ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART
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MERONI BEHIND THE SCENES: UNCOVERING THE ACTORS AND CONTEXT OF A LANDMARK JUDGMENT

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ABSTRACT: *Meroni* is one of the most controversial cases in EU jurisprudence, one bearing profound consequences for the evolution of the EU legal and institutional system. For over sixty years the 1958 judgement has set the conditions for power delegation in the EU. It also first formulated the well-known principle of institutional balance. It remains very topical still today, as shown by the recent *ESMA* case, which raised again the issue of power delegation to external agencies. This *Article* looks behind *Meroni*'s scenes, by analysing the recently released CJEU *dossier de procédure*. Through a "law in context" analysis, it provides innovative insights into the economic and social background of the dispute. It investigates the parties' submissions and their arguments, showing how actors and institutions shaped the Court's reasoning. Ultimately, the *Article* unveils the dynamic nature of the case, arguing that far from being a necessary outcome, the Court's judgment was crafted step by step upon the arguments of the parties, in an unexpected legal build-up leading from judicial protection, to power-delegation up to the principle of institutional balance.

KEYWORDS: *Meroni* – power delegation – principle of institutional balance – judicial protection – Court of Justice of the European Union – legal history.

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I. Introduction

Meroni is one of the earliest EU cases and is possibly the first judgment that has had a long-lasting influence on the EU's institutional architecture.[1] It was formulated back in 1958 by the then Court of the European Coal and Steel Community (ECSC). Yet the principles it expounded are still applied and discussed today. As noted by Craig: "The Meroni principle has stood for fifty years as a constitutional limit to delegation and continues to be applied".[2] It circumscribes external delegation of executive powers of a non-discretionary nature on the basis of the *principle of institutional balance*.

The opening of the archives of the Court of Justice of the European Union (CJEU) now offers the opportunity to look behind the scenes of *Meroni*. The *dossier de procédure original* contains unpublished materials, including the written submissions of the parties, evidence, procedural correspondence, as well as the Report of the *Juge Rapporteur* (see Annex for the composition of the *dossier*).[3]

This *Article* provides a first assessment of the content of the *dossier de procédure*. It adopts a *law-in-context* approach, examining the judgment in the light of the context in which it emerged and of the actors that contributed to shaping it. The purpose is not only historical. Assessing *Meroni* in its context helps to shed light on the reasoning that led to the ruling, and thus provides an innovative perspective on the judgment itself. As noted by Di Donato, "what constitutes a judicial fact depends not only on the norms that qualifies the event in legal terms, but also on the perspectives and on the roles played by the actors concerned and by the community to which they belong, as well as by the context within which the facts take shape".[4] Reconstructing *Meroni*'s "story" appears even more important as it is an old and technical case, the context of which has been largely lost over time.

The *Article* focuses on the submission of the parties, which represents the most interesting aspect of the *dossier de procédure*. It helps retrace the legal reasoning and it unveils the dynamic nature of the case. Ultimately, the *Article* argues that far from being a necessary outcome, the Court's judgment was crafted step by step upon the arguments of the parties, leading from judicial protection, to the issues of power-delegation and institutional balance. The first part provides an overview of the case and situates *Meroni* within the academic debate. The second part investigates the parties' submissions, explaining the context of the dispute and showing how actors and institutions shaped the Court's reasoning. The conclusions summarise the main findings and illustrate the *dossier*'s added value.

[1] Case 9/56 *Meroni v High Authority* (*Meroni I*) ECLI:EU:C:1958:7; Case 10/56 *Meroni v High Authority* (*Meroni II*) ECLI:EU:C:1958:8.

[2] P Craig, *EU Administrative Law* (Oxford University Press 2018) 155.

[3] To be noted that the CJEU Meroni-related *dossiers de procédure* are actually two, as two are the original cases (*Meroni I* cit. and *Meroni II* cit.). The two cases were not joined during the proceedings. However, as the procedures ran in parallel and the two *dossiers de procédure* contain almost the same documents, in this report I will consider the two cases jointly. *Meroni I* will be taken as the main reference.

[4] F Di Donato, *The Analysis of Legal Cases: A Narrative Approach* (Routledge 2020) 1.

