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Some Remarks on the Recent SRM Related Case-Law of the CJEU with Special Regard to the Meroni Doctrine

ABSTRACT: *The study elaborates on the development of the Meroni doctrine, derived from the Meroni judgment of the Court of Justice of the European Coal and Steel Community under a different Founding Treaty framework and its applicability to the Banking Union under the current Treaty framework. To fulfil this aim, the author first elaborates on the Advocate General's opinion and the Judgment of the Court of Justice in the Meroni case and then briefly introduces the evolution and the literature on the issue. After a short introduction of the Banking Union's institutional order, the author introduces two cases in which issues related to the Meroni doctrine were raised before the General Court, as well as the appellate procedures before the Court of Justice in one of these cases.*

KEYWORDS: Meroni, delegation of power, Banking Union, Single Supervisory Mechanism, Single Resolution Mechanism, Banco Popular Group

1. Introduction

The right of a supranational organisation which gained its powers by transfer from Member States to delegate these powers to a third party – such as an organisation registered under private law – was an issue that arose in the 1958 Meroni judgment,[1] just six years after the *European Coal and Steel Community* (ECSC) was established. The issue emerged several more times in the following decades and the Court of Justice of the European Union (CJEU) further elaborated on it. The

1 CJEU, C-9/56, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, Judgment, 13 June 1958.

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case regarding EU agencies, namely the *United Kingdom v. Parliament and Council*[2] *case – a.k.a. ESMA – can be regarded as a milestone among them. In this case, Advocate General Niilo Jääskinen*[3] *summarised the underlying problem as follows:*

> [...] while the Lisbon Treaty clearly maps out the scheme for judicial review of laws and decisions made by agencies, the Treaty is more enigmatic when it comes to delimiting the powers of agencies. [...] no mention is made of agencies in either Article 290 TFEU, which provides for delegation of rule–making in legislative acts to the Commission, or Article 291 TFEU which confers implementing powers on the Member States, the Commission, and in some limited circumstances the Council.[4]

There was a Commission proposal intended to regulate the issue; however, it was withdrawn due to insufficient support.[5] It is thus the CJEU's case-law, in particular the *Meroni* and *the United Kingdom v. Parliament and Council* cases, that elaborated on the issue of the autonomous powers of EU agencies. In the latter case, the CJEU updated the Meroni doctrine and expanded the scope of powers delegable to agencies to include discretionary powers, as long as adequate controls were in place.[6] However, Chamon and De Arriba-Sellier argue that the Meroni doctrine '[has been] European administrative law's own "*Schrödinger's cat*", that may be simultaneously considered both dead and alive.'[7]

2. The Meroni doctrine: Its evolution in case-law and its evaluation in the literature

■ *2.1. The Meroni case: Opinion of Advocate General Roemer and the Court's decisions*

In its March 1955 *Decision No. 14/55*[8] 'on establishing a financial mechanism to ensure the regular supply of scrap metal to the common market', based on Article

2 C-270/12, *United Kingdom v. Parliament and Council*, Judgment, 22 January 2014.
3 C-270/12, *United Kingdom v. Parliament and Council*, Opinion of Advocate General Niilo Jääskinen, 12 September 2013.
4 C-270/12, opinion of the Advocate General, para. 75.
5 Withdrawal of obsolete Commission proposals, OJ C 71/17, 25 March 2009. See: Chamon, 2010, pp. 26–34.
6 Babis, 2014, pp. 266–270.
7 Chamon and De Arriba-sellier, 2022, p. 313.
8 Höhe Behörde, Entscheidung Nr. 14/55 über die Schaffung einer finanziellen Einrichtung zur Sicherstellung einer gleichmäßigen Schrottversorgung des gemeinsamen Marktes. Vom 26. März 1955 – The provisions were translated from German by the author. Online [Available at]: https://eur-lex.europa.eu/legal-content/de/ALL/?uri=CELEX%3A31955S0014 (Accessed: 14 July 2024)

65(2)[9] of the ECSC Treaty[10] with a view to its task under Article 3 of the ECSC Treaty meant to ensure the proper functioning of the Common Market,[11] the High Authority authorised two organisations established under Belgian private law, namely *l'Office Commun des Consommateurs de ferraille* ('Office') and the *Caisse de péréquation des ferrailles importées* ('Fund')[12] – commonly referred as 'Brussels agencies' – to decide on the amount of contributions to be paid by companies under Article 80 of the ECSC Treaty.[13] – That is those functioning in the coal and steel industry.

The Fund was designated as the responsible body for execution, while the Office primarily served as an advisory body of the Fund. However, under certain conditions, the Fund was allowed to negotiate purchase agreements.[14] The High Authority subjected the delegation to two conditions: *first*, the permanent representative or the deputy representative of the High Authority had to attend every General and Board meetings of the Brussels agencies. *Second* the Boards of the Brussels agencies had to adopt their decisions unanimously, which – if the representative or the deputy representative of the High Authority deemed necessary – was subject to the High Authority's approval. In the absence of unanimity or if the Brussels Agencies failed to hold a meeting within 10 days from the request of the permanent representative or the deputy representative, the decision was taken by the High Authority.[15]

In his opinion, Advocate General *Karl Roemer* addressed the issue whether the High Authority, as a public authority, was entitled to delegate certain powers

9 Article 65(2) of the ECSC Treaty: '[...] the High Authority shall authorise specialisation agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds that:
(a) such specialisation or such joint buying or selling will make for a substantial improvement in the production or distribution of those products;
(b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose; and
(c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market [...]'

10 Treaty establishing the European Coal and Steel Community (Signed on 18 April 1951 – No longer in force)

11 Article 3 of the ECSC Treaty: 'The institutions of the Community shall, within the limits of their respective powers, in the common interest: (a) ensure an orderly supply to the common market, taking into account the needs of third countries; (b) ensure that all comparably placed consumers in the common market have equal access to the sources of production; [...]'

12 Article 1 of Decision No. 14/55.

13 Article 80 of the ECSC Treaty: 'For the purposes of this Treaty, "undertaking" means any undertaking engaged in production in the coal or the steel industry within the territories referred [and], any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.'

