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EDITORIAL

TOWARDS A TRANSATLANTIC AREA OF COOPERATION

*Giacinto della Cananea**

More than six decades ago, six countries moved by the hope of ensuring peace and rising living standards, agreed on the text drafted by Jean Monnet and made public by Robert Schuman and later signed the Treaty of Paris establishing the European Coal and Steel Community. After the failure of the Treaty establishing the European Defence Community, two further economic communities were created in 1957. The following decades have seen the achievement of the initial goals (peace and prosperity), the gradual expansion of the tasks of the new bodies, and the institutionalization of the European polity. This constitutes a “new legal order” – to borrow the famous expression used by the Court of Justice in its ruling in *Van Gend en Loos* – the subjects of which do not comprise only the States, but also their citizens. An unprecedented process of transformation from an interstate union to a “composite”, quasi-federal polity has thus taken place. Some similarities with federal polities, such as the United States of America, have often been pointed out, though the distinctive features cannot be ignored, to begin with the ambition to create “an ever closer union between the peoples of Europe”, instead of a people.

As the integration process has evolved from the transfer of sovereign powers, “albeit in limited fields”, to a more complex web of policies, this expanded the external role of the Community. Although the Member States retained their powers to negotiate unilaterally international treaties, as well as their powers to join the international regimes created after World War II, the Community has increasingly played a role on the international stage.

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It has exercised its exclusive competence for commercial policy, becoming a founding member of the World Trade Organization, joining the US in promoting free trade, though not without differences and sometimes disputes. Similarly, in the environmental field, the European Union (which, after the Lisbon treaty, has replaced the Community) has promoted the creation of international regimes, such as that of Kyoto, not rarely in disagreement with US policies. More recently, the Union has taken important steps to ensure the respect of the resolutions adopted by the Security Council of the United Nations, and promoted or sustained by the US, though in Europe this area has become increasingly less insulated from judicial review and has eventually required a gradual adjustment of the measures provided by the UN.

All this shows that between the EU and the US there are important common features, but also distinctive traits. There is also an important, increasing potential for closer cooperation between the EU and the US. While the common foreign and security policy of the EU has been viewed as persistently weak by its counterparts on the other side of the Atlantic Ocean and the external dimension of its internal area of justice and security still needs to be strengthened, the role of the Union can be highly significant in the economic area not narrowly intended, that is to say with important implications for environmental and social policies.

The question that thus arises is whether, after the (sometimes mainly rhetoric) trans-Atlantic proclamations of solidarity in the aftermath of 9/11, the EU and the US can create a more institutionalized pattern of cooperation. An agreement, the *Transatlantic Trade and Investment Partnership*, has been under negotiation since 2013. If it is signed and ratified, and if it is combined with the trade agreements that already exist on both sides of the Atlantic Ocean (in the perspective of a Transatlantic Free Trade Area), it could give rise to the wider free trade area of the world, with important positive effects not only for the contracting parties, but also for the rest of the world. The “if”, however, is not merely a manifestation of caution. It also serves to point out that several steps must be taken in order to transform

those potentials into a reality of closer and institutionalized cooperation. What matters is not only the variety of attitudes that have emerged within Europe since the Iraqi War or the different views that prevail in the EU and the US with regard to the relations with other global players.

Looking at the topic from a legal point of view, the attempt to create a free trade area, where non-tariff barriers and other distortion to competition are eliminated raises, first, the question of the goals of competition, of its underlying philosophy. There is, second, an increasing divide in an important field, that of data protection. Few years ago, the decision by the European Court of Justice (in joined cases C-317/04 and 318/04) has annulled the decision on adequacy concerns processing of personal data, for its contrast with EU law. The Court, consistently with its case law, ruled in favour of a strong vision of data protection. This vision is in clear collision with the surveillance carried out by the US' National Security Agency (NSA) in the last years. Realists will argue that all national governments must, and do, carry out surveillance activities. Whatever the intellectual soundness and political expediency of this way to consider the question, there is evidence that an agreement does not only serve to enhance mutual trust between the parties, but it also presupposes such mutual trust. This requires concrete steps to harmonize legal and administrative provisions in order to ensure that an adequate protection has been put in place. Last but not least, remedies for citizens and business must be taken into due account. A growth of transnational exchange is likely to produce new disputes. Whether such disputes can be solved only through the traditional instruments of EU law, that is to say the courts, or through alternative instruments for solving disputes, it is an important question in view of the consolidation of a system of adjudication capable of responding to the needs of a transnational society.