II. *Meroni* and the evolution of EU law

II.1. Overview of the case

In *Meroni* two Italian companies contested two individual decisions of the High Authority of the ECSC (High Authority) requiring payment to an obligatory ferrous-scrap equalisation system. The equalisation system was introduced in the Communities at a time of shortage of ferrous scrap in the internal market to prevent the price of Community ferrous scrap from rising to the higher prices of imported ferrous scrap. All steel companies had to share the costs of the equalisation system which was operated via some private law agencies based in Brussels.[5] The Brussels agencies determined the rate of contribution that applied to each company.

As Meroni did not pay its contribution as requested by the Brussels agencies, the High Authority adopted two individual enforceable decisions with an ultimate payment request.[6] Meroni sought the annulment of the two decisions, alleging infringement of procedural requirements and a failure to state the reasons for the decisions, arguing that no adequate information was provided with regard to the composition and the method of calculation of the sum claimed. It also contended that the Brussels agencies had put in place a discriminatory system.

Following the opinion of the Advocate-General (AG), the Court annulled the two decisions. The AG stressed the need to ensure adequate judicial protection when delegating powers to private law associations.[7] The Court also found that the delegation of power to the Brussels agencies infringed the Treaties, as the High Authority could not confer upon the delegated agencies powers different from those which it itself received under the Treaties.[8] In addition, however, the Court went beyond the arguments of the applicant and of the AG to examine whether a delegation of power to private law bodies was at all possible under the Treaties. It ruled that such a delegation was only possible if limited to "clearly defined executive powers, the exercise of which can be subject to strict review in the light of objective criteria" and could not involve discretionary powers.[9] The Court based its arguments on the *principle of institutional balance*, or, as it is worded in this ruling, "balance of

[5] These agencies were: the Imported Ferrous Scrap Equalization Fund and the Joint Bureau of Ferrous Scrap Consumers.

[6] Decision 22/54 and 14/55 of the High Authority of the European Coal and Steel Community of 26 March 1954 and of 26 March 1956 establishing machinery for the equalization of ferrous scrap imported from third countries.

[7] *Meroni I* cit. and *Meroni II*, opinion of Advocate General (AG) Roemer cit. 194.

[8] *Meroni I* cit. 150.

[9] *Ibid*. 152.

powers", as a fundamental guarantee for the undertakings established by the Treaties, that would be made ineffective by a delegation of discretionary power.[10]

II.2. The long and contested life of *Meroni* in EU law

Meroni stands out in the early jurisprudence of the Court of Justice, which tended to be rather low key and focused on technical trade issues.[11] Certainly a case of high technical and economic relevance, *Meroni* nonetheless established pivotal legal principles of EU law, which distinguish it from the shy jurisprudence of the European Coal and Steel Community (ECSC) Court.

Starting from the 1990s, when the process of agencification in the EU intensified, the *Meroni principle* was at the centre of intense debate.[12] Scholars struggled with the dilemma of reconciling the ever-growing need for the delegation of important (and often discretionary) powers to external agencies with a legal doctrine that seemed to prohibit such a delegation. As new bodies were granted broad-ranging powers in many regulatory fields,[13] several authors observed that *de facto* EU agencies already enjoyed powers that went well beyond what would be allowed under the *Meroni doctrine*.[14] Some argued that the *Meroni principle* did not directly apply to agencies;[15] others endorsed a more flexible reading that narrowed non-delegation to basic choices, thus allowing for some discretion.[16]

[10] *Ibid*. The Court observed that delegation was necessary to achieve the Community's general objectives set out in art. 3 of the ECSC Treaties. However, it recalled that these objectives were binding on the "Institutions of the Community... within the limits of their respective powers, in the common interest".

[11] V Fritz, *Juges et Avocats Généraux de La Cour de Justice de l'Union Européenne (1952-1972) : Une Approche Biographiques de l'Histoire d'une Révolution Juridique* (Klostermann 2018) 140; A Vauchez, *L'Union par le Droit : L'invention d'un Programme Institutionnel pour l'Europe* (Presses de Sciences Po 2013) 76.

[12] M Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?' (2010) Maastricht Journal of European and Comparative Law 281.