14 Articles 4-5 of Decision No. 14/55.

15 Articles 8-9 of Decision No. 14/55.

to associations governed by private law? First, the Advocate General examined the domestic practice of the Members States in general and then the rules of the Community Law on delegation.[16] Second, the Advocate General was of the view that the delegation of administrative powers of a public authority to associations of undertakings is a well-established practice in the Member States' domestic law. In these cases, the State reserves its right of control and supervision. The reasons for delegating power include: (I) the need for technical knowledge and the existence of special installations and/or (II) a desire for decentralisation. The Advocate General took the view that, in a modern State founded on the rule of law, generally accepted conditions should be established on the delegation of the administrative powers of public authorities to private associations. *First,* the delegation must be based on law, which specifies the content of the delegation precisely and provides a sufficient level of control for the delegator. *Second,* a complete system of legal protection against the measures adopted by these associations must exist. Legal protection may be achieved by assimilating associations' decisions to those issued by the public authorities to make them subject of review according to the general rules of administrative law. [17]

Then, the Advocate General addressed the issue of delegation in Community Law, and found that the Treaty did not contain *expressiss verbis* rules on this question: Article 53 of the ECSC Treaty did not allow a conclusion that the High Authority can delegate the powers conferred on it. However, it did not seem to prohibit such a delegation either. In the Advocate General's view, it was necessary that the legal protection under the Treaty continued to exist in case of delegation as a guarantee. The guarantees should have included: the publication of the statement of the reasons on which the decision was based – so that possible complainants could elaborate on their pleas – and the possibility to apply for judicial review. According to the Advocate General, there were two possible ways of ensuring the proper judicial review: either the decisions of these associations should had been assimilated to decisions of the High Authority or the latter should adopt the final decisions; that is, only the supporting preparatory and purely technical implementing work was left to the body. However, in the case at hand, the Advocate General found that as there was no statement of the reasons on which they are based and they were only communicated to the undertakings as part of a note as to the means of payment, it was not possible to assimilate these decisions to the High Authority's decisions.[18] The Advocate General came to the conclusion that: '[...] the High Authority, has ignored important guarantees as to legal protection laid down by the Treaty. In particular, there is no sufficient statement of the reasons on which the decisions are based and there has been no proper publication of them,

16 CJEU, C-9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community,* Opinion of Advocate General Karl Roemer, 9 March 1958. paras. II/4-8.
17 CJEU, C-9/56, *Meroni,* Opinion of the Advocate General, para. II/5.
18 CJEU, C-9/56, *Meroni,* Opinion of the Advocate General, paras. II/7-8.

whereas their significance [and their general applicability] made these matters essential.'[19]

The CJEU – as then called the *Court of Justice of the European Coal and Steel Community* – came to a similar conclusion. Its main findings were that the delegating authority was not allowed to confer powers different from those conferred on the delegating authority itself under the Treaty. In the case at hand, the fact that the Brussels Agencies were allowed to take decisions exempt from meeting conditions that the decisions of the High Authority under the Treaty, gave the Brussels Agencies more extensive powers than the High Authority had. Thus, Decision No. 14/55 of the High Authority infringed the Treaty.[20]

As the CJEU elaborated on the topic, it stated that the right to delegate powers cannot be presumed, and the delegating authority should take an express decision on delegation. In CJEU's view, the right of the High Authority to authorise or to make the financial arrangements itself under Article 53 of the Treaty entailed the right to entrust certain parts of its powers to bodies such as the Brussels Agencies under conditions to be determined by the High Authority and under its supervision. However, under Article 53 of the Treaty, such delegations of powers are only legitimate if the High Authority recognised them as 'to be necessary for the performance of the tasks set out in article 3 and compatible with this treaty, and in particular with article 65'.[21]

The consequences of power delegation are very different depending on whether it involves clearly defined executive powers or discretionary powers. In the first case, the authority, which received the powers had to stick to the conditions set out by the delegating authority and the exercise of such rights may be subject to strict supervision, meaning it cannot appreciably alter the consequences of the procedure; the latter type replaces the choices of the delegator by the choices of the delegate and brings about an actual transfer of responsibility. It also enables the execution of actual economic policy. Under Article 3 of the Treaty, the objectives were binding not only on the High Authority, but on the 'institutions of the community. [...] Within the limits of their respective powers, in the common interest'. The CJEU took the view that this implied that the "balance of powers" was characteristic of the institutional structure of the community, which served as a fundamental guarantee set out in the Treaty for those on whom it applied, namely economic operators. Delegating discretionary powers to other bodies than the Treaty has established would have rendered that guarantee ineffective.[22] Contrary to this principle, the powers delegated by the High Authority implied a wide margin of discretion, while the High Authority did not retain sufficient powers to keep the delegation within the above limits. In the CJ's view, reserving the power

19 CJEU, C-9/56, *Meroni*, Opinion of the Advocate General, para. III/4.
20 CJEU, C-9/56, *Meroni*, Judgment, p. 150.
21 CJEU, C-9/56, *Meroni*, Judgment, p. 151.
22 CJEU, C-9/56, *Meroni*, Judgment, p. 152.

to refuse the approval was an insufficient guarantee under the Treaty. Thus, in the case at hand, the delegation of powers was contrary to the ECSC Treaty.[23]

■ *2.2. The Meroni-doctrine in the literature*

Before discussing the most significant result of the Meroni doctrine in the literature, namely laying down the rules of the delegation of powers by EU bodies, it is worth reiterating another aspect of the case. That is, the delegation of powers from state authorities to private bodies is a characteristic of modern states attributable to the need for special knowledge necessary to decide certain issues or to the desire of decentralisation. The current literature agrees with these findings and labels these as "technocratic" reasons. As *Merijn Chamon* elaborates on the topic, the *pros* from a technical point is that the knowledge of independent scientific experts enhances the credibility of long-term policy commitments and isolates decision-making from politics. The Commission sees this independence as the *raison d'être* of agencies. Additionally, delegation relieves overburdened institutions and allows them to focus on their core responsibilities. As for the *cons* from the technical point of view, the delegating institutions would also need the necessary expertise, otherwise their control would be *de jure* control lacking any substantial evaluation. However, if the Commission has to enhance the level of its expertise above a certain level, that would call into question the rationality of outsourcing to agencies. Furthermore, the Commission's enhanced control – including veto right – would call into question its independence from politics.[24]

The political reasons for creating agencies is that they enable a discrete deepening of political integration within the "game of powers"; that is, while Member States are typically reluctant to give new and more powers to the Commission, they are more enthusiastic about giving powers to an agency; therefore, the Commission opts for establishing agencies. Furthermore, as agencies are not concentrated in Brussels, winning the seat of an agency is a fact that can be announced as political success by governments. However, the Commission has to play a shuttlecock policy, when it creates new agencies: it has to keep control on agencies, while reassuring the Member States that it cannot control them.[25]

As for the most important feature of the Meroni-judgment, *Bálint Teleki* highlights – in line with the mainstream perception of the Meroni-doctrine – that the CJEU has, on the one hand, imposed strict limits on the delegation of powers; on the other hand, it has explicitly allowed it within certain limits. In Teleki's view, under the Meroni judgment, the delegator may delegate powers to agencies provided that: (I) the delegated powers are his own, (II) the delegated powers are clearly defined implementing tasks which does not allow wide discretion and the