IJPL SYMPOSIUM 2012

THE EURO CRISIS JURISPRUDENCE OF THE FEDERAL CONSTITUTIONAL COURT

*Peter M. Huber**

Abstract

On September 12th 2012 the Federal Constitutional Court (FCC) decided on several constitutional complaints and applications demanding a temporary injunction against the Federal law approving the Treaty on the ESM (TESM), the Federal laws implementing that treaty into the national legal order and the Federal law approving the treaty on the so called Fiscal Compact (TFCP). These demands had been put forward by the vastest amount of plaintiffs in the 62 years old history of the FCC – 76 MPs, several professors of economics, the parliamentary group of the Left and more than 41.000 citizens. The decision of September 12th had already been the fourth significant decision of the FCC dealing with the Sovereign Debt Crisis since 2011, and it won't be the last.

These decisions belong to a long line of jurisprudence which started to deal with European integration already in the early 1970s. There may have been some change in tone over the past 40 years; the cornerstones of the FCC's approach, however, remain unchanged. At the base of this long line of case law is a concept which conceives the EU as an association of sovereign states (*Staatenverbund*) in which the Member States are "masters of the treaties" and, as far as Germany is concerned, cannot be deprived of this role but for an act of the constituent power *i.e.* a referendum according to art. 146 Basic Law.

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I. National legislation as basis of European integration

Against this background EU-law has to be applied because and insofar as Parliament has approved it by ratification (*Rechtsanwendungsbefehl*). Therefore the Federal Act Approving the EEC Treaty and its subsequent amendments are the basis of Germany's membership in the EU, and the conceptual basis of the precedence EU-law takes over national law. If EU membership is based on national legislation, it seems to be inevitable that especially national constitutional law may also set limits to European integration. Looking at this in more detail there are two limits to European integration derived from national constitutional law: the constitutional identity on the one hand (1.) and the program of integration i. e. the principle of conferral on the other (2.).

1. *Constitutional identity as a limit to integration*

a) *Eternity clause of art. 79 (3) GG*

The constitutional identity of the Federal Republic of Germany, which according to art. 23 (1) third sentence of the Basic Law is not open to European integration is determined by and only by the so-called eternity clause of art. 79 (3) Basic Law. Codifying the jurisprudence of the FCC¹ the Basic Law states that “[...] the establishment of the European Union as well as changes in its treaty foundations [...] that amend or supplement this Basic Law or make such amendments or supplements possible, [...] shall be subject to paragraphs (2) and (3) of art. 79”². Insofar, the division of the federation into ‘Länder’, their participation in the legislative process, or the principles laid down in artt. 1 and 20’ are off limits even for legislation concerning European integration. In other words, the limits the legislator has to abide by when amending the constitution apply to the advancement of European Integration as well.

b) *Content of the guarantees*

In the Lisbon Judgment, the Federal Constitutional Court tried to further sort this out and elaborated that the Basic Law also guarantees the sovereign statehood of the Federal Republic of Germany.³ Consequently, Parliament, Federal Council, and the Government, the so-called *pouvoirs constitués*, do not possess the power to abolish the sovereign nation state over the heads of the German people; this would require an act of the constituent power, the *pouvoir constituant* (art. 79 (3), 146 Basic Law)⁴. It further stated that, in spite of all the utopias surrounding the term ‘multi-level-constitutionalism’, the European Union remains an association of sovereign states based on public international law. In the future, it will therefore continue to be steered by the

¹ BVerfGE 37, 271 ff. – Solange I; 73, 339 ff. – Solange II; 75, 223 ff. – 6. UStRiL; 80, 74 ff. – e. A. Fernsehrichtlinie; 89, 155 ff. – Maastricht; 123, 267 ff. – Lissabon.

² Für einen eher spielerischen Umgang mit diesen Grenzen J. Schwarze, Ist das Grundgesetz ein Hindernis auf dem Weg nach Europa?, JZ 1999, 637 (640).