[13] Among others: the European Medicines Agency (EMA), the European Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA), the European Food Safety Authority (EFSA), the European Securities and Markets Authority (ESMA).

[14] K Lenaerts was among the first authors to question the constitutional limits of the delegation of executive powers to agencies. See K Lenaerts, 'Regulating the Regulatory Process: "Delegation of Power" in the European Community' (1993) ELR 23. See further: E Vos and M Everson, 'European Agencies: What About the Institutional Balance?' (Maastricht Faculty of Law Working Paper 4-2014) 4.

[15] R Dehousse, 'Misfits: EU Law and the Transformation of European Governance' (Jean Monnet Working Paper 2-2002); E Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) CMLRev 1395.

[16] G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) ELJ 319 ff.; S Griller, A Orator, 'Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine' (2010) ELR 3 ff.; R Schütze, '"Delegated" Legislation in the (new) European Union: A Constitutional Analysis' (2011) ModLRev 661, 673.

Largely, the protection of the rights of individuals under delegation emerged as a key concern.[17]

For a long time, the CJEU did not provide additional guidance on how to interpret *Meroni*.[18] Only recently, in the *ESMA* case, the United Kingdom directly referred to *Meroni* to challenge the agency's powers to prohibit or impose conditions on short-selling of financial products.[19] This was seen as the much-awaited opportunity to test the applicability of the *Meroni doctrine* to agencies and to clarify its scope. However, the *ESMA* judgment did not entirely settle the issue. The Court reconfirmed the relevance of *Meroni* for EU agencies, but it found that the powers delegated to ESMA were sufficiently circumscribed to comply with the *Meroni* conditions.[20] In fact, the *Meroni doctrine* is still very much alive as shown by the powers endowed to agencies in new regulatory fields such as the Banking Union.[21]

III. Actors and institutions behind the *Meroni* judgment

Only a tiny percentage of the arguments of the parties contained in the *dossier de procédure* are reflected in *Meroni*'s public documents (see Annex). Therefore, the parties' submissions reveal many aspects of the dispute that were previously unknown. They uncover who was driving the case and why, identifying the actual actors behind the legal reference to parties and institutions. They also help to retrace how the legal reasoning evolved. What emerges from the dossier is in fact a dynamic process. The parties shifted their arguments during the procedure and the Court reformulated them in the final judgment.

Looking at the actors in *Meroni* is critical because the case precedes the season of *constitutionalisation* of the EU legal order, which started in the 1960s with *Van Gend en Loos* and

[17] J.-P. Jacqué noted that the principle of institutional balance originally worked as a "substitute for the principle of the separation of powers" to protect the rights of individuals. J-P Jacqué, 'The Principle of Institutional Balance' (2004) CMLRev 383. M. Chamon warned that the key concern for the Court in 1958 was the judicial protection of the rights of private parties and not the delimitation of the powers of the different institutions. M Chamon, 'EU Agencies between *Meroni* and *Romano* or the Devil and the Deep Blue Sea' (2011) CMLRev 1055; M Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?' cit.

[18] In some rulings in the 2000s it confirmed the general applicability of *Meroni*, but it never clarified its scope nor its direct applicability to modern agencies. Case C-301/02 P *Tralli v ECB* ECLI:EU:C:2005:306; joined cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* ECLI:EU:C:2005:449; joined cases T-369/94 and T-85/95 *DIR International Film and Others v Commission* ECLI:EU:T:1998:39.

[19] Case C-270/12 *United Kingdom v European Parliament and Council* ECLI:EU:C:2014:18.

[20] E Vos and M Everson, 'European Agencies: What About the Institutional Balance?' cit.; M Chamon, 'The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism' (2014) ELR 380.

[21] Lately, the Single Resolution Board (SRB), the central authority within the European Banking Union, was given extensive powers, including to formally decide on the resolution of a bank. The SRB delegation has not so far been challenged in Court, yet it raises again the question of what level of discretion could be tolerated by the Court under the *Meroni* Jurisprudence. See P Lintner, 'De/Centralized Decision Making Under the European Resolution Framework: Does Meroni Hamper the Creation of a European Resolution Authority?' (2017) European Business Organization Law Review 591.