23 CJEU, C-9/56, *Meroni*, Judgment, pp. 153–154.
24 Chamon 2010, pp. 16-17; Griller and Orator, 2010, pp. 3–35.
25 Chamon 2010, pp. 8–9.

delegator's control is retained, (III) the delegation is made by an explicit decision, and (IV) the delegation does not infringe the institutional balance between the European institutions.[26] Chamon identified six conditions from the Meroni-judgment: (I) the delegating authority cannot delegate more powers than itself has under the Treaties; (II) the delegating authority should keep continued scrutiny; (III) delegation cannot be implied, but must be established explicitly; (IV) the possibility of judicial supervision should be ensured; (V) the institutional balance should not be infringed; and (vi) the delegation should indeed be necessary to perform the tasks concerned.[27]

As for the further development of the Meroni doctrine, Teleki offers a thorough overview of the evolution of the doctrine in CJEU's case-law – including the Romano-case, in which the CJEU stated that the right to issue normative acts cannot be delegated[28] – a doctrine that legally froze the delegation of rulemaking powers to EU agencies. However, the need for specialised agencies to enhance internal market integration have pragmatically eroded the theoretical rigidity of the principle and EU agencies entered the domain of regulatory powers by the back door, as *Marta Simoncini* argues.[29] Additionally, the *Lisbon Treaty*,[30] which explicitly mentions EU agencies within the actors that can legitimately exercise administrative powers – including the adaption of acts with general application – within the framework of the Treaties[31] and which – compared to the ECSC Treaty – enhanced the democratic legitimacy of EU institutions[32] made necessary a revision of the principle. In the ESMA-case – after 60 years of no progress on the issue, the CJEU was asked to significantly re-evaluate its findings in Meroni and Romano in light of the changed framework of EU law. In *László Szegedi*'s view, by reverse logic, the CJEU has concluded, on the basis of the legal protection against acts issued by agencies – "bodies, offices and agencies" – that the power to issue acts of general application can also be delegated to agencies. That is, EU bodies other than the European Commission may be the recipients of a delegation of powers, provided that they are EU legal entities established by the EU legislator whose powers under delegation are limited by various criteria and conditions under EU law.[33]

26 Teleki, 2023, pp. 49–50; Kálmán, 2013, pp. 1–17.
27 Chamon, 2014, p. 382.
28 CJEU, C-98/80, *Giuseppe Romano v. Institut national d'assurance maladie-invalidité*, Judgment, 14 May 1981
29 Simoncini, pp. 1492–1493.
30 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17.12.2007, p. 1-271).
31 TFEU Article 15: 'In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.'
32 Simoncini, 2021, pp. 1490–1491.
33 Szegedi, 2020, p. 123.

Accordingly, the ESMA-judgment displayed a significant shift from the original Meroni doctrine, which clearly excluded the delegation of powers requiring discretionary decisions. Accordingly, Teleki summarises the updated Meroni doctrine as: (I) the delegation of powers must be clearly defined by the delegating act; (II) the exercise of powers must be under the effective – political – control of the delegating body; thus, (III) no political responsibility can be delegated and (IV) it must be subject to appeal.[34] In Szegedi's view, there are three main points that need to be highlighted regarding the Meroni doctrine in light of the ESMA judgment, namely: (I) the powers may be addressed to an EU legal entity established by the EU legislator, (II) only precisely delimited powers may be delegated, (III) and they are subject to judicial review in view of the purposes defined by the delegating authority.[35] However, the CJEU failed to classify in clearer terms the powers that can be delegated, as Szegedi remarks.[36]

Some authors spoke of 'mellowing the Meroni' in the context of the judgment.[37]. In Teleki's view, the doctrine has been modified to the extent that it allows agencies to have more influence, but still considers them as essentially expert actors without exclusive decision-making powers.[38] In Simoncini's view, the ruling clearly shows that the emergence of a democratically legitimated legislature is key to ensuring control over the exercise of administrative powers. Nowadays administrative actions taken by specialised bodies is necessary to discharge public functions. Simoncini argues – in line with Roemer's findings in the Meroni case – that:

> Delegation constitutes an inevitable aspect of modern administrative law, as those who in constitutional terms are nominally entrusted with the exercise of a particular public function are often not in a position, for a variety of reasons, to discharge their responsibilities fully without supplementary action by others. [39]

Chamon introduces several possibilities to classify the agencies and, as a conclusion, he finds the classification established by Griller and Orator[40] as the most suitable. According to this classification there are: (I) "ordinary" agencies without decision-making powers – if decisions need to be taken this is done by the Commission –; (II) "pre-decision-making" agencies, enjoying a considerable influence over the adoption of the final decision – which is again taken by the Commission –;

34 Teleki, 2019, p. 41; Repasi, 2014, p.7; Pelkmans and Simoncini, 2014. pp. 4–5.
35 Szegedi, 2020, p. 124.
36 Ibid.
37 Pelkmans and Simoncini, 2014.
38 Teleki, 2023, pp. 52–53.
39 Simoncini, 2021, pp. 1492–1493.
40 Griller and Orator, 2010, pp. 3–35.

and (III) genuine decision-making agency, having the capacity to enact legal instruments binding upon third parties. As Chamon notes, the major difference is that agencies of the third type do not require the rubberstamp of the Commission, unlike those of the second type. However, it is important to realise that even the latter hold considerable power, as the Commission generally lacks the expertise to assess their advice properly. The last type are (IV) "regulatory" or rule-making agency holding discretionary power to translate broad legislative guidelines into concrete instruments.[41] The author of the current article finds this type of classification suitable, as the T–510/17 *Antonio Del Valle Ruíz* case of the CJEU – to be introduced in Section 3 – revolved around the legal nature of the SRB, which may fall into the second or third type by applying the categorisation of Chamon.

