition of the Parliament's "democratic credentials" in the *Isoglucose* cases, but did not see the overall reinforcement of the Parliament, in particular since the Single European Act, as necessarily "[rendering] the Community or the Union a considerably more democratic organization".[98]

This was the point that Jo Shaw highlighted. Her premise was the importance of each institution's role "in relation to questions of democracy, legitimacy and institutional efficiency". Against this background, she took *Chernobyl* as evidence of the Court's contribution to secure institutional balance through policing the correct use of legal bases – a type of legal dispute that, as she noted, is "intensely political".[99] *Chernobyl* was "the logical conclusion to the process of recognition of the Parliament in the institutional structure of the EU begun in the *Isogluclose*

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[92] Jacqué (n 81) 177-180. In some cases, those sections omit *Chernobyl* from their accounts: Jean Boulouis, *Droit institutionnel de l'Union européenne* (5th edn, Montchrestien 1995) 143-144.

[93] Philippe Manin, *Les Communautés Européennes. L'Union européenne. Droit Institutionnel* (3rd edn, Pedone 1997) 378; Piet Jan Slot, 'Le role du juge et du législateur dans le développement de droit communautaire et du Droit des États membres' in Piet Jan Slot and Walter Van Gerven (eds), 1 *Droit Européen* (Pedone, 1998)44, and to, a large extent, Isaac and Blanquet (n. 91).

[94] Joël Rideau, Droit Institutionnel de l'Union et des Communautés Européennes (LGJD 1999) 139.

[95] Jean Boulouis (n 92) does not mention *Chernobyl* in his section on institutional balance (p. 143-144), neither does Paolo Mengozzi in his section on standing in action for annulment, referring only to the Treaty, Paolo Mengozzi, *Il Diritto Communitario e dell'Unione Europea* (CEDAM 1997) 207.

[96] Paul Craig and Gráinne de Búrca, *EC Law: Text, Cases, & Materials* (OUP 1995) 65-68. Equally noted by Jacqué (n 17) and Bradley (n 53) 245 and fn 16. On the risks that the Parliament would use its newly found right inappropriately, see Bradley (n 53) 253; Bonichot (n 52) 449.

[97] Craig and de Búrca (n 96) 68-69.

[98] Ibid, 57, 65-67.

[99] Jo Shaw, *Law of the European Union* (2nd edn, Palgrave 1996) 70 and 175.

cases".[100] The conditional standing it recognised to the Parliament was, importantly, "a change of heart by the Court" that foreshadowed the Treaty revision of Article 173.[101] More emphatically, Mancini and Keeling noted the contribution of *Chernobyl* to strengthening the democratic legitimacy of the Community's "system of checks and balances".[102]

With the exceptions just noted, the possible significance of *Chernobyl* to strengthen democracy in the Community and in the Union, was mostly absent from the academic analyses. It appeared only in passing in a couple of commentaries. Condinanzi noted that, by "interpreting the Treaties in an evolutive sense", the Court contributed to "ensure, beyond the letter of the norm, respect for fundamental principles of the Community legal order, among which feature prominently the *democratic model* of the rule of law [*stato di diritto*]."[103] This was illustrative of the views on democracy in the Union that envisaged it from a Westminster-type point of view.[104] In his analysis, the judgment narrowed down the distance between the democratic legitimacy of the Parliament and its powers under the Treaty, even if placing a parliament in the need to resort to a court to defend its prerogatives remained questionable.[105] Bradley, on the other hand, mentioned democracy to point out the limits of the Parliament's conditional standing. Since standing was granted as a matter of legal protection, he asked whether the Parliament would be "unable to argue before the Court that a legislative measure infringes the Treaty or constitutes a violation of the fundamental rights of the *citizen (and voter)"*. Such possibility could be in reach but was highly unlikely: while "the Court may reach findings on such matters proprio motu", the Parliament had "only exceptionally [resorted] to judicial proceedings to protect interests other than its own" and was unlikely to deviate from that practice.[106] Pushing "democratization through law" did not seem to be on the agenda, at least not as a result of *Chernobyl*.[107]