³ BVerfGE 123, 267 (346 ff.) – Lissabon; früher schon P.M. Huber, Maastricht – ein Staatsstreich?, 1993, S. 22 ff.

⁴ BVerfGE 123, 267 (348 f.) – Lissabon; erstmals wohl P.M. Huber, Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der gemeinschaftsrechtlichen Kompetenzordnung, AöR 116 (1991), 210 (250); ders., in: Sachs (Hrsg.), GG, 1. Aufl. 1996, art. 146 Rn. 19; H. Dreier, in: ders. (Hrsg.), GG, Band III, 1. Aufl. 2000, art. 146 Rn. 16.

Member States, who, as former judgments had put it, are and will continue to be the ‘Masters of the Treaties’⁵, and that the principle of democracy (art. 20 (1) and (2) Basic Law) entails a special responsibility for parliament when it comes to integration; it demands that national parliaments have to take an active part in European matters. These requirements, laid down in art. 23 (2) to (6) Basic Law resemble what art. 12 TEU and the Protocols on the Role of National Parliaments in the EU and on the Application of the Principles of Subsidiarity and Proportionality require under an EU perspective⁶.

aa) As far as the distribution of competences between the EU and the Member States is concerned, this means that the latter have to retain the right to unilaterally withdraw from the union, which is now expressly established in art. 50 TEU, that the EU cannot be granted the ‘Kompetenz-Kompetenz’, but rather that the allocation of competences is to be based on the principle of conferral⁷ and that the ‘majority of functions and powers’ must remain with the Member States⁸. The Lisbon Judgment tried to substantiate this – admittedly intangible – phrase by listing examples of areas of policy – citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realization of fundamental rights.

bb) Because of the ongoing Euro-crisis the Court has had the opportunity to further shape the budgetary dimension of the constitutional identity. In its decisions concerning the aid measures for Greece and the Euro rescue package⁹ as well as the ESM¹⁰ it has identified the budget autonomy of the German parliament as a fundamental part of the constitutional identity and declared the *Bundestag’s* overall fiscal autonomy to be inalienable. It stated verbatim: “Against this background, the German Bundestag must not transfer its budget autonomy to other participants by granting indefinite authorisations concerning

⁵ BVerfGE 75, 223 (242) – 6. USt.-RiL; 89, 155 (190) – Maastricht; P.M. Huber, *Recht der Europäischen Integration*, 2002, § 5 Rn. 13 ff.

⁶ Siehe dazu BVerfG, NVwZ 2012, 954 Rn. 98 – Informationsrechte.

⁷ Früher schon BVerfGE 75, 223 (242) – 6. USt.-RiL.

⁸ BVerfGE 89, 155 (186) – Maastricht.

⁹ BVerfGE 129, 124 (179 ff.) – Griechenlandhilfe und Euro-Rettungsschirm.

¹⁰ BVerfG, NJW 2012, 3145 ff. – ESM-Vertrag, Fiskalpakt.

fiscal policy. In particular, it may not – not even by statute – subject itself to mechanisms of financial importance which – be it because of the general concept or the result of an overall evaluation of individual measures – could lead to incalculable burdens on the budget (expenditure or loss of revenue) without the essential prior approval. Prohibiting the Bundestag from relinquishing its budget autonomy in this way is not an inadmissible restriction of the legislator’s budgetary competence, but is in fact aimed at its protection”¹¹.

2. *The principle of Conferral and the ultra-vires-problem*

If national legislation is the basis of EU-law, the EU can only possess such competences that have been conferred upon it by the Member States (principle of conferral). Activities of the EU and its organs are therefore democratically legitimate only insofar as they keep within the scope of the programme of integration approved by national parliaments – as far as Germany is concerned by Bundestag and Bundesrat. This applies to all organs of the EU, to the European Parliament, the Council, the Commission, the ECJ and also to the European Central Bank. It is the ground on which several plaintiffs have challenged the ECB’s OMT-Decision of sept. 6th 2012 before the Federal Constitutional Court.

The limit of competences conferred on EU institutions, i.e. the scope of the programme of integration, is inevitably a recurring source of conflict. This becomes a constitutional law issue of some explosiveness especially when the ECJ, who inter alia possesses the competence to adjudicate on whether the EU institutions keep within their competences (art. 19 (1) second sentence TEU), approves acts that exceed the conferred competences and thus acts ultra vires itself.