However, Chamon provides a rather sceptical approach on the applicability of the Meroni doctrine to contemporary agencies, arguing that, on the one hand, the facts and contexts of the Meroni case exclude the delegation of powers; on the other hand, the true meaning of Meroni judgment is generally misunderstood in the literature. As for the first issue, Chamon reiterates that the applicability of a judgment based on the ECSC Treaty and revolving around the delegation of power to bodies established under private law to a case in which power was delegated to agencies – in essence public bodies[42] – created under the EEC Treaty is subject to academic debate.[43] Some authors argue that, in the context of the ECSC Treaty – a *traité loi* – the High Authority was endowed with important and detailed regulatory and implementing powers. The EEC Treaty – being a *traité cadre* – sets broad objectives to be achieved progressively by national administrations.[44]

As for misinterpretation, Chamon argues that the Meroni-doctrine simply excludes the possibility of delegating any discretionary powers at the first place and that the principle of institutional balance cannot directly deduced from the judgment. As Chamon argues, the CJEU did not mention institutional balance in its judgment, as it was only elaborated on in its later cases.[45] Moreover, Szegedi argues the principle of institutional balance in its original sense was not primarily intended to protect the decision-making order laid down in the Founding Treaties, but to protect the rights of individuals against abuses of power.[46] Chamon argues

41 Chamon, 2010, pp. 6–7.

42 Or to be more precise, administrative commissions, but in the light of the evolution of the law they can safely be called agencies, as they were in every respect their predecessors or early forms. – Teleki, 2023 p. 50.

43 Chamon, 2010, pp. 12–14, 24, 25.

44 Chamon, 2010, pp. 16–17.

45 It is important to note, however, that the judgment itself refers to Article 3 of the ECSC Treaty and cites that 'The institutions of the Community shall [act], within the limits of their respective powers [...]' and the CJEU concludes in the judgment that '[...] the balance of powers is characteristic of the institutional structure of the community a fundamental guarantee granted by the treaty.' – CJEU, C-9/56, Meroni, page 152.

46 Szegedi, 2020, p. 122.

that, in the Meroni judgment, the balance of powers was *originally* conceived as a substitute for the separation of powers elaborated on by *Montesquieu* – something that is missing from the institutional order of the integration[47] – the aim of which was to protect individuals against the abuse of power. Therefore, the main objection to applying the modern interpretation of the principle of "institutional balance" in Meroni is a qualitative leap from the modern-day concept. Advocate General Roemer indicated that the most important means of achieving the above-mentioned protection was to ensure the judicial review of decisions of the delegated body. The Advocate General first remarked that, in a modern constitutional state, two important conditions should apply to the delegation of powers to bodies under private law: the delegation may only be done through a legislative act, which accurately describes the content of the delegation and offers sufficient judicial protection against the acts of such organisations. In Roemer's view, the latter can be achieved by equating the acts of these bodies with acts of the High Authority or by having the High Authority take the final decision. Contrary to the opinion of the Advocate General, the CJEU took the view that the way of providing the prevalence of guarantees is that these bodies may only exercise strictly executive powers, without any discretion. In its judgment, the CJEU referred to Article 3 of the ECSC Treaty and cited that, 'The institutions of the Community shall [act], within the limits of their respective powers [...]' and the CJEU concluded in the judgment that '[...] the balance of powers is characteristic of the institutional structure of the community a fundamental guarantee granted by the treaty'.[48] By upholding the balance of powers, the CJEU safeguarded not only the decision making process envisaged by the Treaty, but also the accompanying guarantees for private individuals. Despite the different solutions worked out by the Advocate General and the CJEU in the Meroni case, the key concern for both was the way in which rights of private parties – as guaranteed by the regime of judicial protection established by the Treaty – would still be guaranteed after certain tasks have been outsourced to private bodies outside the Treaty Framework. However, this differs from the way the institutional balance is conceptualised today.[49]

47 Simoncini, 2021, p. 1489.
48 CJEU, C-9/56, *Meroni*, Judgment, p. 152.
49 Chamon, 2010, pp. 23–24.

3. The Banking Union and the Meroni-doctrine: The resolution of the Banco Popular Group

■ *3.1. A short introduction to the Banking Union*

As Chamon noted, the Commission's 2008 promise to abstain itself from proposing new agencies did – until the above discrepancies are settled – did not survive the 2007 financial and economic crisis. The EU legislator decided to create a proper supervisory system – which after early attempts – resulted in the Banking Union (BU),[50] including the *Single Rulebook*, *Single Supervisory Mechanism*[51] (SSM), *Single Resolution Mechanism*[52] (SRM) and the *European Deposit Insurance Scheme* (EDIS). – Until now, only the first three pillars have been realised, with the EDIS still under development.[53]Under the BU, *less significant credit institutions*[54] fall under the supervision of national authorities, while significant ones[55] fall under the

50 For the process, please see: Marinkás, 2020, p. 140.

51 Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, pp. 63–89) (SSM Regulation).

52 Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund [...] (OJ L 225, 30.7.2014, pp. 1–90) (SRM Regulation).

53 For a more detailed introduction on the topic please see: Marinkás, 2024.

54 The SSM Regulation does not contain the definition of credit institutions; instead, it refers to Article 4 (1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council, which defines credit institutions as follows: 'credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account'. – Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance (OJ L 176, 27.6.2013, p. 1–337)

55 The delimitation is to be made as contained Article 6 (4) of the SSM Regulation: 'The significance shall be assessed based on the following criteria: (I) size; (II) importance for the economy of the Union or any participating Member State; (III) significance of cross-border activities. With respect to the first subparagraph [...], a credit institution or financial holding company or mixed financial holding company shall not be considered less significant, unless justified by particular circumstances to be specified in the methodology, if any of the following conditions is met: (I) the total value of its assets exceeds EUR 30 billion; (II) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20 %, unless the total value of its assets is below EUR 5 billion; (III) following a notification by its national competent authority that it considers such an institution of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution. The ECB may also, on its own initiative, consider an institution to be of significant relevance where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities

direct supervision of the ECB.[56] The notion of credit institutions is an autonomous concept of EU law that shall prevail.[57] ECB's Framework Regulation[58] for the SSM – alongside with the *Court of Justice*'s (hereafter: CJ) case-law – further refined the rules on cooperation,[59] including (I) the methodology for determining the quantitative criteria for classifying banks as significant or less significant, (II) the exercise of powers, and (III) the relations between domestic regulators and the ECB. [60] The *General Court* (GC) also contributed to the clarification of certain definitions and the interpretation of some provisions.[61]

The SRM covers the same scope as the SSM' however, differences can occur in practice when it comes to the classification of financial institutions, as illustrated by the "Veneto-paradox", a term introduced by, Szegedi and Teleki.[62] The purpose of the SRM Regulation is to provide a framework for the resolution

subject to the conditions laid down in the methodology. Those for which public financial assistance has been requested or received directly from the EFSF or the ESM shall not be considered less significant.'

56 The decisions of the ECB can directly affect individual credit institutions, which are subject to a two-fold review system: an internal administrative review and an external judicial review. See: Chiarella, 2016, p. 70.

57 Ibid, p. 48.

58 Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation).