Costa/ENEL.[22] Some of *Meroni*'s actors went on to have prominent roles in the new Court's leadership. In the following sections I explain how the main actors influenced the outcome of the case. I do so by compiling some biographical information with the analysis of the submissions in the CJEU *dossier the procédure*. Table 1 provides an overview.

Actor	Role	Observations	Impact on CJEU
Aldo Meroni	Applicant	Most active private undertaking in front of the CJEU	Low
Arturo Cottrau	Lawyer of the applicant	Most active euro-litigant in the early years	Low
Giulio Pasetti	Agent of the High Authority	Active HA's and Commission's legal agent	Low
Antonio Trabucchi	Advisory agent of the High Authority	As CJEU judge he will be key actor of constitutional turn of the CJEU (Van Gend en Loos) and then AG in important cases	High
Karl Roemer	Advocate General	Longest serving AG. Will issue opinions in important cases (Nold, Dassaonville, Defrenne)	High
Jacques Rueff	Juge Rapporteur	Well known French economist, important influence in focusing the Court on competition and internal market	Medium
The ECSC Court's judges	The Court	Rather low-profile Court with an economic focus and an heterogenous composition	Medium

TABLE 1. Main actors of the Meroni case.

III.1. *MERONI*: SHEDDING LIGHT ON THE CONTEXT AND ON THE ECONOMIC RATIONALE

Meroni & Co Industrie Metallurgiche were two Italian medium-size steel companies. According to data by Vauchez and Marchand, Meroni was was among the ten major actors before the CJEU during the period 1954-1978.[23] Arturo Cottrau, Meroni's lawyer, was equally one of the most active euro-litigants until 1963. He specialised in ECSC pricing and represented several Italian coal and steel companies in over sixty proceedings before the Court of Justice.[24] *Meroni* was one of his first cases and by far the most important.

Meroni's submission provides a new perspective on the litigation context and the interests that were driving the actors. We learn that there were at the time widespread

[22] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1; case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

[23] C Marchand and A Vauchez, 'Lawyers as Europe's Middlemen: A Sociology of Litigants Pleading to the European Court of Justice' in J Rowell and M Mangenot (eds), *A Political Sociology of the European Union. Reassessing Constructivism* (Manchester University Press 2011) 68, 74.

[24] *Ibid*. 75 and 78.

concerns for the functioning of the system, that the contribution rate affected disproportionally the economic performance of small undertakings (in particular on the Italian market), and that the agencies were dominated by big Italian steel companies.[25] Meroni repeatedly raised the issues of discrimination and of the economic consequences of the system, arguing that: "Therefore a situation has emerged where few big companies dominate the market at the expenses of the other ones which have to provide for their supply of raw material day per day and that, if maintained, will lead small undertakings to total economic collapse, leaving full space to the big industrial companies".[26]

These contextual elements are important to grasp the economic ideology behind the judgment. The ECSC Court was predominantly an "economic Court". Vauchez notes that from the very beginning the Court was eager to endorse an economic doctrine marked by enthusiasm for competitive markets.[27] The objective to promote fair competition arguably influenced the position of the Court, revealing concerns that an Italian Small and Medium-sized enterprises (SMEs) was struggling to find its place in a market dominated by "big companies". But they are even more important to understand why judicial protection became such a relevant issue in the case. The controversy was not about technical measurements of a neutral body that was just implementing the directives of the High Authority. It was about an agency (mostly managed by big companies) that was responsible for defining the rate of payment for many other undertakings. Fixing the contribution rate, which might appear at first to be a highly technical issue (especially if considered in light of the powers and the "discretion" that EU agencies enjoy nowadays), mattered a great deal in economic terms for the undertakings that participated in the mechanism. In the undertakings' view, it was crucial that they preserved their legal rights to challenge a decision with which they did not agree, regardless of whether the decision was taken directly by the High Authority or by an agency which had received a mandate to carry out the task. The issue was therefore far more political and sensitive than it may appear at first sight fifty years later.