This was enunciated explicitly for the first time in the Maastricht Judgment¹² and has since been confirmed in the Lisbon Judgment¹³ and outlined in more detail in the Honeywell ruling¹⁴.

¹¹ BVerfGE 129, 124 (179 ff.) – Griechenlandhilfe und Euro-Rettungsschirm.

¹² BVerfGE 89, 155 (188, 195, 210) – Maastricht.

¹³ BVerfGE 123, 267 (398 ff.) – Lissabon.

¹⁴ BVerfGE 126, 286 ff. – Honeywell; dazu A. Proelß, Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen

It has gained a large following among other Member States' constitutional or Supreme Courts. In 2012 the Czech Constitutional Court, for the first time, even considered an ECJ judgment to be *ultra vires*¹⁵.

Although this case has remained an exception so far – the FCC has namely rejected *ultra vires* claims by the majority¹⁶ with regard to the ECJ's Mangold line of case in 2010,– this does not mean that the court's reserve control is ineffective. The mere fact that the majority of national (constitutional) courts claims to apply the standards of national law to determine whether the ECJ had acted *ultra vires* has been incentive enough for the ECJ to avoid such conflicts. It has thus – with a somewhat clumsy reasoning – upheld the Irish Constitution's prohibition of abortion, and did only classify the prohibition of women's armed military service, which was included in the German Basic Law until 2000 (art. 12a (4) third sentence), as an infringement of Directive 76/207/EEC after the Advocate General had realized that this prohibition is not a provision in the sense of art. 79 (3) Basic Law. The Omega case may be another example¹⁷. It will however be interesting to see how things will develop after the Akerberg/Franson judgment of 26th February 2013¹⁸.

II. The key role of the democratic principle

Until the 1990s the main constitutional concern in Germany was that European integration would endanger the level of protection the fundamental rights as they are laid down in the Basic law. This has become a lesser concern in the past 20 years whereas the democratic issue has turned out to be the key question of European integration – at least under a German perspective.

der Europäischen Union: Der ausbrechende Rechtsakt“ in der Praxis des BVerfG, EuR 46 (2011), 241 ff.

¹⁵ Tschech. VerfG Pl. ÚS 5/12 – Slovak Pensions.

¹⁶ BVerfGE 126, 286 (308 ff.); see Dissenting opinion of Landau S. 318 ff.

¹⁷ ECJ, Rs. C-36/02, *Omega*, Slg. 2004, I-9609 Rn. 39.

¹⁸ ECJ Rs. C 617/10 – Akerberg/Fransson Slg. 0000.

1. Basics

Behind this line of adjudication seems to be a uniquely German concept – critics might say exaggeration – of democracy. Its origins can be traced back to the KPD-judgement of 1954¹⁹ but it did not emerge clearly until after reunification. The other Member States’ democratic principles if they are theoretically recognized at all, are less intense and doctrinally elaborated.²⁰ Europe’s ‘most democratic’ state, Switzerland, does not even recognise any *principle* of democracy²¹. Democracy does not extend past the application of the procedures provided for the forming of the political will.

The German concept substantially amounts to the proposition that the principle of democracy and the sovereignty of the people (art. 20 (1) and (2) Basic Law) are based on the individual right to political self-determination which itself is based on human dignity (art. 1 (1) Basic Law) and, just as all fundamental rights, has a tendency to strive for an expansion of the range of opportunities that it involves²². Therefore, democracy in Germany is not merely an abstract principle that is given effect to by elections of some kind; it means taking the individual seriously as a voter and as a citizen, in fact aiming to free him from being a subject who is controlled and patronized by the state, the European Union or other political institutions. It is aimed at optimizing the possibilities for political participation and at maintaining the political value of the right to vote in national elections (as elections to the European Parliament do not amount to a comparable level of participation for the individual).

¹⁹ BVerfGE 5, 85 (204 f.) – KPD-Urteil.

²⁰ P.M. Huber in: Streinz (Hrsg.), EUV/AEUV, 2. Aufl. 2011, art. 10 EUV Rn. 9 ff.

²¹ K.P. Sommermann, Demokratiekonzepte im Vergleich, in: Bauer/Huber/ders. (Hrsg.), Demokratie in Europa (Hrsg.), S. 191 ff.