59 C–450/17 P, *Landeskreditbank Baden–Württemberg v. ECB, Judgment of the CJ*, 8 May 2019; C–52/17, *VTB Bank (Austria) AG v. Finanzmarktaufsichtsbehörde*, Judgment of the CJ, 19 December 2018; C–219/17, *Berlusconi and Fininvest v. Banca d'Italia and IVASS*, Judgment of the CJ, 19 December 2018; C–594/16, *Buccioni v. Banca d'Italia*, Judgment of the CJ, 13 September 2018.

60 For a more detailed analysis, see: Marinkás, 2018, pp. 437–471.

61 T–122/15, *Landeskreditbank Baden–Württemberg – Förderbank v. ECB*, Judgment of the GC, 16 May 2017; T–712/15, *Crédit Mutuel Arkéa v. ECB*, Judgment of the GC, 13 December 2017; T–133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*, Judgment of the GC, 24 April 2018; T–751/16, *Confédération nationale du Crédit mutuel v. ECB*, Judgment of the GC, 13 July; T–745/16, *BPCE v. ECB*, Judgment of the GC, 13 July 2018; T–757/16, *Société générale v. ECB*, Judgment of the GC, 13 July 2018; T–758/16, *Crédit agricole SA v. ECB*, Judgment of the GC, 13 July 2018; T–768/16, *BNP Paribas v. ECB*, Judgment of the GC, 13 July 2018.

62 In mid-2017, the SRB decided to resolve the *Banco Español S.A.* – a systemically important bank supervised by the ECB – under a resolution scheme adopted by the SRB, while the *Banco Popolare di Vicenza* and *Veneto Banca* in Italy remained under the jurisdiction of the National Resolution Authority, thus allowing the domestic resolution authority to act under much more favourable national rules. The co-authors argue that different ratings of EU-level players could be detrimental to the functioning of the Single Market in a broader sense. See: Szegedi and Teleki, 2024.

of failing systemically important institutions[63] within the BU to avoid systematic risks and to minimise the costs for taxpayers and the real economy. The banking sector finances this resolution procedure through a single resolution fund. The regulatory level is two-tiered: it consists of the *Single Resolution Board* (SRB) – a new EU agency that started functioning in 2015 – and *national resolution authorities*[64] (NRAs). If a financial institution falls within the competence of the SRB, it adopts the resolution scheme under Article 18(1) of the SRM regulation – either on a communication pursuant to Article 7(4)b, or on its own initiative – provided that the following conditions are met: (I) 'the entity is failing or is likely to fail;[65] (II) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures [...] would prevent its failure within a reasonable timeframe.' and (III) 'a resolution action is necessary in the public interest pursuant to Article 18(5)'.[66]

63 According to Article 131(3) of Directive (EU) 2013/36/EU, systemic importance shall be assessed on the basis of at least any of the following criteria: (I) size, (II) importance for the economy of the Union or of the relevant Member State, (III) significance of cross-border activities, and (IV) interconnectedness. – Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338–436)

64 For details on the Hungarian regulation and domestic supervision system, please see: Nagy and Csiszár, 2016, pp. 157–163.

65 SRM Regulation Article 18(4) elaborates on the notion of "failing or to be likely to fail", that is. when an entity shall be deemed to be failing or to be likely to fail, namely the following cases:
(a) the entity infringes, or there are objective elements to support the determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the ECB, including but not limited to the fact that the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its funds;
(b) the assets of the entity are or there are objective elements to support a determination that the assets of the entity will, in the near future, be less than its liabilities;
(c) the entity is or there are objective elements to support a determination that the entity will, in the near future, be unable to pay its debts or other liabilities as they fall due;
(d) extraordinary public financial support is required except where, to remedy a serious disturbance in the economy of a Member State and preserve financial stability, that extraordinary public financial support takes any of the following forms: (I) State guarantee to back liquidity facilities provided by central banks in accordance with the central banks' conditions; (II) State guarantee of newly issued liabilities; or (III) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the entity, where neither the circumstances referred to in points (a), (b), and (c) of this paragraph nor the circumstances referred to in Article 21(1) are present at the time the public support is granted.

66 SRM Regulation, Article 18(5): '5. For the purposes of point (c) of paragraph 1 of this Article, a resolution action shall be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.'

Under Article 18(6) of the SRM Regulation,

> If the conditions laid down in paragraph 1 are met, the Board shall adopt a resolution scheme. The resolution scheme shall: (I) place the entity under resolution; (II) determine the application of the resolution tools to the institution under resolution referred to in Article 22(2)[67], in particular any exclusions from the application of the bail-in in accordance with Article 27(5) and (14); (III) determine the use of the Fund to support the resolution action in accordance with Article 76 and in accordance with a Commission decision taken in accordance with Article 19.

Article 18(7) states,

> Immediately after the adoption of the resolution scheme, the Board shall transmit it to the Commission. Within 24 hours from the transmission of the resolution scheme by the Board, the Commission shall either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme [...].

Within 12 hours from the transmission of the resolution scheme by the Board, the Commission may propose to the Council: (I) 'to object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfil the criterion of public interest referred to in paragraph 1(c)', or (II) 'to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.' Based on this regulation, the Council acts according to simple majority. The regulation requires the Council or Commission to provide reasons for exercising its power of objection. If no objection has been expressed by the Council or the Commission within 24 hours after its transmission by the Board, the resolution scheme enters into force.

According to Article 29(1) of the SRM Regulation: 'National resolution authorities shall take the necessary action to implement decisions referred to in this Regulation, [...] National resolution authorities shall implement all decisions addressed to them by the Board.' Under Article 29(2),

> Where a national resolution authority has not applied or has not complied with a decision by the Board pursuant to this Regulation or has applied it in a way which poses a threat to any of the resolution objectives under Article 14 or to the efficient implementation of the resolution scheme, the Board may order an institution under

67 Article 22(2) of the SRM Regulation: 'The resolution tools referred to in point (b) of Article 18(6) are the following: (a) the sale of business tool; (b) the bridge institution tool; (c) the asset separation tool; (d) the bail-in tool.'

> resolution: [...] to adopt any other necessary action to comply with the decision in question. [...] Before deciding to impose any measure the Board shall notify the national resolution authorities concerned and the Commission of the measure it intends to take.

The word "notify" implies that the SRB has a wide margin of appreciation in this case.