## 4. Judicial reception: the faded legal component of a political principle

*Chernobyl's first decade*

[100] Ibid, 175.
[101] Ibid, 320.
[102] Giuseppe Mancini and David Keeling, "Democracy and the European Court of Justice" (1994) 57 *Modern Law Review* 2, pp. 175-190, 181.
[103] Condinanzi, (n 17) 136, emphasis added.
[104] G. Majone, "Europe's 'Democratic Deficit': The Question of Standards", *European Law Journal* Vol. 4, No. 1 (1998), pp. 5-28.
[105] Condinanzi (n 17) 137.
[106] Bradley (n 53) 252-253, emphasis added.
[107] The term is from Antonio Caiola and Fernanda Nicola, "Defending Democracy Through Law: The Establishment pf the Legal Service of the European Parliament" (2023) 46 *Fordham International Law* (1)

The judgments issued in the immediate aftermath of *Chernobyl* contrast with the "grand" constitutional readings, while confirming the importance of the judgment in securing the Parliament's position in the institutional balance established by the Treaties. They mostly gave the Court the opportunity to solidify the path it had opened in that judgment.

In two judgments the Court pushed back against the attempts of the UK and of the Council to limit the range of actions where the Parliament would have standing. In a legal-basis dispute, it rejected summarily the UK's argument that the Parliament's right of action would arise only if the Commission disagreed with the Parliament on the legal appraisal of the Parliament's prerogatives.[108] In another instance, ruling on the Parliament's right to be consulted, the Court rejected the Council's claim that the Parliament's standing was limited to "cases where the balance of the Treaty system risks being disturbed or there is a substantial infringement of the Parliament's basic prerogatives", while implying that *Chernobyl* was limited to legal basis disputes in cooperation procedures. In both cases, the Court reiterated the criteria set in *Chernobyl*.

Subsequent case law indicates that the main task that *Chernobyl* left to the Court was to delimit the precise scope of *Chernobyl*, i.e. which parliamentary prerogatives justified standing under the judgment's criteria.[109] A case pertaining to the Parliament's right to be consulted in the adoption of the Community's financial regulation, decided in 1994, confirmed that its right to participate in the legislative procedures was one of such prerogatives.[110] Because standing was conditional, the Court specified that the Parliament needed to indicate "in an appropriate manner the substance of the prerogative to be safeguarded and how that prerogative [was] allegedly infringed".[111] In that same case, the Court strengthened the institutional importance of the Parliament by referring to the passages of the *Isoglucose* cases where the right to participate in the legislative procedure – in need of judicial protection – was characterised as the limited expression at the Community level of the principle of democracy.[112] Nevertheless, it was clear that the Parliament's right to participate in the legislative procedure depended strictly on there being a Treaty norm that secured the Parliament's involvement, no matter the democratic relevance of the matters that may be decided

[108] Judgment of 7 July 1992, *Parliament v Council*, C-295/90, EU:C:1992:294, paras 8-9 (annulment of the student's residence directive)
[109] Jacqué (n 17) para 20; Chambault (n 85) 47; Thill (n 68) 10; Craig and de Burca (n 94) 454 (citing Bradley (n 53)).
[110] Judgment of 2 March 1994, *Parliament v Council*, C-316/91, EU:C:1994:76, paras 11, 19 (Lomé Convention). See also Judgment of 30 April 1996, *Netherlands v Council*, C-58/94, EU:C:1996:171
[111] *Parliament v Council*, C-316/91, para 13; Judgment of 13 July 1995, *Parliament v Commission*, C-156/93 EU:C:1995:238, paras 10, 11, 13; Judgment of 18 June 1996, *Parliament v Council*, C-303/94, EU:C:1996:238, para 17; Judgment of 8 July 1999, *Parliament v Council*, C-189/97, EU:C:1999:366, para 13.
[112] C-316/91 (n 110) para 17. See also, Judgment of 22 June 1991, *Commission v Council*, C-300/89, EU:C:1991:244, paras 20-21 (annuling the Titanium Dioxide Directive also on the grounds of breach of prerrogatives of the Parliament due to the use of the wring legal basis).

without involving the Parliament.[113] Later on, the Court maintained this position: despite the step that it had taken in *Chernobyl*, on the grounds of a political and legal principle (institutional balance), its reliance on the principle of democracy would not trump choices clearly expressed in the Treaty.[114]

Legal-basis disputes during the 1990s, though not always decided to the advantage of the Parliament, confirmed the position that the Parliament had acquired with *Chernobyl*.[115] Thus, the Parliament's right to participate in legislative procedures required, specifically, that the Parliament be reconsulted where pertinent to secure that it had a substantive say on the final content of the acts.[116] Yet, as successive Treaty revisions solidified the participation of the Parliament in legislative procedures, and in particular with the extension of the co-decision procedures, legal-basis disputes largely subsided. In this regard, the Treaties fundamentally changed the "system for distributing powers among the different Community institutions". This is the essence of institutional balance, making it largely a self-referential principle deprived of autonomous content.[117]

