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CONCEPTUAL FRAMEWORK FOR THE PROJECT SEPARATION OF POWERS FOR 21ST CENTURY EUROPE (SEPAROPE)

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Conceptual framework for the project *Separation of Powers for 21st Century Europe (SepaRope)*

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I. Introduction

The objective of this conceptual framework is to reconstruct separation of powers, not as a strawman in the sense of a pure theory that never existed, but as an idea that could lead to an operationalizable understanding of separation of powers in Europe for the purpose of the project Separation of Powers for 21st Century Europe (SepaRope).

The SepaRope project aims to provide an understanding of how the **different branches of government, from different levels of governance, co-determine each other's powers** within the EU**.** The project takes inspiration from Christoph Möllers' conceptualisation of separation of powers derived from *individual* and *collective self-determination* as the central element of the justification of public authority.[1] We build on this and aim to identify how the interactions between different branches within the EU contribute to or hinder **democratic will-formation,** and manage or fail to **control** the exercise of public power. Democratic will-formation, i.e. forming of opinions and volitions by the political community, is seen as the core of the EU's collective self-determination, while control of the exercise of public power is understood to be a central institutional contribution to individual autonomy**.**

More specifically, SepaRope pursues a *threefold objective*:

1) tracing whether and how the polycentric and multilevel distribution of powers in the EU is subject to **control structures that can link back to different branches of government**;
2) identifying and assessing **legitimacy and accountability gaps** resulting from this distribution of powers in the three substantive policy fields (trade, migration, EMU);
3) establishing **principles and control mechanisms** that can ultimately be linked back to **different sources of legitimacy**, in order to

a) strengthen, in the *exercise of powers*, checks and balances *across levels of governance*,
b) contribute to *enhancing the legitimacy* of European governance and
c) thereby further *citizens' trust* in the functioning of their government and in the European project as a whole.

The project sees separation of powers and legitimacy as closely linked. Separation of powers is a principle that contributes in particular to the EU's normative (input) legitimacy through safeguarding the processes through which the EU exercises its powers. The perspective of

* University of Amsterdam, University of Helsinki, and University of Gothenburg, respectively. PIs of the 2020-2023 NORFACE project 'Separation of Powers for 21st Century Europe (SepaRope)'.
[1] Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013), p. 51.

SepaRope is thus primarily institutional. The principle of separation of powers is primarily concerned with the core idea of the non-concentration and limitation of power in a single source, rather than with the substantive outcome of decision making (output). Interaction with societal actors, such as NGOs, is also relevant for input legitimacy and thus highly relevant in the process of will-formation.

The conceptualisation in this paper serves the dual purpose of guiding the researchers working on SepaRope and locating our understanding within the constitutional debate on separation of powers more broadly.

This paper approaches separation of powers from the purpose of this concept (Section 2). In a second step, it focusses on the particularities of the European Union and considers – where relevant – the intricate relationship between EU actors and actors of the Member States in the specific context of this project, namely in the context of 21st century EU (Section 3). Section 4 lays down a conceptual research agenda for the project.

II. Purpose and relevance of separation of powers

Separation of powers is the traditional and well-known term referring in practice to a designation and delimitation (rather than separation) of powers with mutual control structures and constraints between the three branches: legislative, executive, and judicial. Interaction and collaboration between these branches forms 'part and parcel of the ideal of the separation of powers'.[2] Separation of powers both *restrains* and *constitutes power*.'[3] Political power 'can be divided without decreasing it, and the interplay of powers with their checks and balances is even liable to generate more power, so long, at least, as the interplay is alive and has not resulted in a stalemate'.[4] In other words, separation of powers does not only serve confinement of the three branches, but also has a constructive constitutive function.

Separation of powers is meant to ensure that power resides in all those subject to its exercise, i.e. the democratic community or the people in a simple indexical sense, without reference to ethnicity or culture. The democratic community as represented in the constituting act is the constituting power of/behind the particular expression of separation of powers in a given polity. The legislature, executive, and judicature within this polity are then the constituted power and as such they are circumscribed by law.

Separation of powers is intimately connected with the boundaries of discretion and the margin of appreciation,[5] and what is in the US called the counter-majoritarian difficulty.[6]

[2] Aileen Kavanagh, 'The Constitutional Separation of Powers' in: David Dyzenhaus and Malcolm Thorburn, *Philosophical Foundations of Constitutional Law* (OUP 2016), p. 236.
[3] Möllers (n 1), p. 10.
[4] Hannah Arendt, *The Human Condition* (2nd edn., University of Chicago Press, 2018), p. 201.
[5] 'Margin of appreciation' is the terminology used by the ECtHR. See: Preamble of the ECHR, as amended by Protocol 15.
[6] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962).

Probably the most recognised of its purposes is to ensure the **rule of law** as opposed to the rule of men. The rule of law, however, 'has to be set, executed, applied and enforced in order for it to be a rule of law'.[7] Therefore, the rule of law cannot be understood independently from the political decision-making structures.

Law simultaneously provides the decision-making structures within which collective **will-formation** takes place, and the **control mechanisms** that limits the legal powers of each branch. Separation of powers *inter alia* serves the purpose to 'express, mediate, and mitigate' – indeed, to protect and perpetuate – the at times contradictory claims of individual and collective autonomy; put differently, between liberalism and a republican-Rousseauist idea.[8] While facilitating the political negotiation between these claims, decision-making structures also function as a **control** on political power by ensuring that no single view is allowed to become hegemonic (often known especially in the American context as the concept of 'checks and balances').[9]

Separation of powers hence is not only relevant for the distribution of power and the division of tasks, but also defines the ***relationships*** between the three branches while they carry out their distinct roles as part of a joint enterprise. As Madison put it, the three branches' 'mutual relations' provide 'the means of keeping each other in their proper places'.[10]

In this **relational** approach to the separation of powers, the three branches are both **independent and interdependent**. They are distinct but interconnected. At times they exercise supervisory functions vis-à-vis each other and at times they have supportive functions allowing each other to best perform their tasks.

Law, Politics, and the Rule of Law

In its double function of allowing for collective will-formation and protecting from abuse of power, separation of powers is central to the functioning of modern constitutional democracies. It cannot be correctly understood in a simplistic correlation between one branch and one function. 'Law-making [is for example] a **collaborative enterprise**, where each branch contributes different elements in ways which reflect their particular institutional structures, skills, competence, and legitimacy.'[11]

The executive may perform significant legislative tasks both in initiating legislation and in the adoption of 'delegated legislation'. The judiciary inevitably interprets, refines and modifies the law in the process of applying it. Furthermore, all three branches are bound by constitutional law (as interpreted by the judiciary), and thus compelled to engage in applying the law as part of the process of creating it.

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[7] Bert van Roermund, 'Sovereignty: Unpopular and Popular' in: Neil Walker (ed.), *Sovereignty in Transition: Essays in European Law* (Hart Publishing, 2003), p. 37.
[8] Möllers (n 1), p. 108; see also: Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996).
[9] Möllers (n 1), p. 46f.
[10] James Madison, 'No. 51' in Clinton Rossiter (ed), *The Federalist Papers* (New York: Penguin Putnam, 1999), p. 288-93.
[11] Kavanagh (n 2), p. 236.