One may ask, does the delegation of powers to the European Supervisory Authorities fit the principle of delegation of powers? Szegedi examined this issue by using the so-called "flexible Meroni model", originally created by Griller and Orator. Szegedi argues that the basic tenets of the doctrine can be preserved only if the overall result of steering and control reaches an adequate level of input-oriented legitimacy – democratic exercise of public authority – and output-oriented legitimacy – efficiency-based approach with reliance on expertise of the independent agencies – as well as institutional balance. Szegedi concluded that the European Supervisory Authorities essentially meet the criteria of the flexible model, as the relevant Lisbon primary law, that is, Articles 290 and 291 of the TFEU, cannot be interpreted in an absolutely restrictive way regarding the delegation of powers. He concludes, that the delegation of the power to issue legally binding individual decisions will need to be further assessed, in particular in the light of the specific legal acts that the agencies will issue in the future.[68]

■ *3.2. The recent case-law: Procedures before the General Court*

Two novel judgments, both delivered on 1 June 2022, revolving around the resolution of the *Banco Popular Group* – the sixth-largest banking group in Spain at the time of the resolution – also show clarity issues many years after the SRB was implemented, such as who should be notified in case a resolution scheme is to be adopted. In the T–510/17 *Antonio Del Valle Ruíz v. European Commission and Single Resolution Board* case,[69] in their first plea-in-law,[70] the applicants claimed that SRB's procedure under Article 18 of the SRM Regulation contradicted Articles 41 and 47 of the *Charter of Fundamental Rights of the EU* (Charter).[71] Emphasis was placed on the right to an effective remedy and a fair trial under Article 47 of the Charter, as in their view, the fact that shareholders and creditors are not heard during the procedure infringes on this right.[72] The GC reiterated that, while no provision of the SRM Regulation expressly excludes or restricts the rights of shareholders and

68 Szegedi, 2012, pp. 351–354.
69 T–510/17, Antonio Del Valle Ruíz v. European Commission Single Resolution Board, Judgment of the GC, 1 June 2022.
70 The applicants submitted nine pleas-in-law. The author introduces here only the first and the ninth as the most relevant ones.
71 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, 391–407).
72 CJEU, T–510/17, judgment, para. 113.

creditors of the entity concerned to be heard during the resolution procedure, such a hearing procedure, which would be lengthy in the case of thousands of shareholders and creditors, is contrary to the purpose of the procedure and may jeopardise its effectiveness,[73] as the decision procedure under Article 18 of the SRM Regulation is aimed at:

> [...] ensuring the continuity of the critical functions of the entity concerned and [...] protecting the stability of the financial system of that Member State and, therefore, preventing contagion to other Member States of the euro area would have been exposed to serious risks.[74]

This risk is real, as the background of the case proves: on 31 May 2017, *Reuters* published an article titled 'EU warned of wind–down risk for Spain's Banco Popular'; the publication was based on the allegations of an EU official, whose identity remains unknown. As a result, Banco Popular faced massive liquidity outflows during the first few days of June 2017.[75] Regarding the infringement of Article 47 of the Charter, the GC stated:

> It is sufficient to note that the applicants' argument is based on a misinterpretation of the scope of the right to an effective remedy enshrined in Article 47 of the Charter, which guarantees a right to an effective remedy against an act which adversely affects a person and not before the adoption of the act.[76]

Therefore, the GC rejected the first plea-in-law as unfounded.[77]

In the ninth plea, the applicants claimed under Article 277 of the TFEU that Articles 18 and 22 of the SRM Regulation contradict the principles relating to the delegation of power set out by the CJEU in its 1958 *Meroni* v. *High Authority* judgment.[78] In the applicants' view, '[...] the provisions of Article 18(7) of [the SRM Regulation], according to which the Commission is to endorse the resolution scheme within 24 hours [...] it is the SRB which decides on the resolution policy, with the Commission simply carrying out a 'rubber–stamp' function'.[79] The GC first reiterated that the Founding Treaties do not elaborate on the issue of conferring powers on an EU body, office, or agency as highlighted by the statements of Advocate General Niilo Jääskinen cited above.

73 CJEU, T–510/17, judgment, paras. 124, 151, 165.
74 CJEU, T–510/17, judgment, paras. 152, 161.
75 CJEU, T–510/17, judgment, paras. 42–44.
76 CJEU, T–510/17, judgment, para. 190.
77 CJEU, T–510/17, judgment, para. 203.
78 CJEU, C–9/56, *Meroni v High Authority*, Judgment. On the issue of the applicability of the Meroni case in the current institutional context, see Ferran, 2012, p. 110.
79 CJEU, T–510/17, judgment, paras. 204–205.

It is thus the case-law – in particular, *Meroni and the United Kingdom v. Parliament and Council* – that elaborated on the issue of the autonomous powers of EU agencies. In the latter case, the CJEU updated the Meroni doctrine and expanded the scope of powers delegable to agencies to include discretionary powers as long as adequate controls were in place.[80]

In the GC's view, the EU legislator avoided an "actual transfer of responsibility" under the Meroni judgment. First, the SRM Regulation states that the resolution scheme may enter into force only if no objection has been expressed regarding the discretionary aspects of the scheme by the Council or the Commission within 24 hours of its transmission. Therefore, to produce legal effects for the resolution scheme, it is necessary for an EU institution to approve it. This finding is supported by Preambulars 24 and 26 of the SRM Regulation.[81] Second, under Article 14 of the SRM Regulation, the Commission is also obliged to make the assessment under Article 18 when it has to endorse the choice of a resolution tool and comply with the public interest criterion. Under Article 43(3), the Commission is entitled to designate a permanent observer, who has the right to participate in the meetings of executive and plenary sessions of the SRB, as well as the debates, and who has access to all documents; consequently, the Commission becomes aware of the resolution scheme before it is transferred by the SRB and has sufficient time to assess its discretionary aspects during the preparation of the scheme. Therefore, in GC's view, the SRB does not have the autonomous power to decide on the resolution of an entity or the resolution tool pursuant to Article 22 of the SRM Regulation.[82] Accordingly, the GC rejected the ninth plea-in-law as unfounded.[83]

The legal nature of the resolution scheme was also one of the core issues in the T–481/17 *Fundación Tatiana Pérez [...] v. SRB* case.[84] In its intervention[85], the Commission claimed that the action was inadmissible because the resolution scheme was an intermediate measure, which did not produce legal effects. By its decision, it approved the resolution program, made its own,[86] attributed binding legal effects to it and that the action brought solely against the resolution program was inadmissible. In the GC's view, while there is no doubt that – as the Commission argued at the hearing – the resolution program will only enter into force with its support, this does not mean that the Commission's support extinguishes the autonomous legal effects of the resolution scheme, something that the GC denied

80 Babis, 2014, pp. 266–270.
81 CJEU, T–510/17, Judgment, paras. 215–219.
82 CJEU, T–510/17, Judgment, paras. 227–228, 230–232.
83 CJEU, T–510/17, Judgment, para. 234.
84 CJEU, T–481/17, Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v. SRB, Judgment of the GC, 1 June 2022.
85 The applicants submitted ten pleas-in-law. The author dispenses with them and focuses on the intervention of the Commission.
86 It is worth reiterating the thoughts of Advocate General Roemer in the Meroni case.

in the above introduced ruling, which was delivered the same day. The GC took the view that, contrary to the Commission's assertion, respect for the principles laid down in the Meroni judgment concerning the delegation of powers does not mean that only the decision adopted by the Commission produces legal effects.[87] As Preambular (26) of the SRM Regulation states,

> [...] The procedure relating to the adoption of the resolution scheme, which involves the Commission and the Council, strengthens the necessary operational independence of the Board while respecting the principle of delegation of powers to agencies, as interpreted by the Court of Justice of the European Union.