*Institutional balance as a static and political principle*

The principle reappeared again in the late 2000s, but, naturally, the element of legal protection that, following *Chernobyl*, had been so important in solidifying the institutional position of the Parliament had lost its relevance. The constitutional relevance of institutional balance as a principle that could push for, or endorse, Treaty changes – the "dynamic" character that had enabled the Court to "supplement the Treaty" – clearly subsided. *Chernobyl* remained a single instance thereof.[118]

The principle now supported the Court in refining aspects of the distribution of powers between the institutions and in preserving the Treaty system against what could become important disruptions. Thus, in *Parliament v Council* (list of safe countries of origin), institutional balance strengthened the argument that the institutions cannot define, in secondary provisions, decision-making procedures that amend the procedure defined in the Treaty: such practice would undermine a principle that "requires that each of the institutions must exercise its powers with due

[113] C-58/94 (n 110) paras 32, 37, 41 (access to documents, granted at the time through the decisions of the institutions based on their power of internal organisation).
[114] Judgment of 19 July 2012, *Parliament v Council*, C-130/10, EU:C:2012:472, paras 80-82 (on the Common Foreign Security Policy)
[115] Judgment of 28 June 1994, *Parliament v Council*, C-187/93, EU:C:1994:265, para 16.
[116]Judgment of 16 July 1992, *Parliament v Council*, C-65/90, EU:C:1992:325, paras 11-14; Judgment of 1 June 1994, *Parliament v Council*, C-388/92, EU:C:1994:213, paras 10, 19 (transport).
[117] C-316/91 (n 110) para 11. De Witte (n. 9), 144. Chamon identifies an autonomous content in this self-referential character: it indicates the principle's systemic protection function (Merijn Chamon, *The European Parliament and Delegated Legislation: An Institutional Balance Perspective* (Oxford, Hart Publishing, 2022), 2-3).
[118] De Witte, n 9.

regard for the powers of the other institutions".[119] In a consistent line of case law, the Court resorted to institutional balance to deny standing to the governments of regions or other local authorities within Member States, in the capacity of "Member States".[120]

In many cases, institutional balance was either a preliminary point in the Court's reasoning or an ancillary aspect of the institutions' assigned competences, to signify "a system allocating powers among the EU institutions", without have any specific bearing on the outcome of the judgment.[121] But there were important exceptions, where the principle of institutional balance was a basis to entrench the Treaty's allocation of powers, in view of the general functions of the institutions. Two cases stand out: *Macro-financial Assistance* and *EPSU*.

In *Macro-financial Assistance*, the Council, supported by several Member States, contested the Commission's withdrawal of a legislative proposal on the grounds that, in doing so, the Commission had exceeded its Treaty powers and, consequently, had undermined the institutional balance.[122] No such powers are conferred on the Commission, so they claimed, in the conditions in which it had withdrawn its proposal. The Court drew on several Treaty provisions to conclude that the Commission had that power, subject to providing reasons for the withdrawal that both the institutions and the Court could ascertain.[123] Short of such reasons, withdrawal would amount to a veto right which would indeed be contrary to institutional balance. In this case, the grounds the Commission had invoked were such as to justify the withdrawal and that much sufficed to comply with the principle of institutional balance.[124] Unlike the *Isoglucose* cases, the principle of democracy – invoked by the claimants - had no bearing in the dispute. Considering the power of the Commission to withdraw a proposal as "inseparable" from the right of initiative, the court summarily stated that "*there can be no question*, in this instance, of an infringement of [the principle of democracy laid down in] Article 10(1) and (2) TEU".[125]

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[119] Judgment of 6 May 2008, *Parliament v Council*, C-133/06, EU:C:2008:257, paras 53-57. Similarly, and more recently, Judgment of 1 March 2022, *Commission v Council*, C-275/20, EU:C:2022:142 (on the extension of the period of entitlement for audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea).

[120] Judgment of 22 November 2001, *Nederlandse Antillen v Council* Case C-452/98 EU:C:2001:623 paragraph 50; Judgment of 2 May 2006, *Regione Siciliana v Commission*, C-417/04 P, EU:C:2006:282, para 21.