Under the separation of powers doctrine, each branch benefits from different forms of legitimation. The doctrine does not a priori assume that majoritarian institutions enjoy greater legitimacy than non-majoritarian institutions. On the contrary, separation of powers assumes that the institutions of each branch are as a matter of principle vested with the legitimacy to carry out their core functions. The legitimacy of the system as a whole benefits from an arrangement in which each branch carries out its respective core functions without interference from the others. Informative in this regard is Jürgen Habermas' procedural account of democratic legitimacy, which presumes that a collective will can only be formed in a legally structured political community.[12] Judicial review ensures that the collective will is formed pursuant to pre-established (constitutional) rules, including both procedural and substantive rules that allow the equal and free participation of all in the collective will-forming,[13] and could from this perspective be seen a functional and fundamental requirement of constitutional democracies.

Habermas distinguishes – as do many – between the *adoption* and the *application* of law. He emphasizes that law 'owes its legitimating force to a democratic procedure intended to guarantee a rational treatment of political questions' (adoption).[14] The judiciary by contrast must be 'prevented from programming itself. This explains the principle of binding the judiciary to existing law' (application).[15] In turn, 'the rationality of the adjudication depends on the legitimacy of existing law'.[16] However, while the distinction between law-making/adopting and law-application may have great explanatory appeal for illuminating the tasks and sources of legitimacy of the different branches, it has convincingly been criticized for drawing an overly simplistic line and failing to produce a workable way of delimiting the role of the judiciary.[17] It is widely accepted that courts also engage with law-making when they are facing hard cases particularly in the realm of 'balancing' of principles, including fundamental rights.

For the purpose of understanding the outer boundaries of the powers of the three branches and interactions between them, it continues to make sense to differentiate between law-application, interpretation and development, as opposed to law-making, representation, and the ability to redesign a policy field, while acknowledging that this distinction is imperfect and recognising that the precise delimitation of powers between the branches does not necessarily or entirely follow from this distinction. One can go as far as stating that separation of powers, as well as the rule of law, rest on the basic assumption that judges interpret and

[12] See Habermas (n 8), p. 448.
[13] This follows roughly Habermas, ibid. See for a detailed analysis of Habermas' stand on democracy and judicial review: Christopher Zürn, 'Deliberative Democracy and Constitutional Review' (2002) 21 *Law and Philosophy* 467.
[14] Habermas (n 8), p. 146.
[15] Ibid, p. 172.
[16] Ibid, p. 239.
[17] Forcefully challenging this distinction: Duncan Kennedy, 'Proportionality and 'Deference' in Contemporary Constitutional Thought' in Tamara Perišin and Siniša Rodin (eds.), *The Transformation or Reconstitution of Europe* (Hart Publishing, 2018), referring to Gerald Gunther, 'The Subtle Vices of the "Passive Virtues"--A Comment on Principle and Expediency in Judicial Review' (1964) 1 *Columbia Law Review* 1. See also: Duncan Kennedy, *A Critique of Adjudication: Fin de Siecle* (Harvard University Press, 1998), p. 23-38. Similarly see Mauro Cappelletti, 'The Law-Making Power of the Judges and its Limits' (1981) 8 *Monash University Law Review* 15, p. 16–20, who however holds that there are crucial differences between judicial and legislative decision-making that justify the distinction.

apply legal norms made in other – political and democratically legitimised – fora and that the role of judges is constrained by and benefits from a particular formality that connects their decisions to the legitimacy of the entire legal order.

What seems to be important is 'the separation of legislative powers of law-making (i.e. powers to make legally unprecedented laws) from judicial powers of law-making (i.e. powers to develop the law gradually using existing legal resources)'.[18] Democracy and the rule of law seem to require in particular that a distinction is possible and made between the legislature and the judiciary. From the perspective of individuals, the rule of law protects the core value that that they are subject to pre-established and general laws, applied equally and uniformly by courts, rather than ad hoc executive decisions. Separation of powers is here a means to ensure that laws are not made at the same moment of adjudication, which would 'eviscerat[e] democracy at its point of application'.[19] As convincing as this may seem, it still leaves us in search for the proper position and role of the executive in a tripartite concept of separation of powers. In the particular context of the EU, often described as characterized by executive federalism, this seems an important point.

Functional Approach

An **institutional conception** of separation of powers emphasizes that *institutions perform a distinct constitutional role* as opposed to a clear function, while allowing for interdependencies and interaction between these constitutional roles.[20]

The **functionalist approach** to separation of powers, by contrast, focusses on identifying the **core functions,** tasks, and efficiencies **of the different branches** and requires comparatively greater isolation. At the heart of this approach lies an understanding that separation of powers should serve to ensure the connection between the institutions that represent the distinct types of governmental authority and the exemplary functions that they are empowered to serve, while retaining a degree of control on the government as a whole in a way that meets the overall commitment to the rule of law.[21] Separateness and interdependence, as well as reciprocity and autonomy are understood as necessary elements of a functioning government. The functional approach accepts close interaction and acknowledges interdependence but requires that the three branches do not interfere with each other's core functions. These core functions need not be directly defined by law. Instead, the functional approach allows a reflection on the formal and informal ways these powers are exercised in a way that remains somewhat autonomous from the actual legal rules governing the institutional game.

[18] John Gardner, 'Legal Positivism: 5 1/2 Myths' in John Gardner, *Law as a Leap of Faith* (OUP, 2012), 41. Cf also Cappelletti (n 17), p. 42, who, emphasising the differences in decision-making procedures between the judiciary and the legislature, argues that '[g]ood judges can certainly be, and can appear to be, creative, dynamic, activist law-makers' but '[o]nly bad judges, however, would *act* as legislators.'
[19] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP, 2004).
[20] Kavanagh (n 2).
[21] For the US system: Peter L. Strauss, 'Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency?' (1987) 72 *Cornell Law Review* 488, p. 493.

As a result, a functionalist approach is **more permissive to acts of the different branches**. Courts are vested with greater power of interpretation. They must determine the core function and whether a particular act interferes with a core function under the given circumstances. At the same time, a functional understanding considers the structure of government a matter of politics, rather than attempting to bind the three branches, including the courts, strictly to the letter of the law. It comes in this sense closer to the idea of 'checks and balances', which implies that the branches are capable of protecting themselves from encroachment by the other branches, through the weapons they are provided with under the constitution (i.e., in the case of the EU, the Treaties).

Key take-aways

Our understanding of separation of powers concept is characterized by the following six key points:

First, our approach to separation of powers emphasises the ***relational*** **and** ***functional*** **dimension** of separation of powers, which takes into account the relationships between the branches/institutions while preserving the core functions of each of the branches. We inquire whether and how in their interaction the institutions achieve the *purpose(s) of separation of power as above developed*, e.g. through which procedures, by relying on which claims. We also investigate whether the interaction between the different branches *preserves their autonomy in exercising their core function* and takes into account both formal and informal ways of exercising power.

Second, the relationship **between law and politics** cannot be organized according to an over-arching rule since they are closely integrated and interrelated and together constitute constitutional power. In other words, separation of powers is a dynamic means to avoid in practice a continuous domination of law over politics or vice versa. Constitutional democracy relies on the legitimacy that flows from the presence of both and from the fact that they hold each other in check. Judicialisation or politicisation of a policy area shifts the actual powers of the different branches in practice. It also alters the possibilities of each branch to convincingly claim legitimacy in the decision-making process in that area.