III.2. The High Authority: the dynamic nature of the case

The High Authority was represented by its agent Giulio Pasetti. Starting from the rejoinder, Pasetti was assisted by Professor Alberto Trabucchi. Pasetti was an agent for the High Authority in several Court cases during the 1950s and 1960s. He was a former student of Prof.

[25] Reference was made to other Court cases raising similar issues and Meroni even quoted a speech of a Member of the European Parliament (MEP) mentioning the problem. Dossier de Procédure Original *Meroni I*, HAEU CJUE-0564 50.

[26] Dossier de Procédure Original *Meroni I* cit.

[27] A Vauchez, *L'Union Par Le Droit: L'invention d'un Programme Institutionnel pour l'Europe* cit. 76.

Trabucchi and he invited Trabucchi to plead in front of the Court on several occasions.[28] Together Pasetti and Trabucchi also published an Italian edition of the EC Treaties.[29]

Trabucchi was a renowned private law professor. He served as a judge in the CJEU from 1962 and was Advocate-General between 1973 and 1976.[30] Despite his private law focus, Trabucchi was very influential in the Court throughout his career. He joined the bench right at the moment of the Court's ideological shift towards a proto-federal agenda. In the landmark judgment of *Van Gend en Loos* he was instrumental in pushing for a constitutional interpretation of the Treaties.[31] *Meroni* was one of the first cases in which Trabucchi was involved as an external agent.[32] His specialisation in private law arguably led him to recognise the importance of the legal protection of private companies.[33] As I argue below, Trabucchi was indeed instrumental to shifting the High Authority's defence towards a strategy that took due account of judicial protection.

The submission of the High Authority unveils the dynamic nature of the case. Its position changed substantially during the procedure and led the Court to address the issue of power delegation and to formulate the well-known *Meroni doctrine*. One can distinguish two phases in the High Authority's defence.

Initially, in its response, the High Authority argued that it could not be made responsible for the deliberations of the Brussels Agencies. If there was any misuse, this was to

[28] V Fritz, *Juges et Avocats Généraux de La Cour de Justice de l'Union Européenne (1952-1972) : Une Approche Biographiques de l'Histoire d'une Révolution Juridique* cit. 326.

[29] G Pasetti and A Trabucchi, *Codice Delle Comunità Europee* (Giuffré 1962). The "codice" merely gathered and commented on EC Treaty provisions in force at the time and was probably also aimed at providing Trabucchi with some "European" credentials (the author thanks A Arena for pointing to this element).

[30] Subsequently, Trabucchi was *Juge Rapporteur* in *Walt Wilhelm* (Case 14/68 *Walt Wilhelm and Others v Bunderskartellamt*, ECLI:EU:C:1969:4) and Advocate General in important cases, such as case 4/73 *Nold KG v Commission* ECLI:EU:C:1974:51, 8/74 *Dassonville* ECLI:EU:C:1974:82 and 43/75 *Defrenne v SABENA* ECLI:EU:C:1976:39 See V Fritz*, Juges et Avocats Généraux de La Cour de Justice de l'Union Européenne (1952-1972) : Une Approche Biographiques de l'Histoire d'une Révolution Juridique* cit. 325-329.

[31] M Rasmussen, 'Law Meets History. Interpreting the Van Gend En Loos Judgment' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 103; B Davies and M Rasmussen, 'From International Law to a European Rechtsgemein-schaft: Towards a New History of European Law, 1950-1979' in J Laursen (ed), *The Institutions and Dynamics of the European Community, 1973-83* (Nomos 2015) 97.

[32] Trabucchi was associated as an external agent to the High Authority's defence in the summer 1957. Seeking external support was seemingly a usual habit of the European executive in its early days. Thus, Trabucchi pleaded eleven times for the European institutions before his appointment as judge. C Marchand and A Vauchez, 'Lawyers as Europe's Middlemen: A Sociology of Litigants Pleading to the European Court of Justice' cit. 79 and 85.