[121] See, respectively, Judgment of 15 November 2011, *Commission v Germany*, C-539/09, EU:C:2011:733, paras 56-57 (a case opposing the Commission to Germany over the latter's objection to an audit by the Court of Auditors, where the Court concluded that Germany had breached its duties to collaborate with the Court of Auditors); and Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paras 31, 33-38 and 40-46 (Swiss Financial Contribution), in which the Court held that the Commission needed to secure the Council's approval prior to signing an addendum to the memorandum of understanding with Switzerland on the latter's contribution to the EU budget.

[122] Judgment of 14 April 2015, *Council v Commission*, C-409/13, EU:C:2015:217.

[123] Ibid, paras 67, 75-78.

[124] Ibid, paras 85-94.

[125] Ibid, para 96. Institutional balance served a similar function in *Puppinck*, preserving the Commission's power of initiative against the binding character of a successfully registered ECI: judgment of 19 December 2019, *Puppinck v Commission*, Case C-418/18 P, EU:C:2019:1113, para 65.

The Court took a similar position, in very different circumstances, in *EPSU v Commission*. The protection of the Commission's right of initiative meant, in this case, that, contrary to the appellant's claims, the Commission can refuse to submit to the Council a proposal for a decision implementing an agreement concluded between management and labour under the European social dialogue provisions. The Court invoked Article 17(2) TEU in support of this conclusion, arguing that it "reflects the principle of institutional balance, characteristic of the institutional structure of the European Union".[126] In this case, this reliance on the general provision of Article 17(2) TEU, in combination with institutional balance, enabled the Court to go against the letter of the Treaty.[127] If in *Macro-financial Assistance* a reading of institutional balance in isolation from the principle of democracy, precluded a change that was defensible in the post-Lisbon context,[128] in *EPSU* it hindered the specificity of the European social dialogue, and its democratic function that the Court had upheld in the past.[129]

## 5. Conclusion

*Chernobyl* was undoubtedly a landmark judgment in the 1990s. Standing in actions of annulment was more than just a means of ensuring the legal protection of an institution whose prerogatives should – from a liberal-constitutional perspective – be protected by political means. It reinforced the position of the Parliament in the institutional system of the Treaty through a contortionist reasoning: the principle of institutional balance – purportedly followed only insofar as defined in the Treaty – enabled the Court to give the Parliament what the silence of the Treaty had denied it. The legal technique of a "procedural gap" overcame the Member States disagreement on the role that of the Parliament in the EU set up.

Many greeted the audacity of the judgment that, in line with *Les Verts,* marked the evolution of EU law towards a "constitutional order". Yet, *Chernobyl* was the only instance in which the Court used the principle of institutional balance to "supplement" the institutional balance that the Treaty had enshrined.[130] The judicial activism that some had feared, and that others unmistakably

[126]Judgment of 2 September 2021, *EPSU v Commission*, C-928/19 P, EU:C:2021:656, para 48.
[127] According to Article 155(2) TFEU, "agreements concluded at Union level shall be implemented … by a Council decision on a proposal from the Commission".
[128] See, further, Dominique Ritleng, 'Does the European Court of Justice take democracy seriously? Some thoughts about the Macro-Financial Assistance case' (2016) 53 *Common Market Law Review* 11–33.
[129] Pierre Carré and Marc Steiert "Social Europe without Social Dialogue: Decision of the Court of Justice of the European Union in C-928/19 P European Federation of Public Service Unions" (2022) 18 *European Constitutional Law Review* 2, 315-333. See Judgment of 17 June 1998, *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME)*, Case T-135/96, ECLI:EU:T:1998:128.
[130] De Witte (n 9).

attributed to *Chernobyl*,[131] did not ensue. Neither did the empowerment of the Parliament following from *Chernobyl* meant that the principle had the vocation of protecting democracy, as had also been argued. In different ways, both the judgments in *Macro-financial Assistance* and in *EPSU* confirm the dissociation between the two principles.

*Chernobyl* is part of the history of EU law. The contrast between the most emphatic academic analyses and its judicial reception, however, tells a story of the limits both of EU constitutional thinking (in particular, of the misplaced analogy between institutional balance and separation of powers) and of legal-dogmatic constructions too prone to identify the content of a principle that can be, in reality, very thin and easily shifted by judicial practice.

[131] On judicial activism, see, Bradley (n 53) 257, replying to such concerns. See also Damian Chalmers, *European Union Law - Law and EU Government*, vol 1 (Ashgate 1998) 327.