Third, separation of powers is a crucial means to mitigate the **tensions between collective and individual autonomy** in a way that remains dynamic in practice and avoids at all times collapsing one into the other. Separation of powers protects both the self-rule of the polity (collective autonomy) and individuals' fundamental rights (individual autonomy). It does so by means of law. This makes collective will-formation possible and protects collective influence over the course that the polity takes.

Fourth, the **different branches rely on different sources and processes of legitimacy**. Judicial decisions are always (ultimately) justified by reference to formal legal rules and existing case law, which requires coherence in reasoning, forming part of a doctrine. Political reasoning requires neither of these. The difference in legitimation justifies sharp differences in the appointment process: The legislature is elected by popular vote, and the executive is responsible to the parliament. Judges, within the EU and the Member States, are appointed

in a process that distances them from party politics and that are meant to ensure both their independence and qualification.

Fifth, neither the Treaties nor institutional identities decisively determine what the institution can and cannot do or how it should do it. Instead, **determining the boundaries of institutional interaction** depends to a considerable extent **on changing circumstances and developing practices.** This also means that any assessment must be based on a contextual investigation of the function of the acting body within the specific constitutional structure (in our case, the EU). Whether an institution is acting in a legitimate manner is something assessed in that particular political community, which also presumes properly functioning methods of will formation.

Finally, separation of powers also presumes predictability. As a part of a constitutional setting, the inter-institutional relationships need to stay above daily political struggles and constantly changing priorities and majorities. Therefore, the determination of the institutional function would have to take place at a certain distance from the circumstances and interests at play, and be determinable *a priori* and for categories of cases.

III. Dividing Lines of Power within the EU

The division of power between the EU institutions **does not easily correspond to any classic model of separation of powers**. There are several reasons for this. Under the EU Treaties no central and unifying role of a head institution can be identified for each branch, that would actually justify speaking of a 'branch' under the control of that one head. Within the EU, the particular interaction between the Member States and EU actors, and amongst different EU actors is subject to a complex and multidimensional division of powers (multilayered; polycentric), which is inseparably interlinked with issues of will-formation, control, and legitimacy.

The CJEU's doctrine of **'institutional balance'** refers to the prerogatives of each institution under the Treaties. As such, it represents an institutional conception of power differentiation, while remaining distinguishable from the concept of 'separation of powers'.[22] Article 13(2) TEU stipulates that each institution 'shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'. It links the principle of conferral to the institutional balance as 'a system for distributing powers among the different […] institutions, assigning to each institution its own role in the institutional structure of the [Union] and the accomplishment of the tasks entrusted to the [Union]'.[23] The objective of this coupling seems to be that the rules governing will-formation within the Union are not at the discretion of the Member States or the EU

[22] Jean-Paul Jacqué, 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 383. Robert Schütze, 'Constitutionalism and the European Union' in Catherine Barnard and Steve Peers (eds.), *European Union Law*, (2nd edn., OUP, 2017), p. 87-88. Convincingly questioning the conceptual clarity of institutional balance: Gerard Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17(3) *European Law Journal* 304.

[23] Case C-70/88, *EP v Council* [1990], ECLI:EU:C:1990:217, para 21.

institutions.[24] The concept of institutional balance takes as its starting point the different institutions and how the Treaty defines their tasks and functions, which is of relevance for a functional conception of separation of powers as a frame for this study.[25]

Habermas' procedural account of democratic legitimacy described above presumes that a collective will can only be formed in a legally structured political community. The EU is a legally structured community in many respects. However, unlike different national constitutional contexts where the principle of separation of powers is generally applied, the EU is a **fragile political community**. It has difficulties to legitimise its own actions, and relies for this reason on national institutions and procedures. The relationship between the EU executive and the European Parliament is not characterized by support of the majority of parliamentarians for the government in office. The power spectrum across party lines in the Council and within the EP develop independently of each other. Majorities and minorities in the two institutions form according to the outcome of different elections (European / national). The direct elections for the EP do not build on detailed political programmes that citizens could position themselves with when casting their vote and that would then guide decision-making at EU level. EP elections are unconnected to national elections, even if in practice they take place on the basis of national lists and voters may use them to punish national parties. Due to its low level of political integration and lack of genuinely European will-formation, it is difficult to settle what counts as 'legitimate' in the EU, since the concept receives its meaning in a particular political community.

However, these particularities of the EU do not normatively exclude that the principle of separation of powers can help to answer a core question of political legitimacy: *who* should be in charge of deciding *what* and how is it ensured that institutions remain in their proper place without exceeding their mandates?

We set out to consider the EU's particular characteristics when exploring what separation of powers should mean within the EU and what it could mean for the EU's legitimacy, **focusing on its procedural (input) dimension and interinstitutional relationships.**

The Treaty provisions that determine the boundaries of institutional powers and govern the interinstitutional relationships often leave considerable leeway for interpretation. While much of the work of the CJEU is anchored into a relatively detailed set of rules of procedure and practical rules for parties, various parts of decision-making in the EU executive and legislature is more unregulated and subject to flexible informal practices that can be adjusted to the circumstances. Any evaluation of decision-making and interinstitutional relations within the EU must therefore be based on a contextual understanding of the function of the acting body within the EU structure and in relation to national legitimation structures, taking into account the empirical reality of informal rules and practices of exercising power.

Principle of allocated powers

[24] Case C-28/12, *Commission v Council (US Air Transport Agreement)* [2015], ECLI:EU:C:2015:282, para 41 et seq.
[25] In American literature, a distinction is often made between a 'formalist' and 'functionalist' approach to separation of powers; see Rebecca L. Brown, 'Separated Powers and Ordered Liberty' (1992) 139 *University of Pennsylvania Law Review* 1513, but cf, for a critical view, Möllers (n 1), p. 31.

In a multi-level governance structure such as the EU competence divisions are a core part of its constitutional settlement. The EU Treaties not only allocate tasks to the EU institutions and establish their relationships but also define in which areas they are entitled to act and what forms their action can take. At the same time, the EU has a 'living Constitution'. The understanding of the EU Treaties as an elastic constitution has relied on a great degree of teleological interpretation, which has enabled the Union to respond to various unexpected developments during its existence. An elastic understanding of a constitution sets a

In a weak political community, such as the EU, the principle of allocated powers has a special meaning. When approving the Lisbon Treaty, the German Constitutional Court underlined how

> *faith in the constructive force of the mechanism of integration cannot be unlimited. If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally important tension will arise with the principle of conferral and with the individual Member State's constitutional responsibility for integration. […] if the institutions are permitted to re-define expansively, fill lacunae or factually extend competences, they risk transgressing the predetermined integration programme and acting beyond the powers granted to them.*[26]

The **EU Treaties** establish the tasks and competences of each EU institution. In combination with the applicable legal basis, the principle of conferral also has the function of linking Union powers to specific decision-making procedures. Usually, a legal basis identifies the organs authorised to act, specific objectives to be pursued, the form or type of act that is to be adopted, as well the procedure to be followed.[27] This vests the EU institutions with formally procedurally circumscribed powers for attaining certain (albeit broadly formulated) objectives and adds to the principle of conferral an immediate relevance for the relationships and procedural interaction between the EU institutions.