[33] This also emerges from the oral hearing that can be consulted at the historical archives of the European Commission in Brussels. Pleading in front of the Court, Trabucchi reiterated the importance of judicial protection of undertakings and the responsibilities of the High Authority in controlling the Brussels agencies. See Historical Archives of the European Commission, Report of Oral Hearing, BAC 371/1991 77.

be attributed to the agencies, whose deliberations however could not be challenged directly. "The High Authority adopts the data furnished by the Brussels Agencies without being able to add anything thereto. Any other specific explanations would mean unauthorized interference in another body's powers for the purpose of explaining the factors involved in the elaboration of its decisions".[34]

This statement reveals the High Authority's initial litigation strategy, which aimed to distance itself from the deliberations of the Brussels agencies, as if they were independent bodies that had the power to act unilaterally. In so doing, the High Authority introduced the key elements of power delegation and of the related legal protection. The issues were picked up by Meroni first and then reformulated by the AG and the Court. This line of defence indeed implied that undertakings would be deprived of any means to defend themselves as they could neither challenge the High Authority's decisions, nor the decisions of the Brussels agencies, that enjoyed even wider powers than the High Authority itself, whose decisions "can always be contested before the Court of Justice".[35]

It is interesting to note the change in defence strategy of the rejoinder (Phase two): "The actual declaration of intention is to be sought in the decision of the High Authority establishing the system, and everything else constitutes an application of the criteria contained in that legislative measure".[36]

The shift in the argument is evident: The High Authority adopted the conclusions of the agencies not because they were issued by a separate independent body, but because they were technical expressions of criteria already established by law. Arguably, the High Authority realised that shifting responsibility onto the Brussels agencies could be risky and it would deprive undertakings of their legal protection guarantees, while endowing external agencies with extraordinary powers.

To sum up, the dossier points to a clear change in the defence strategy of the High Authority. What happened between the response and the rejoinder that led the High Authority to change its strategy so drastically? Meroni's reply unveiled several shortcomings with respect to judicial protection. However, something else happened: Trabucchi entered the picture. It is not unreasonable to conclude that his arrival had something to do with the change.

However, the judgement of the Court barely considered the arguments of the rejoinder and only focused on the initial defence of the High Authority. The change of strategy can only be fully appreciated when reading the two unpublished High Authority's submissions contained in the *dossier*. Thus, the second phase of the defence constitutes a "path not taken". It remains an open question what the Court's position would have been had the High Authority adopted the rejoinder's line of defence from the beginning or if the

[34] *Dossier de Procédure Original Meroni I* cit. 5.
[35] *Ibid*. 44.
[36] *Ibid*. 12-13.

Court had considered the arguments put forward in the rejoinder rather than those of the response.

III.3. The Court: an innovative judgment of a conservative Court?

The Court issuing the *Meroni* judgment was a *sui generis* Court with regard to its composition. It was presided over by the Italian M. Pilotti. Together with the Luxembourgish Ch. L. Hammes and the German O. Riese, Pilotti was one of the few renowned judges sitting on the bench. The rest of the Court was composed of lawyers who had been active in politics (the Belgian L. Delvaux), in the public service (the Dutch A. Van Kleffens), in trade unions (P. Serrarens, also from the Netherlands), and even of an economist (the French J. Rueff).[37] Overall, this heterogenous group of judges led scholars to consider the first Court of Justice as a "specialised economic Court", that limited itself to coal and steel trade issues and generally relied on a literal interpretation of the Treaties.[38] According to Vauchez and Fritz, these early judgments were rather "unspectacular" and the technical nature of the Court made it unfit to pronounce grand legal principles.[39]

What led such a conservative and technical court to a landmark judgment such as *Meroni*? The analysis of the submissions of the parties allows us to retrace key elements that probably influenced the Court's approach. It shows that the Court's own position partly emerged from the reinterpretation of the parties' arguments; that the Juge-Rapporteur Rueff and the AG Roemer were instrumental in directing the reasoning of the Court; and that some arguments, such as the *principle of institutional balance*, were introduced by the Court *ex novo*.

a) The reinterpretation of the parties' arguments.