²² Grundlegend BVerfGE 107, 59 (91 f.) – Wasserverbände NRW; 123, 267 (342 ff.) – Lissabon; P.M. Huber, Demokratie in Europa – Zusammenfassung und Ausblick, in: Bauer/ders./Sommermann (Hrsg.), Demokratie in Europa (Hrsg.), 2005, S. 491 (495 f.); S. Unger, Das Verfassungsprinzip der Demokratie, 2008, *passim*.

2. *Practical Consequences*

Democratic legitimation – seen from the point of view of the Basic law – is realized primarily through decisions of parliament (“Wesentlichkeitsdoktrin”) and through the involvement of the Bundestag in the decision making process of the EU. The national Parliament is considered the center of democracy and an essential part of our constitutional identity²³. If the *Bundestag* therefore loses competences, the right to vote guaranteed in art. 38 par 1 1 GG loses substance. The capacity of the individual to political self-determination is diminished and he or she must be therefore entitled to make a constitutional complaint arguing that the treaty or the measure at stake would go too far and violate the constitutional identity of the Basic Law. This concept of democracy, laid down in art. 20 (1 and 2) of the Basic law, is part of the constitutional identity and therefore unalienable for the ordinary legislator as well as for the constitution amending legislator or the legislator in European affairs.

III. *Euro crisis – jurisprudence*

1. *Decision of September 7th 2011*

In a more specific way the democratic principle as it is laid down in art. 20 par 1 and 2 of the Basic law entails the requirement that the Bundestag remains the place where decisions on the amount of loans and guaranties which Germany may give for other countries, their duration and their conditions have to be decided on in order to make a public debate and accountability possible.

The Federal Constitutional Court’s judgement concerning the aid measures for Greece and Germany’s participation in the EFSF²⁴ (7th September 2011) is the most important case so far in which these questions have arisen in practice. The Federal Constitutional Court has not only made clear that the limits to integration cannot be skirted by switching to treaties of international public law, but stated moreover, that the individual has a right that said limits are obeyed. This continued expansion

²³ Siehe P.M. Huber, § 26 Rn. 83 ff.

²⁴ BVerfGE 129, 124 ff. – Griechenlandhilfe und Euro-Rettungsschirm.

of the standing is defended against scholarly criticism as follows: “The citizen’s right to democracy which is ultimately based on human dignity [...] would be ineffective if the parliament relinquished core parts of political self-determination and thus permanently deprived the citizen of the possibility of democratic participation. The Basic Law has declared the connection between the right to vote and the government in art. 79 (3) and art. 20 (1) and (2) Basic Law to be inviolable [...]. The legislator has made clear when revising art. 23 Basic Law that the obligation to develop the European Union is tied to the adherence to structural requirements of constitutional law (art. 23 (1) first sentence Basic Law) and that art. 79 (3) has set an absolute limit in order to protect the constitutional identity (art. 23 (1) third sentence) which is transgressed not just when there is an impending seizure of power by totalitarian forces. The citizen must have a recourse of constitutional law against a transfer of competences by the parliament that is in breach of art. 79 (3) Basic Law. The Basic Law does not provide for a more extensive right to complain. Art. 38 (1) Basic Law becomes important in situations in which there is a danger of the competences of the present or future bundestag being undermined in a way that would make the realization of the citizen’s political will legally or practically impossible. The applicant is only entitled to make an application if he can substantiate that his right to elect the Bundestag may be devalued. There may be a right to lodge a constitutional complaint via art. 38 (1) Basic Law as well, if, what is alleged in this case, the authorizations to give guarantees, can have a substantial detrimental effect on budget autonomy, either by their nature or by their amount!”²⁵.

At the centre of this decision, which is primarily based on art. 20 (1) and (2) as well as art. 79 (3) GG, is the proposition that the Bundestag must not transfer its budget autonomy to other entities or subject itself to mechanisms of financial importance which, “be it because of the general concept or the result of an overall evaluation of individual measures, could lead to incalculable burdens on the budget (expenditure or loss of revenue) without the essential prior approval”²⁶. Against this

²⁵ BVerfGE 129, 124 (169 f.) – Griechenlandhilfe und Euro-Rettungsschirm.