Formally, the **principle of conferral** rather statically delimits the Union's powers to those conferred to it; although in practice the ever-ongoing process of interpreting those conferrals renders the division of competence significantly less static. As a result, the division of powers between the EU and Member States becomes not particularly clear and, unlike in federations, does not contain a principled division of powers between the States and the Union. As Koen Lenaerts argued in his classic piece,

> *residual powers of the Member States have no reserved status. The Community may indeed exercise its specific, implied or non-specific powers in the fullest way possible, without running into any inherent limitation set to these powers as a result of the sovereignty which the Member States retain as subjects of*

[26] Bundesverfassungsgericht (German Federal Constitutional Court), Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 (hereafter: 'Lisbon Judgement'), para 237-8.
[27] See Case 68/86, *UK v Council* [1988], ECLI: EU:C:1988:85, para 32; Case C-133/06, *EP v Council* [2008], ECLI:EU:C:2008:257, para 54.

> *international law. There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.*[28]

In other words, no national policy field is immune from EU action, as competence always needs to be exercised in a manner that is compatible with EU law, which according to longstanding jurisprudence takes precedence over conflicting national law.[29] Moreover, the way in which the principle is applied is affected by the dynamics of centralisation, supranationalisation, integration and their countertendencies. Those EU actors that are further removed from national political control are often accused of displaying overall a bias towards an EU solution. This is of course also what the Treaties mandate the institutions to do: Article 13(1) TEU defines it as a task of the EU institutional framework to 'promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'.

In many policy areas, such as economic, social or employment policies, Member States take the leading role while the EU increasingly 'coordinates' their action. In others, such as trade, the EU has exclusive competence and the EU institutions are in the leading role. In the area of migration, Member States and the EU institutions are both involved in different ways with different aspects. EU and national institutions and bodies act in parallel, in distinct roles and without any identifiable hierarchy. The simplifying shorthand of 'horizontal' and 'vertical' power relations, which implies a hierarchical relationship, falls short of describing the complex reality.

We will examine the many connections and interactions between the national and EU actors and legal spheres, including with the intention to uncover the complexity that is not adequately reflected in the labels of 'horizontal' and 'vertical'. On the one hand, we see that these structures create additional channels and mechanisms of control between relatively autonomous EU and national actors from the same or different branches. They also proliferate opportunities to participate and hence the potential for democratic legitimacy.[30] On the other hand, these structures contribute to complexity and make the attribution of responsibilities to a specific actor, a branch, or a particular level more challenging. This in turn also has a negative effect on legitimacy, since roles and responsibilities become blurred. As a result, both 'control' and 'will-formation' require multilevel action in order to be operable.

Finally, like many other societies, the EU constitutional structure recognises the emergence of a 'fourth branch' of government alongside the legislature, executive and judiciary[31]: the 'watchdogs' i.e. European Ombudsman and the European Court of Auditors, which exercise significant oversight functions of the legislature and the executive. Their control function and relevance is also briefly considered below.

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[28] Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, p. 220.
[29] E.g. Case 9/74, *Casagrande* [1974], ECLI:EU:C:1974:74.
[30] Möllers (n 1), p. 39.
[31] Anchrit Wille and Mark Bovens, 'Watching EU Watchdogs Assessing the Accountability Powers of the European Court of Auditors and the European Ombudsman' (2020) *Journal of European Integration* 1.

1. Legislative branch

Collective will-formation and legitimacy

Will-formation for legislative purposes takes place at both EU and national level. National parliaments are (to a varying degree, depending on national constitutional provisions) involved in settling their national position for the purposes of Council decision making. They are also directly involved in EU legislative procedures through subsidiarity and proportionality control.

At the EU level, the Parliament and Council hold the power to jointly adopt legislative acts under the ordinary legislative procedure,[32] and act in varying roles in the specific legislative procedures. The procedures used in EU law-making are highly informal, flexible and rely on political compromise and interinstitutional practices.[33] Political groups and rapporteurs for individual legislative files are decisive for settling the Parliament's position. The Council usually aims at consensus, but the positions of large Member States are often decisive for its position. Rights of participation are also highly relevant for will formation, including European citizen initiatives that should influence the legislative agenda.[34] Overall, while the EU legislative process has been slowly becoming more transparent, decisive stages of the political decision-making continue to be confidential, which makes the evaluation of its will formation difficult.

The ordinary legislative procedure set out in Article 294 TFEU comprises three stages (first reading, second reading and third reading with conciliation), but may be concluded after any one of those stages if the Parliament and the Council reach an agreement. By using informal trilogues, an agreement is in practice often achieved during the first reading.[35] The aim of such exchanges is to reach a prompt agreement on a set of amendments acceptable to the Parliament and the Council, which are subsequently approved by them in accordance with their respective internal procedures.[36]

While the Parliament and the Council are formally known as the EU's co-legislature, the reading of the ECJ has been more functionalist and also included the Commission as a 'key player in the legislative process':

> *EU legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. The power of initiative […] includes, first, the power to decide whether or not to submit a proposal, except in the situations where that institution is obliged to submit such a proposal. In particular, the Commission's*

[32] Articles 289 and 294 TFEU.
[33] Deirdre Curtin and Päivi Leino-Sandberg, 'In Search of Transparency for EU Law-Making: Trialogues on the Cusp of Dawn' (2017) 54(5) *Common Market Law Review* 1673. Päivi Leino, 'The politics of efficient compromise in the adoption of EU legal acts' in: Marise Cremona and Claire Kilpatrick, *EU legal acts : challenges and transformations,* Collected courses of the Academy of European Law (Oxford University Press, 2018).
[34] Päivi Leino-Sandberg, 'Disruptive Democracy: Keeping EU Citizens in a Box' in: Inge Govare and Sacha Garben (eds.), *The Future of Constitutional Democracy in Europe: A Legal Assessment* (Hart Publishing, 2019).
[35] Case T-710/14, *Herbert Smith Freehills* v *Council* [2016], ECLI:EU:T:2016:494, para 57.
[36] Ibid, para 56; Case T-540/15, *Emilio de Capitani* [2018], ECLI:EU:T:2018:167, para 68.

> *decision to abandon, following an impact assessment, the legislative initiative envisaged puts a definitive end to the planned legislative action, which may not be resumed unless that institution withdraws that decision. Second, the Commission's power of initiative includes the power to determine the subject matter, objective and content of a potential proposal, bearing in mind that, under Article 293(1) TFEU, except in the cases referred to in that provision, where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously. In view of that power, the Commission is a key player in the legislative process.* [37]

The Commission participates in the trilogues and contributes actively to its outcome. It also needs to give its consent to the outcome, and holds the possibility to withdraw its legislative proposal until the very end.[38] While it is normal for the executive branch to be charged with the preparation of legislative proposals, the Commission is involved in its exercise until the very end. In cases where the outcome of the process deviates from its legal position, it may explicitly distance itself from the outcome and indicates its intention to subject it to outside control by the CJEU.