As the GC reiterated, the division of competencies between the SRB and the Commission – as set out in the SRM Regulation – does not support the Commission's argument that it makes the resolution program its own by endorsing it. The Commission has its own power to assess the discretionary aspects of the resolution program and can decide whether to endorse or object to it. However, it has no power to exercise the powers reserved for the SRB or to amend the resolution programme or its effects; that is, the Commission cannot object to or alter the technical aspects of the resolution scheme. Furthermore, Article 86 of the SRM Regulation provides that all decisions of the SRB – except for decisions which may called into question before an appeal body – may be challenged before the CJEU by means of an action under Article 263 of the TFEU. In GC's view, the resolution programme falls conceptually within this category of decisions, and no reservation in that Article or any other provision of the [SRM Regulation] allows its exclusion.[88] Therefore, it follows from the wording of Article 86 of the SRM Regulation, as well as from other provisions of the Regulation, that the resolution scheme adopted by the SRB may be challenged individually without requiring the launching of a procedure against the Commission's decision to endorse it.[89]

■ *3.3. The recent case-law: Procedures before the Court of Justice*

An appeal was submitted against T–510/17 *Antonio Del Valle Ruíz v. European Commission and Single Resolution Board*, which the Court rejected.[90] Conversely, the CJ proceeded and delivered a judgment in the C-551/22 P case, the appeal against T–481/17 *Fundación Tatiana Pérez [...] v. SRB*.[91] *Advocate General Tamara Ćapeta* in her

87 CJEU, T–481/17, paras. 107, 127.
88 CJEU, T–481/17, paras. 132, 140.
89 CJEU, T–481/17, paras. 143–144.
90 CJEU, C-539/22 P, Order of the President of the Court, 6 September 2023.
91 CJEU, C-551/22 P, Judgment of the Court, 18 June 2024.

opinion[92] summarised the three grounds of appeal of the Commission[93] into one single question, namely: was the GC correct in finding that an action challenging the resolution scheme of Banco Popular can be brought against the SRB under Article 263 of the TFEU?

Although the Advocate General refuted the Commission's assertions that the Meroni doctrine is decisive in the case at hand – the AG argued that it is the legislative choices regarding the SRM Regulation that are important[94] and provided an analysis on the Meroni doctrine and two judgments she deemed important in the development of the doctrine, namely the Romano and the ESMA cases. The Advocate General again, refuted the Commission's allegations and acknowledged that the Meroni doctrine is widely perceived as prohibiting the delegation of discretionary powers by union bodies. Citing a 2023 study of Simoncini,[95] she was of the view that, a general prohibition of delegating discretionary powers to any other body except for the Commission does not fit today's reality.[96]

She reiterated that, on the one hand, in the Romano case, the CJ found that a body such as the Administrative Commission could not have been empowered to adopt 'acts having the force of law' since Articles 173 and 177 of the EEC Treaty [Articles 263 of 267 the TFEU], were silent on judicial review against decisions of bodies such as the Administrative Commission.[97] However, in the ESMA case, the Court addressed the requirements of Meroni with a view to the changes brought by the Lisbon Treaty, and concluded that it is the delegation of "wide margin of discretion" to an agency what remains prohibited. She concluded that the powers granted to ESMA are precisely delineated and the judicial review is allowed.[98]

Therefore, the Advocate General concluded that 'delegating discretion to agencies in individual decision-making is permissible, as long as it is subject to judicial review.'[99] Therefore, under the Meroni doctrine, the legislator would have been allowed to grant the SRB the power to decide on a resolution scheme without the Commission's endorsement, since the SRB's powers are precisely limited under the SRM Regulation. However, the legislator decided the other way; therefore, the Advocate General concluded that the legislative choices reflected in the SRM Regulation, rather than the Meroni doctrine, are relevant for deciding the present

92 CJEU, C-551/22 P, Opinion of Advocate General *Tamara Ćapeta,* 9 November 2023.

93 'The Commission raises three grounds of appeal. First, it argues that the General Court erred in law by concluding that the resolution scheme, as adopted by SRB, produces binding legal effects. Second, the Commission argues that the General Court allowed an action against the wrong defendant, thus breaching the Commission's rights of defence. Finally, the Commission argues that the General Court's reasoning is contradictory.' – CJEU, C-551/22 P, Opinion of the Advocate General, para. 27.

94 CJEU C-551/22 P, Opinion of the Advocate General, para. 97

95 See endnote No. 60 of the Advocate General's Opinion.

96 CJEU, C-551/22 P, Opinion of Advocate General, para. 78.

97 CJEU, C-551/22 P, Opinion of Advocate General, para. 85.

98 CJEU, C-551/22 P, Opinion of Advocate General, para. 89.

99 CJEU, C-551/22 P, Opinion of Advocate General, para. 92.

appeal.[100] She held that, based on the SRM Regulation, the resolution scheme is not legally binding without the Commission's – or in certain cases the Council's – approval. Moreover, the Commission's half a page long approval is not an independent act: it is related to the resolution scheme of the SRB – an integral part of the Commission's decision – and could not exist on its own. Thus, in the Advocate General's view, the subject of the judicial review can only be the resolution scheme as endorsed by the Commission.[101]

The question remains, who is the author of these – in the Advocate General's view–, inseparable acts. Referring to CJEU's case-law on the so called "composite procedures"[102] – in the CJ's word-pick "complex procedures"[103] – which according to the Commission's assertions are applicable to the horizontal composite procedures as well[104] – only the act that puts an end to the entire procedure can exert legal effects. In case of the resolution procedure, it is the Commission, which ends the procedure with its approval on the Commission approves the technical and discretionary aspects of the resolution scheme. In that regard, the Advocate General argued that the wording of the SRM Regulation does not suggests that the Commission approves only the discretionary parts of the resolution scheme. Instead, the SRM Regulation states that, 'the Commission shall either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme (...)'.[105] Accordingly, an endorsement concerns the resolution scheme in its entirety, unlike an objection, which is directed only against its discretionary aspects.[106]