²⁶ BVerfGE 129, 124 (179 f.) – Griechenlandhilfe und Euro-Rettungsschirm.

background, the Court has stated that the legislature is prohibited from establishing permanent mechanisms under the law of international agreements which result in an assumption of liability for other states' voluntary decisions, especially if they have consequences whose impact is difficult to calculate. Sufficient parliamentary influence must also be ensured with regard to the manner in which the funds that are made available are dealt with²⁷. With regard to the possibility of having to make payments in a guarantee event, the legislature has a considerable margin of appreciation. The Federal Constitutional Court has to respect this as well as the legislature's assessment of the future sustainability of the federal budget and of the economic performance of the Federal Republic of Germany²⁸.

The Senate could uphold the statutes in question – the Monetary Union and Financial Stability²⁹ Act and the EFSF Act³⁰ – mostly because the possible liabilities arising from those Acts were sufficiently definite – because of a limit regarding the sum, a time limit, a strict conditionality and the requirement of unanimity³¹. Against this background, it seemed sufficient to put the budget commission in charge of the control of the execution of namely the EFSF Act. However, that approval of the budget committee had to be obtained *prior* to giving guarantees which could only be ensured by interpreting § 1 (4) first sentence of the EFSF Act in conformity with the constitution and by pushing the boundaries of interpretation³².

2. Decision of February 28th 2012

After the FCC had allowed to transfer the responsibility for details of state guarantees and aids on the budget committee the legislator planned to organise the parliamentary supervision of the sovereign debt crisis as whole in a special committee of nine elected Members of Parliament.

²⁷ BVerfGE 129, 124 (180 f.) – Griechenlandhilfe und Euro-Rettungsschirm, unter Hinweis auf BVerfGE 123, 267 (356 ff.) – Lissabon.

²⁸ BVerfG, a. a. O.

²⁹ BGBl. I 2010, 537.

³⁰ BGBl. I 2010, 627.

³¹ BVerfGE 129, 124, (184 ff.) – Griechenlandhilfe und Euro-Rettungsschirm.

³² BVerfGE 129, 124, (186) – Griechenlandhilfe und Euro-Rettungsschirm.

This has prompted the Federal Constitutional Court to issue a temporary injunction against the entering into force of the amendment of § 3 (3) StabMechG³³ and has led to an essential decision regarding the internal organisation of the Bundestag³⁴. At the core of this decision is the principle that the Bundestag complies with its function as a body of representation in its entirety, i.e. by participation of all its members, and not by single members of parliament, a group of members, or the majority of parliament. This holds true especially when it comes to the budget.

The German Bundestag's right to decide on the budget and its overall budgetary responsibility are, in principle, exercised through deliberation and decision-making in the plenary sitting "[...], through deciding on the Budget Act, statutes with financial importance or any other constitutive decision of the plenum [...]. Every member of parliament has the right to assess the draft budget of the federal government and the proposed amendments (art. 38 (1) in conjunction with art. 77 (1) first sentence and art. 110 (2) first sentence Basic Law). A member of parliament shall be able to present his views on how the budgetary funds should be spent and thereby influence the decision on a budget [...]. Moreover, the members of the German Bundestag have the right and the obligation to comply with their function to control fundamental decisions on budgetary politics [...]"³⁵.

However, this is not an absolute guarantee. A restriction of the member of parliament's equal participation (art. 38 par 1 S. 2 GG) can be justified by other legal interests of constitutional rank, as the parliament's ability to function. This amounts to a gradual guideline which is based on the idea of essentiality and directed by the principle of proportionality – in the words of the Federal Constitutional Court.

"If members of parliament are excluded from participating in parliamentary decision-making by a transfer of decision-making competences to an executive committee, this is admissible only in order to protect other legal interests of constitutional rank and only if the principle of proportionality is strictly observed.

³³ BVerfGE 129, 284 ff. – e. A. EFSE.

³⁴ BVerfG, NVwZ 2012, 495 ff. – Sondergremium.

³⁵ BVerfG, NVwZ 2012, 495 ff. – Sondergremium, Rn. 110.

The competence to internal organization does not permit to completely deprive a member of parliament of his rights”³⁶.