The Commission has a key role in the adoption of delegated acts, which are also a form of quasi-legislative action. Such acts are not approved in a legislative procedure, but are used to amend or supplement non-essential elements of a legislative act. Thus, their approval involves the use of legislative powers, which the Commission exercises in a more or less self-standing manner.

In addition, the European Council is often decisive in settling the legislative agenda, and could exceptionally address legislative files through the emergency break clauses applicable in certain policy fields (e.g. criminal law, social policy).

The legislative process offers the primary institutional fora for the formation of collective will. The legislature is both subject to the legal principles and rules of collective will-formation and individual rights protection, but also exercises power to create and change the law. The EU Treaties are amended in heavy but deliberative processes aimed at anchoring the changes also in Member States. Since the entry into force of the Lisbon Treaty the ordinary amendment procedure has not been used. Instead, the institutions have relied on 'new interpretation' of the Treaties, which has sometimes also had implications for the roles and tasks of the Institutions.

Control

Control of the EU legislative branch takes place in particular by the Court. The Court has traditionally approached the EU's legislative work more through questions of legal basis and the correct legislative procedure, protecting in particular the Parliament's institutional prerogatives, rather than limiting its substantive choices. The Court's standard of review has

[37] Case C-57/16P, *Client Earth v Commission* [2018], ECLI:EU:C:2018:660.
[38] Case C-409/13, *Council v Commission* [2015], ECLI:EU:C:2015:217.

occasionally been considered 'too low, too lax, too permissive';[39] it has 'has eroded the principle of conferral – the basis of the entire European order'.[40] This has recently resulted in various challenges by national constitutional bodies, questioning whether the Court's level of scrutiny ensures effective constitutional control in the EU. This debate is highly relevant for separation of powers as well, and can be presumed to continue during the SepaRope project.

Recently the Court has stressed the need to ensure the democratic nature of decision making in the EU's own legislative institutions. The European Ombudsman has also been involved in scrutinising the legislative work of the three legislative institutions, though with a more mixed record.

2. Executive branch

Michel Foucault pointed out that government in the very broad meaning 'designate[s] the way in which the conduct of individuals or of groups might be directed […]. To govern, in this sense, is to control the possible field of action of others.'[41] Even though Foucault's work develops a meaning of government and governmentality that is encompassing rather than focused on executive power, this quote also identifies what is at the heart of executive power, namely *governing in the broad sense of steering, with the meaning of regulating, guiding, or directing the behaviour and conduct of others*. In our functional separation of powers framework, executive power needs to have its own positive shape and form, *inter alia* in order to consider whether any of the current arrangements results in a usurpation of the core powers of any of the three branches.[42]

Executive power is, more than the other two powers, present in the direct relationship between public authorities and their subjects, this is those affected. It is present when laws and – in the EU context less prominently – when court decisions are *executed*. This is most visibly present in EU administrative power. Yet, there is however another dimension of to govern that has a strong guiding function, including on the legislature, and influences the will-formation. This is the executive power of high politics. Within the EU, this is best illustrated by the European Council.

Core functions of the EU executive

We start our analysis from the question of what is the role of EU executive power for the two core functions of separation of powers as a mechanism for collective will-formation and control.

[39] See Urška Šadl, 'When is a Court a Court' (*Verfassungsblog*, 20 May 2020) <verfassungsblog.de/when-is-a-court-a-court/>).
[40] Dieter Grimm, 'A Long Time Coming' (2020) 21 *German Law Journal* 944, p. 945-946.
[41] Michel Foucault, 'The Subject and Power' in James Faubion (ed.) and Robert Hurley (trans.), *Power: Volume 3 of the Essential Works of Foucault, 1954-1984* (London: Penguin, 2002), p. 341.
[42] Möllers (n 1), p.47 et seq.

The EU executive has the primary responsibility for the three core tasks of steering, executing and enforcing EU law.[43] The first two tasks are influential in the formation of the collective will within the EU.

Steering or exercising 'political power to govern',[44] largely done by the European Commission and the European Council, contributes most directly to the collective will-formation. Here, the power of initiating and proposing legislation and legislating by delegation are particularly noteworthy. *Executing* EU law, institutionally largely connected with the Commission and EU agencies, is a way of concretising and fleshing out the legal framework, consisting of codified law adopted by the legislature and case law adopted by the judiciary.

The Commission, regarded as the EU's principal 'executive organ',[45] exercises the functions of 'promot[ing] the general interest of the Union', 'ensur[ing] the application of the Treaties, and of measures adopted by the institutions', 'oversee[ing] the application of Union law under the control of the Court', and 'execut[ing] the budget and manag[ing] programmes, 'exercis[ing] coordinating, executive and management functions',[46] as well as initiating legislation.[47] All these combined, the Commission's tasks also include political, technical and judicial tasks:

> *[B]esides being the executive body of the Community, the Commission fulfils a vital arbitrating role in conciliating interests of the Member States, trade and industry and Community citizens in the process of defining Community policies and proposing Community legislation. In certain areas, it also fulfils a quasi-judicial role, as in the field of competition or in enforcing Community law obligations against the Member States under Articles 226 and 228 EC.*[48]

The Commission relies, when proposing or amending legislation, on public consultations and the involvement of expert groups both from the private sector and civil society and carries out an information gathering function. Knowledge production in the process of law- and policy-making and implementation within the EU has a crucial impact on the division of powers. The growing 'expertization' of decision-making leads more broadly to an empowerment of the executive branch when it comes to policy-relevant knowledge production. This is commonly justified on grounds of technical complexity and specialised knowledge.[49] Commission's expertise-based determinations are also one reason for the demands on greater transparency of evidence collection during Commission's preparatory work. The EU executive has great framing powers, but also has the effect of shifting the

[43] See similar: Robert Schütze, *European Constitutional Law* (CUP, 2015), p. 303-304.
[44] Ibid.
[45] Case T-562/12, *John Dalli v. the Commission* [2015], ECLI:EU:T:2015:270.
[46] Article 17(1) TEU.
[47] Article 17(2) TEU.
[48] Opinion of Advocate General Geelhoed in Case C-432/04 *Commission v. Edith Cresson* [2006], ECLI:EU:C:2006:140, para 72.
[49] Cathrine Holst and Ase Gornitzka, 'The Expert-Executive Nexus in the EU: An Introduction' (2015) 3(1) *Politics and Governance* 1; Maria Weimer and Anniek De Ruijter, 'Regulating Risks in the European Union: The Co-production of Expert and Executive Power' in Maria Weimer and Anniek de Ruijter (eds), *Regulating Risks in the European Union: The Co-production of Expert and Executive Power* (Hart Publishing, 2017).

burden of argument. It places the legislature on the backfoot, having to overcome a presumption established by 'evidence' if it wants to go another way.

The European Council conclusions give direction to the political and legislative course of the EU. References are made to its conclusions in recitals of secondary legislation.[50] They are tools for a persuasive interpretation of secondary legislation.[51] It has formally become the strategic driver behind *all external policy fields*.[52] The European Council, with its President, is further an executive power largely unfettered by parliamentary control.[53] The Court only has competence to review the acts of the European Council that are intended to produce legal effects *vis-à-vis* third parties, limiting its scrutiny effectively. In fact, it is difficult to think of a case where the Court has rejected a solution supported unanimously by the 27 Member States in the European Council. Recent examples of the Court's deference can be found in all three policy fields that are relevant for this study.[54]

In the conclusion of international agreements by the EU, the Council and the Commission exercise together what is traditionally executive power. The recent Brexit deal however demonstrates how for example the increasing practice of provisional application strengthens the role of the executive at the expense of parliaments. Significant frictions between the European actors on the one hand and the Member States/national actors are also exemplified by the frequent conclusion of mixed agreements, i.e. agreements concluded by the EU and the Member States jointly and as one party.