The only question left and deemed relevant by the author in the context of the current study is the existence of an effective judicial review. To ensure effective judicial review by the CJEU the legally binding measures must contain a statement of reasons; without knowing the reasons, it is difficult for the person affected by a measure to construe a meaningful challenge, an issue raised in the Meroni case as well.[107]

As the Advocate General endorsed the resolution scheme, the Commission also endorses the statement of reasons and is good aware of their content, since according to SRM Regulation[108] the Commission (and the ECB) have a representative entitled to participate in the meetings of executive and plenary sessions of the SRB as a permanent observer, who participates in debates, and has access

100 CJEU, C-551/22 P, Opinion of Advocate General, para. 92-94, 96-97.
101 CJEU, C-551/22 P, Opinion of Advocate General, para. 101, 106, 108.
102 See the case-law cited in footnote No. 87 of the Advocate General's opinion.
103 CJEU, C-551/22, Judgment, para. 92.
104 The vertical one are, when the EU and domestic bodies are involved.
105 Article 18(7) of the SRM Regulation.
106 CJEU, C-551/22 P, Opinion of Advocate General, paras. 110-113.
107 CJEU, C-9/56, Meroni, Opinion of Advocate General, II/7; CJEU, C-9/56, Meroni, Judgment, paras. 142-143.
108 Article 43(3) of the SRM Regulation.

to all documents.[109] Thus, as the Advocate General stated in accordance with the findings of the General Court in the T–510/17 case – another Banco Popular-related case introduced above – that the Commission's approval of the resolution scheme does not seem to be a "mere rubber-stamping". – Regarding this, the author deems necessary to point that according to the case files, it took less than one and a half hour for the Commission to adopt the resolution scheme.[110] – In the Advocate General's view, the Commission endorsed the content of the resolution scheme, having regarded its above participatory role.[111] Therefore the question is: why the Commission in its practice dispenses with publishing it alongside with the resolution scheme[112] preventing individuals, who would like to bring a direct action under Article 263 TFEU to know the reasons on which the Commission based its approval from the very decision of approval?[113] The Commission replied that as the resolution scheme contains confidential information, it does not deem it fortunate to publish it alongside with its decision. It added that the scheme was nevertheless published by the SRB on its website;[114] therefore, it is publicly available. In this regard the Advocate General recommended that the Commission change its practice to make it possible for the potential applicants to learn the statement of facts.[115]

As the final conclusion, the Advocate General stated, '[...] the resolution scheme has no independent legal existence, and thus cannot be challenged independently of the Commission's endorsement. A direct action should challenge the Commission's endorsement of the SRB's resolution scheme. Therefore, there is a single challengeable act with the Commission as its author.' [116]

The CJ came to the same conclusion through a similar – though a bit differing – train of thought.[117] The CJ provided an overview of the Meroni doctrine and its evolution, taking a similar stance regarding its applicability as the Advocate General. When addressing the wording of the SRM legislation on the discretionary power granted to the SRB and to its limits, the GC devoted more attention to this issue than the Advocate General. The CJ also addressed the issue of complex procedures – called composite procedures – to find that it is the Commission's

109 CJEU, C-551/22 P, Opinion of Advocate General, paras. 124, 126.
110 See CJEU, T-481/17, Judgment, paras. 77-78; CJEU, C-551/22 P, Opinion of Advocate General, para. 14.
111 CJEU, C-551/22 P, Opinion of Advocate General, para. 128.
112 As end note 103 of the Advocate General's opinion highlights, the Commission still continues that practice.
113 It is worth reiterating that the publication of the reasoning – that is the possibility for the possible applicants to learn the grounds of the decision – was also an issue in the Meroni-case.
114 The non-confidential files are available online at: https://www.srb.europa.eu/en/content/banco-popular (Accessed: 28 August 2024).
115 CJEU, C-551/22 P, Opinion of Advocate General, paras.130-132.
116 CJEU, C-551/22 P, Opinion of Advocate General, paras, 133.
117 CJEU, C-551/22 P, Judgment, paras. 64-97.

approval, which provides the binding force, thus making the decision on the resolution subject to judicial review under Article 263 of TFEU. The Court of Justice did not address the issue of publishing the scheme alongside with the approval.

4. Concluding remarks

As shown by the recent BU related case-law of the CJEU, the meaning of Meroni-doctrine and its relevance is still an actual issue. In the T–510/17 *Antonio Del Valle Ruíz* case the GC, stated that the Commission has the final say and the SRB only provides a professional opinion. The GC also stated that the resolution scheme only produces legal effect if an EU institution approves it. This is in line with the thoughts of AG Roemer in the Meroni-case that is the real decision is made by the delegating authority and only the preparatory work is left to the "agency". Thus, in the GC's view, the EU legislator avoided an "actual transfer of responsibility" within the Meroni doctrine, since the Commission's approval – which has to be given within 24 hours – is not a mere rubber stamping, as the Commission becomes aware of the resolution scheme before it is transferred by the SRB and has sufficient time to assess its discretionary aspects during the preparation of the scheme. Therefore, in the GC's view, the SRB does not have the autonomous power to decide on the resolution of an entity or the resolution tool pursuant to Article 22 of the SRM Regulation.

In the T–481/17 *Fundación Tatiana Pérez* case, the GC concluded that the resolutions scheme of the SRB can be challenged directly before the CJEU under Article 263 of the TFEU. In the appellate proceedings before the CJ, the Advocate General as well as the CJ took the view that this conclusion was contrary to the CJEU's well-established case-law on the delegation of powers and the so called "composite/complex procedures", including the statements of the GC in the above-mentioned ruling, which was delivered the same day. ––As for the delegation of powers, both the Advocate General and the CJ held that the delegation of powers to the SRB conformed the Meroni-doctrine.

As a novelty however, both the Advocate General and the CJ somehow 'transcended' the Meroni-doctrine, when they found that the said doctrine is not the decisive factor in the case. Instead, it is the choice of the legislator, not to vest the SRB with the right to have the final say. – Despite the legislator could have decided so under the Meroni-doctrine. – That is, without the Commission's approval, the resolution scheme cannot produce any legal effect, since in 'composite/complex procedures' only the act that puts an end to the entire procedure can exert legal effects and therefore be a subject of judicial review under Article 263 of the TFEU. However, old habits die hard. In the recent case, Advocate General Ćapeta paid special attention to the lack of proper publication of the statements of the reason

by the Commission, just like Advocate General Roemer did in the Meroni -case regarding the High Authority.

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