As shown in the previous sections, the Court built its reasoning on judicial protection and power delegation upon the parties' submissions, but it adapted them substantially to meet its needs. First, it was the High Authority's initial defence that led the Court to address power delegation to external bodies in the first place. As the Court relentlessly remarked: "the High Authority uses the Brussels agencies as a shield".[40] Second, the Court reinterpreted Meroni's claims about legal protection and discrimination as a matter of power delegation, linking the need to ensure the legal guarantees of private undertakings to the type and extent of powers delegated to the Brussels agencies. This paved the way to the formulation of the principle of limited delegation in the Court's judgment.[41]

[37] V Fritz, *Juges et Avocats Généraux de La Cour de Justice de l'Union Européenne (1952-1972): Une Approche Biographiques de l'Histoire d'une Révolution Juridique* cit. 34. In the Court there were two Dutch judges, however Serrarens was not appointed for his nationality but rather to integrate the "interests of the workers".

[38] A Vauchez, *L'Union Par Le Droit: L'invention d'un Programme Institutionnel pour l'Europe* cit. 76.

[39] *Ibid*. 76-77; V Fritz, *Juges et Avocats Généraux de la Cour de Justice de l'Union Européenne (1952-1972): Une Approche Biographiques de l'Histoire d'une Révolution Juridique* cit. 140.

[40] *Meroni I* cit. 142.

[41] *Ibid*. 146.

b) The Advocate General and the Juge Rapporteur.

Juge Rapporteur Rueff and Advocate-General Roemer played a crucial role in steering the legal reasoning towards the issues of judicial protection and power delegation.

Rueff was a renowned French economist with liberal views. He was judge at the CJEU from 1952 to 1962. Before joining the bench, in addition to being a Professor, he worked for the Society of Nations and for the *Banque de France*, and held important advisory positions for the French Government.[42] He wrote books on monetary stability and political economy, theorising the expansion of the internal market.[43] Arguably, Rueff was appointed *Juge Rapporteur* in the *Meroni* case because of his economic expertise. His report, which was previously not in the public domain, identified the fundamental legal question as the relationship between the High Authority and the Brussels agencies, thus directing the attention of the Court to the issue of power delegation. He observed: "Thus the role played by the Brussels agencies, even if they are not parties in the case, constantly emerges during the procedure".[44]

One of the longest-serving Advocates-General, the German lawyer Karl Roemer served in this position from 1953 to 1973. Roemer was the AG in important cases, such as *Van Gend en Loos*, *Plaumann* and *Continental Can*. He was known for a rather cautious approach to the Court's new narrative about the constitutional legal order.[45] Conversely, in *Meroni*, his observations about judicial protection paved the way to a landmark judgment. As noted by Chamon, for AG Roemer, judicial protection was certainly the legal focus of the case.[46] The issue was not so much the possibility to delegate power nor the type of delegation, but the need to guarantee legal protection: at the very least "it is necessary to require that the guarantees laid down by the Treaties as to legal protection shall continue to exist even in the case of delegation".[47] If the delegation had contained provisions allowing for judicial review, it would have arguably been legal for AG Roemer.

c) The Court's own arguments.

Despite these many influences, the examination of the *dossier* shows that the Court's conclusions did not stem necessarily from the arguments of the parties. The evidence provided by the parties pointed to several shortcomings in terms of judicial protection in

[42] Notably, in 1958, at the beginning of his second mandate at the Court, Rueff was appointed by French President De Gaulle to preside over a committee of experts to implement a large economic recovery plan. See V Fritz, *Juges et Avocats Généraux de la Cour de Justice de l'Union Européenne (1952-1972): Une Approche Biographiques de l'Histoire d'une Révolution Juridique* cit. 302-309.

[43] CS Chivvis, *The Monetary Conservative: Jacques Rueff and Twentieth-Century Free Market Thought* (Northern Illinois University Press 2010); F Teulon and B Fischer, 'L'analyse libérale des crises financières: un hommage à Jacques Rueff' (2011) Vie et Sciences de l'Entreprise 46.

[44] Dossier de Procédure Original *Meroni I* cit. 4.

[45] A Vauchez, '"Integration-through-Law". Contribution to a Socio-History of EU Political Commonsense' (EUI Working Paper RSCAS 10-2008).

[46] M Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?' cit. 281.

[47] *Meroni*, opinion of AG Roemer, cit. 190.

the activities of the Brussels agencies, hence the decision of the Court is not entirely surprising. However, the Court could have just annulled the decision for lack of statement of reasons, or it could have, as suggested by the AG, concluded that the delegation of power was illegal because it did not uphold necessary legal protection guarantees. The Court, instead, went beyond what was strictly necessary to resolve the dispute and introduced some legal arguments of its own.