Some EU policy fields have specific executive actors. The ECB is the prime example of executive power in the context of EMU. EU agencies and EU institutions exercise executive powers, at times in a rather satellite fashion, relatively detached from the EU's institutional structures and their control mechanisms. Frontex is a good example of such satellite executive action in the area of migration.[55]

National and European executive power connects and interlocks through numerous interactions and interdependencies. Composite administrative procedures are characterized by a decision-making process in which both national and EU administrations take part and in

[50] E.g. Recital 16 of Parliament and Council Regulation (EC) 1905/2006 establishing a financing instrument for development cooperation [2006] OJ L 378/41, providing for implementation of thematic programmes including migration.
[51] E.g. Community Charter of Fundamental Social Rights of Workers, adopted at the European Council meeting held in Strasbourg on 9 December 1989; Case C-222/14, *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* [2015], ECLI:EU:C:2015:473; The Court and its Advocate Generals referred to the European Council in 122 cases in the 5 years since the entry into force of the Lisbon Treaty, and 112 times in all the years before (1975–2009).
[52] Article 22 TEU.
[53] Articles 15(6) and 22 TEU.
[54] E.g. Case C-370/12, *Pringle* [2012], ECLI:EU:C:2012:756.
[55] Florin Coman-Kund, *European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (Routledge, 2018), p. 5; Maarten den Heijer, 'Frontex and the Shifting Approaches to Boat Migration in the European Union: A Legal Analysis' in Ruben Zaiotti (ed.), *Externalizing Migration Management: Europe, North America and the Spread of 'Remote Control' Practices* (Routledge, 2016).

which the final decision depends on the participation of both.[56] The participation of different administrations acting within their own legal framework and carrying out their own responsibilities raises salient issues relating to the separation of powers and by extension to the Union's and Member States' commitment to the rule of law, good administration and judicial protection.

Control and legitimacy

The Commission's task of *enforcing* EU law vis-à-vis national authorities and Member States on the one hand and the EU institutions on the other is the clearest expression of the EU executive's contribution to controlling the exercise of public power. The Commission exercises this control in cooperation with the Court of Justice, eg. when it brings an enforcement action against a Member State. Yet, control by the Commission is multifaceted and usually based on an exchange of reasons for why or why not a particular action or omission infringes EU law. This process gives all actors the opportunity to justify their choices by legitimate reasons.[57] In other words, administrative and judicial challenges against executive acts create an opportunity for further justification by the decision-maker. This is an often underappreciated, distinct way, in which separation of powers generates additional legitimacy of public decision-making.

The Commission is politically accountable to the European Parliament, which has the power to dismiss the Commission as a body.[58] However, short of this nuclear option, Parliament has struggled to control the Commission in its day-to-day decision-making, although it seems that it may be tightening its grip. While the Commission used to be *legitimised* through its expertise and its relative independence from party politics.[59]

Since the appointment of the Juncker Commission the 'special relationship' between the EP and the Commission has been strengthened and the Commission's priorities are strongly influenced by the Parliament's agenda. As a result, the roles of the executive (Commission) and the legislature (in particular the Parliament) have become increasingly blurred. The current Commission President expresses a wish to further

> *strengthen the partnership between the European Commission and the European Parliament. I believe we should give a stronger role to the voice of the people, the European Parliament, in initiating legislation. I support a right of initiative for the European Parliament. When Parliament, acting by a majority of its members,*

[56] Composite procedures are used, e.g. in the context of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), where National Competent Authorities (NCAs) or the National resolution Authorities (NRAs) on the national side and the European Central Bank (ECB) or the Single Resolution Board (SRB) on the European side interact in order to produce a final outcome depending on the contribution of both sides.
[57] See: Rainer Forst, *Kritik der Rechtfertigungsverhältnisse* (Suhrkamp Taschenbuch Wissenschaft, 2011), p. 76.
[58] Article 17(8) TEU.
[59] Article 17(3) TEU: 'The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt'.

adopts resolutions requesting that the Commission submit legislative proposals, I commit to responding with a legislative act […].[60]

As a result, day-to-day influence of Parliament over the Commission has increased and so has the Commission's dependence on party politics. This brings the EU model closer to the parliamentary democracies of the Member States. It also changes the sources of legitimacy of the Commission towards claiming, besides expertise, also democratic legitimacy via the Parliament.

However, different executive actors benefit from different sources of legitimation to different degrees. The Council, the Commission, the ECB and the EU agencies rely to very different degrees on independence from party politics, support by parliament, mobilisation and consideration of public opinion, and expertise.

EU executive actors enjoy exceptionally broad discretion as to their procedural choices. Unlike the Member States, the EU does not have a comprehensive act on administrative procedure that would bind all its executive bodies. Their own Rules of Procedure and the Court's general jurisprudence are the primary source for guidance on administrative procedure. The detailed way in which administrative procedures are regulated thus depends on sectoral legislation, which is incoherent and fragmented, leaving the EU executive more procedural discretion than in many national legal systems and making control more difficult. Can and does the ECJ offer under these conditions effective control of EU executive power?

An additional complexity arises from composite administrative procedures. They can result in a situation, where certain parts relevant for the decision-making process fall outside the scope of judicial review.[61] In addition, in composite procedures, the reach of judicial review into the procedure as a whole may be problematic.[62]

Within these complex, multidimensional, and often informal interactions, the European Ombudsman exercises the important task of investigating complaints about poor administration by EU institutions or other EU bodies. This often concerns complaints that for different reasons do not fall within the formal legal sphere patrolled by the Court of Justice.

3. Judicial branch

The function conferred on the Court of Justice of the EU (CJEU) – a collective name that encompasses both the General Court (GC) and the Court of Justice (ECJ) – is to ensure that 'in the interpretation and application of the Treaties the law is observed' (Article 19 TEU).[63]

[60] See Ursula von der Leyen, 'A Union that strives for more - My agenda for Europe', available at: https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf.
[61] Case C-219/17, *Berlusconi* [2018], ECLI:EU:C:2018:1023.
[62] Ibid.
[63] Article 19 TEU.

EU Courts and national courts

In relation to the other branches and the Member States, the CJEU exercises first and foremost a control function. It arguably comes the closest among the Union institutions to holding a unifying role within its branch. Nonetheless, it also shares the task of interpreting and applying EU law with national courts, who under the principle of decentralised enforcement function as the EU's general courts and as such carry out the bulk of EU law application and interpretation.[64] While there are some differences in subject matter jurisdiction – most importantly, the CJEU holds an absolute monopoly on reviewing the validity of secondary EU law[65] – the division of competences between the EU and national levels is mainly functional and realised through the *locus standi* rules.

The relation between national courts and the CJEU is formalised in the preliminary ruling procedure in Article 267 TFEU, which establishes an institutionalized form of judicial *cooperation* between the ECJ and national courts. It has been hailed as the 'keystone' of the EU judicial system, 'which, by setting up a dialogue between one court and another, [. . .] has the object of securing uniform interpretation of EU law [. . .], thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties [. . .]'.[66] The preliminary ruling procedure lies at the very core of what makes the EU unique, that is, its ability to vest EU law with *extraordinary effectiveness* within the national legal order.[67] The ECJ's interpretation is largely accepted (only exceptionally openly challenged[68]) because of the ever more tightening interlocking embrace between national and European law and the increasing interdependent stakes of all involved actors. The dependence on the support by national courts inherent in the procedure also means that an inter-judicial conflict has greater potential to fundamentally challenge the authority of EU law than a conflict of non-compliance by national political actors.

The relationship between national courts and the CJEU is not hierarchical in a way that the CJEU could repeal rulings of national courts. While the ECJ has made clear that both state liability and infringement actions are available remedies if highest national courts, which are under an EU law obligation to refer, do not do so,[69] this is a much more indirect means of putting pressure than the power to repeal. The ECJ depends on national courts' willingness to cooperate both by referring and by subsequently following its rulings. National courts

[64] C.f. Opinion of Advocate General Bot in Case C-555/07, *Kücükdeveci* [2009], ECLI:EU:C:2009:429, para 55.
[65] See Article 263 TFEU and the judgments in Case C-188/92 *Textilwerke Deggendorf* [1994], ECLI:EU:C:1994:90 and Case 314/85 *Firma Foto-Frost* [1987], ECLI:EU:C:1987:452.
[66] Opinion 2/13 of the ECJ [2014], ECLI:EU:C:2014:2454, para 176 (emphasis added). Earlier, in Opinion 1/09, *European and Community Patents Court* [2011], ECLI:EU:C:2011:123, paras 77ff, the ECJ rejected an ICT—the formation of the European and Community Patent Court—because it considered that the mechanism was susceptible of adversely affecting the position and powers of national courts within the preliminary ruling procedure.
[67] Christina Eckes, *EU Powers under External Pressure: How the EU's External Actions Alter its Internal Structures* (OUP, 2019).
[68] Case C-441/14, *Dansk Industri* [2016], ECLI:EU:C:2016:278; Danish Supreme Court Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S* v. *The estate left by A*; Case C-497/17, *Weiss and others* [2018], ECLI:EU:C:2018:1000; German Constitutional Court Case 2 BvR 859/15, DE:BVerfG:2020:rs20200505.2bvr085915.
[69] Case C-224/01, *Gerhard Köbler v Republik Österreich* [2003], ECLI:EU:C:2003:513; C-416/17 *Commission v France* [2018], ECLI:EU:C:2018:811.

also hold the power to refer repeatedly and potentially in order to enter into a debate on the right outcome.[70] Recent research has however questioned the collaborative nature of the inter-level judicial relationship, arguing that the CJEU takes a more superior role towards national courts than previously acknowledged.[71]

Legitimacy and control

The judiciary derives its legitimacy from the law itself, which requires it to base its decisions on legally recognised modes of reasoning from the established legal sources. This particular legitimacy that differs from, complements and facilitates the more direct democratic legitimacy of the other two branches, in particular the legislature. These different sources of legitimacy justify why a constitutional democracy majoritarianism does not always prevail and how each branch contributes within its function to the working and legitimacy of whole system.

A precondition for this legitimacy is that the judiciary can draw from legal expertise impartially and independently. Without such independence, separation of powers is not possible. As a result of the close interlocking of the EU and national spheres, the rule of law crisis in Hungary and Poland directly raises issues of the separation of powers within the EU. This jeopardizes the multilevel structure of the EU judiciary; the great relevance of the respective contributions of the ECJ and the national judiciaries presupposes their independence. The independence of the national judiciary is particularly central to the formalized judicial dialogue under the preliminary ruling procedure.[72] At the same time, making the admissibility of references dependent on the independence of the referring court cuts these national judicial systems lacking judicial independence, off from the dialogue with the CJEU.[73]

The primary avenue for judicial control of EU legislative and executive decision-making is, at least formally, the direct judicial review procedure under Article 263 TFEU, which allows the CJEU to review the legality of acts of the other EU institutions. Notably, however, the ECJ has placed a significant part of this responsibility on national courts, holding that the Article 263 TFEU procedure forms part of a 'complete system of judicial remedies' when coupled with remedies available to individuals before national courts and the preliminary ruling procedure established by Article 267 TFEU.[74] Direct actions for judicial review of EU legislative and executive action can also be brought before national courts, pursuant to national laws on procedures and remedies (which in turn have to be compatible with the principles of effectiveness and equivalence), who will refer credible challenges to the CJEU for a preliminary ruling.

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[70] See e.g. Case C-102/14, *Taricco and others (Taricco I)* [2015], ECLI:EU:C:2015:555 and Case C-42/17, *M.A.S., MB (Taricco II)* [2017], ECLI:EU:C:2017:936.

[71] Anna Wallerman Ghavanini, 'Power Talk: Effects of Inter-Court Disagreement on Legal Reasoning in the Preliminary Reference Procedure' (2020) *5 European Papers – A Journal on Law and Integration*, p. 887; Rob van Gestel and Jurgen de Poorter, *In the Court we Trust* (CUP 2019).

[72] Case C-64/16, *Associação Sindical dos Juízes Portugueses* [2018], ECLI :EU:C:2018:117, para 43.

[73] C.f. Laurent Pech and Sébastien Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue' (2018) 55(6) *Common Market Law Review* 1827, p. 1842.

[74] Case C-50/00P, *Unión de Pequeños Agricultores* [2002], ECLI:EU:C:2002:462.

Furthermore, the CJEU exercises control of the Member States' implementation of and adherence to EU law through the infringement procedure (Articles 258 and 259 TFEU). By and large, these cases concern actions or omissions of the national legislature and executive; only exceptionally, the national judiciary. The procedure is triggered by the EU Commission or – again, exceptionally – by a Member State and the Court only becomes involved after a pre-procedure, in which the Commission and the Member State exchange in order to resolve controversies without submitting them formal judicial review. Again, however, the doctrine of state liability for breaches of Union law, claims for which are primarily settled by national courts, has entailed that the responsibility for monitoring Member State executive and legislative (and exceptionally even judicial) compliance is shared between the CJEU and national courts.[75]

These procedures provide the CJEU with a clear mandate to strike down measures that violate the Treaties. A more uncertain question is however how the control mechanisms available against discretional decision-making. A certain amount of discretion is inherent in any decision; otherwise it is merely an automatic consequence. The question is how far judicial review of discretional decision-making can be taken, before it displaces rather than protects collective will-formation.[76] In this context, the differing sources of legitimacy place particular strain on the judiciary. The executive benefits from an assumption of greater technical and issue-specific expertise and the legislature from democratic legitimacy, whereas the judiciary, whose legitimacy derives from the law, is hampered by the lack of specific rules inherent in discretion.