The last part of the judgment contains arguments that are nowhere to be found in the proceedings. The Court limited delegation to "clearly defined executive powers", ruling out any discretion by the delegated bodies. In addition, it came up with the *principle of institutional balance* as a safeguard to these limitations.[48]

IV. Concluding remarks

The *Meroni doctrine* remains one of the most controversial developments in the CJEU jurisprudence for its institutional implications and its impact on the EU legal system. The analysis of the *dossier de procédure* can help us to look behind the scenes to understand what motivated the parties and the Court, thus offering an innovative perspective on the judgment. This *Article* so far has shed light on the litigation strategies of the parties and on the reasoning of the Court. As a conclusion, I would like to stress four main observations that have emerged from the analysis.

First, it cannot go unnoticed that at a first screening of the documents the litigation is not about delegation, nor about institutional balance – the two things for which the judgment is mostly known. These issues are brought into the dispute incidentally, mainly because of the High Authority's defence strategy, which insisted on the impossibility of reviewing the decisions of the Brussels agencies. Power delegation was linked to the need to uphold the legal guarantees of the undertakings, which would be deprived of their rights if the interpretation of the High Authority had been accepted. The analysis of the *dossier* would thus confirm the views of those scholars who have identified judicial protection as the main concern of the case.[49]

Second, the analysis of the *dossier* shows that there is an inherent dynamism in the evolution of the case. The outcome was not "necessary" nor "inevitable". In this sense, as noted by Davies and Nicola, *Meroni* shows that EU law evolves in a contingent manner.[50] There was a constant reinterpretation of the arguments of the parties in the light of the Court's key concerns. One might say that the reasons for which the Court annulled the High Authority's decision had little to do with the original complaints. Moreover, the issue of institutional balance does not feature anywhere but in the final judgment. This is an

[48] *Meroni* cit. 152.

[49] M Chamon, 'EU Agencies: Does the Meroni Doctrine Make Sense?' cit.; JP Jacqué, 'The Principle of Institutional Balance' cit.

[50] F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* cit. 3.

argument that the Court introduced on its own initiative. It was not a necessary or inevitable step. The Court did not have to pronounce itself on the matter. The AG had indeed reached similar conclusions on the basis of judicial protection, without introducing any positive rules about the type of delegation at stake.

Third, the *dossier* points to the crucial role of key actors. Trabucchi was arguably behind the shifting position of the High Authority. An experienced euro-lawyer such as Cottrau could seize the weakness of the High Authority's defence to put the spotlight on the lack of judicial protection. Finally, Rueff and Roemer were instrumental in redirecting the attention of the Court to the legal core of the case: judicial protection and how to guarantee it when powers are delegated.

Finally, the *dossier* sheds light on the context of the dispute. Through the arguments of the parties we get a better grasp on the economic background and on the potential disruptions of a system that was put in place to help the economic operators in the internal market. The issue was therefore much more sensitive that it might seem at first sight. Under these circumstances, for the Court it was probably not foremost to determine whether in the specific case of *Meroni* the High Authority provided appropriate justifications for its decisions. Rather, it was much more important to ensure that undertakings still preserved their legal rights in circumstances under which the High Authority had directed another entity to carry out tasks that were part of the High Authority's mandate.

To conclude, *Meroni* stands out as an early example of the Court's creativity in dissecting important legal principles from the Treaties – a practice that would later characterise the revolutionary generation of *van Gend en Loos* and *Costa/ENEL*. However, *Meroni* cannot entirely be seen as a precursor of the later constitutional turn of the CJEU jurisprudence. On the one hand, the focus on legal protection and institutional balance are cornerstones of the successive Court's jurisprudence and have contributed to a progressive vision of EU law grounded in an alternative principle to the traditional separation of power to safeguard legal guarantees. On the other hand, the doctrine of limited delegation reflects a rather conservative approach to the interpretation of power delegation and of the role of EU institutions, which relies upon a problematic and inflexible distinction between discretionary and clearly defined executive powers.