As a possible and less intrusive means of exercising review, the CJEU has sometimes imposed stricter requirements on the reasoning justifying the discretional decision-making of the other branches. Additionally, the judiciary has tried to overcome the difficulties entailed by the scrutiny of expert-based measures, i.e. of the Commission's technical discretion. Courts have been increasingly engaging with the factual backgrounds of the cases[77] and have been developing a rather sophisticated procedural approach to the review of such measures.[78] However, the Commission continues to be the main source of expertise before the CJEU, the appointment of court appointed experts remaining an exceptional feature and being seen as an erosion of judicial authority rather than as a way to question the executive's monopoly over evidence.[79] This raises questions about the CJEU's *de facto* independence from the EU executive and its ability to effectively scrutinize its decisions.

The democratic legitimacy of the legislature argues for judicial restraint where it has been established that the legislature acts within the legal boundaries of its discretion, which is a prime control function exercised by the CJEU. In our understanding, judicial review within those legal boundaries ought to be more deferential vis-à-vis the legislature as the centre of

[75] Joined Cases C-6/90 and C-9/90, *Francovich* [1991], ECLI:EU:C:1991:428.
[76] C.f. Robert Alexy, *A Theory of Constitutional Rights* (OUP, 2002), Postscriptum.
[77] Patrycija Dabrowska-Klosinska, 'EU Courts, Global Risks, and the Health and Environmental Safety Revisited: On Nuances of a Less Deferential Standard of Review' (2013) *Robert Schuman Centre for Advanced Studies* Global Governance Programme Working Paper 2013-07.
[78] Joseph Corkin, 'Science, Legitimacy and the Law: Regulating Risk Regulation Judiciously in the European Community' (2008) 33(3) *European Law Review* 359.
[79] Eric Barbier de la Serre and Anne-Lise Sibony, 'Expert Evidence before the EC Courts' (2008) 45 *Common Market Law Review* 941.

the collective will formation than it needs to be vis-à-vis the executive, which is expected to apply the law rather than create it. However, the fuzzy dividing lines between legislative and executive power makes this position difficult to operationalise in the EU context.

Collective will-formation

Control of executive and legislative power through judicial review is the judiciary's main function in the traditional separation of powers doctrine. Nevertheless, as law-application inherently, as explained in section 2, includes elements of law-making or at the very least law-refining, the judiciary also has a part in the process of collective will-formation. In the EU, this function has been remarkably visible, fuelled by a sustained narrative of judicial activism throughout more than three decades.[80]

National courts have been complicit in this development by referring questions to the ECJ that encourages rulings furthering European integration and by their own interpretation and enforcement of EU law within the Member States.[81]

Historically, the CJEU's exceptionally strong review powers[82] have permitted the Court to fill a void created by political impasses, particularly within the legislature and partially related to the limitations of EU competences. As Treaty changes have gradually expanded EU competence, the Court has in many fields become more withdrawn and more focused on procedural review of formal requirements, leaving substantive choices to the legislature and allowing for executive discretion. Bold interference in the will-formation processes has in more recent years been limited to issues where EU law is still in a developing stage, fundamental rights matters being a prime example.[83]

The legislature can exercise control of the CJEU by rewriting the law to override jurisprudence. This argument is often made in favour of Member States' acceptance of the case law of the CJEU: they could have—if reaching consensus between national governments and majority ratification by all national parliaments, most likely including referendums in several Member States—changed the Treaty to overrule the Court. Nevertheless, this onerous procedure required for primary law amendment, especially coupled with the level of detail of the Treaties, continues to place the judiciary in a comparatively strong position vis-à-vis the legislature. While this is more pronounced for primary law (including the judge-made general principles, which continue to play a major role in the Union legal system), it also applies to relatively technical rules of secondary law. The result is that instead of formal Treaty amendment involving heavy parliamentary procedures, the institutions resort to new interpretations of existing Treaty provisions, which during the past years have enabled far

[80] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policymaking* (Martinus Nijhoff, 1986); Gunnar Beck, 'Judicial Activism in the Court of Justice of the EU', (2017) 36 *University of Queensland Law Review* 333.

[81] Gareth Davies, 'Activism Relocated: The Self-restraint of the European Court of Justice in its National Context' (2012) 19 *Journal of European Public Policy* 76; Anna Wallerman, 'Can Two Walk Together, Except they be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy' (2018) *European Law Review* 159.

[82] E.g. preventive constitutional review powers under Article 218(11) TFEU.

[83] E.g. Case C-311/18, *Schrems II* [2020], ECLI:EU:C:2020:559; Case C-362/14, *Schrems I* [2015], ECLI:EU:C:2015:650.

reaching measures. These interpretations have proven difficult to subject to effective judicial control because, by the time they have reached the Court, their effects can no longer be undone.[84] This changes the balance of powers between the institutions.

IV. Conclusions and research agenda

In sum, we understand the separation of powers within the EU context as based on the following main tenets:

The different branches, but also different actors within these branches, benefit to different degrees from different sources of legitimation. Separation of powers does not *a priori* prioritize majoritarian institutions over non-majoritarian institutions but presumes that each branch has a particular function that it develops in relation to and interaction with the other branches. It is in this interaction that law and politics are constructively reconciled in a way that avoids domination of one over the other.

The SepaRope project has committed to making an ***exploratory contribution,*** addressing how public power is exercised and controlled in the context of polycentric institution-building and multilevel policy-making and how the exercise of power can be situated in relation to the legislative, executive and judicial branches.

We seek in particular to investigate questions concerning the interactions of the three branches within the EU, including the rules and boundaries to which these interactions are subject. This raises amongst others the following questions:

Does the Court of Justice generally go far enough in controlling the exercise of powers by the executive and the legislature? What can we learn from the judicial review of legislative and executive acts in the three policy areas of EMU, migration and trade? Does the current legal framework vest the Court with the necessary tools, i.e. procedural rules and boundaries on institutional action? Does it use them effectively enough to maintain the perception of a 'proper' constitutional order?

Is the Court able to effectively scrutinise informal practices in the three policy areas? What instruments are particularly problematic when it comes to judicial control? Why?

What are the specific sources of legitimation of different executive actors in the three fields? How do they differ from field to field and from actor to actor? How does this influence the interaction with the other branches?

What function does the 'fourth branch', in particular the ombudsperson exercise within the EU's institutional power? How does this function relate to separation of powers between the branches?

[84] Päivi Leino-Sandberg, 'Next Generation EU: Breaking a Taboo or Breaking the Law?' (*CEPS*, 24 June 2020) <www.ceps.eu/next-generation-eu/>.

How is decision-making by the different executive actors regulated? What are the rules set out by the legislature? What other rules exist? What are the practices to the extent that such decision-making remains unregulated?

Which parliament(s), the European Parliament or national parliaments, have control over which forms and parts of decision-making in the different policy areas? How this affect separation of powers within the EU?

The European Parliament seems to have effectively increased its role in controlling and ability to influence the Commission. How does this affect separation of powers within the EU?

Based on our findings to these questions, we aim to ***normatively*** *establish* what structures of will-formation and control could offer political autonomy and adequate checks and balances for EU decision-making and to what extent such structures build on a tripartite separation of powers in the EU's institutional practices.

Finally, we aim to make a ***constructive contribution*** by making tentative suggestions of how legitimate will-formation and control can be realized in a polycentric and multilevel system, potentially beyond separation of powers.