3. Decision of June 19th 2012

In its judgment pronounced of June 19th 2012, the FCC considered well-founded the applications made by the Alliance 90/The Greens parliamentary group with which it asserted that the *Bundestag*'s rights to be informed by the Federal Government have been infringed in connection with the European Stability Mechanism (ESM) and the Euro Plus Pact (EPP).

According to art. 23 par 2 sentence 2 of the Basic law, the Federal Government shall keep the *Bundestag* informed, comprehensively and at the earliest possible time, “in matters concerning the European Union”. The first application was aimed at the European Stability Mechanism (ESM). The applicant applied for a declaration that the Federal Government infringed the *Bundestag*'s rights under art. 23 par 2 GG by omitting to inform immediately before and after the European Council of 4 February 2011 comprehensively, at the earliest possible time and continuously, about the configuration of the ESM, and that it in particular omitted to send the Draft Treaty establishing the ESM to the *Bundestag* on 6 April 2011 at the latest.

The second application concerned what is known as the Euro Plus Pact, which was presented to the public for the first time at the European Council of 4 February 2011. This agreement is intended to reduce the risk of currency crises in the euro area. In this context, the parliamentary group applied for a declaration that the Federal Government infringed the *Bundestag*'s rights under art. 23.2 GG by omitting to inform the *Bundestag* before the European Council of 4 February 2011 about the Federal Chancellor's initiative for an enhanced economic coordination.

Against this backdrop, the FCC had to clarify whether the rights of participation and the rights to be informed under art. 23 par 2 of the Basic law can also apply to intergovernmental instruments of the nature described which are dealt with by the Federal Government in the context of European integration and which are related to the European Union. The Senate ruled that

³⁶ BVerfG, NVwZ 2012, 495 ff. – Sondergremium, Rn. 119.

the Federal Government infringed the *Bundestag's* rights to be informed under art. 23.2 sentence 2 of the Basic law with regard to the ESM and with regard to the agreement on the Euro Plus Pact.

Art. 23 of the Basic law confers to the *Bundestag* far-reaching rights of participation and rights to be informed in matters concerning the European Union. The strong involvement of Parliament in the process of European integration serves as a compensation for the competence shifts in favour of the governments that result from Europeanisation. The Federal Government's duty, to keep the *Bundestag* informed comprehensively and at the earliest possible time intends to make it possible for Parliament to exercise its right to participate in matters concerning the European Union. The information must make it possible to influence the Government's opinion-forming early and effectively; information must be provided in such a way that Parliament's role is not reduced to merely exercising indirect influence. Apart from this, the interpretation and application of art. 23.2 must take into account that the provision also serves the publicity of parliamentary work, a requirement which is derived from the democratic principle laid down in art. 20.2 of the Basic law. The more complex a matter is, the deeper it intervenes in the legislative's area of competences and the closer it gets to formal decision-making or to a formal agreement, the more intensive the required information has to be.

The indication "at the earliest possible time" in art. 23.2 sentence 2 means that the *Bundestag* must receive the Federal Government's information at the latest at a point in time that enables it to deal with the matter in a substantiated manner and to prepare a statement before the Federal Government makes declarations which have an effect on third parties, in particular binding declarations concerning legislative acts of the European Union and intergovernmental agreements. Boundaries of the duty to inform result from the principle of the separation of powers. As long as the Federal Government's internal formation of opinion has not come to an end, Parliament has no right to be informed. If, however, the Federal Government's opinion-forming has reached a stadium in which it can communicate interim or partial results to the public or would like to set out on a process of concertation with third parties with a position of its own, a project no longer

falls within the core area of the Federal Government's own executive responsibility that is shielded from the *Bundestag*.

With regard to the establishment of the ESM the Government had infringed the *Bundestag*'s rights to be informed under art. 23 par 2 sentence 2 of the Basic law.

The establishment and configuration of the ESM were a matter concerning the European Union because in an overall perspective, the characteristics which define it show substantial connections with the integration program of the European Treaties. Though its being intertwined with supranational elements and its hybrid nature it has to be considered a matter concerning the European Union. The establishment of the ESM is to be safeguarded by amending the TFEU, furthermore, the treaty to be concluded for its establishment assigns to the institutions of the EU, in particular to the European Commission and the ECJ new responsibilities concerning the identification, realization and monitoring of the financing program for Member States in need of assistance. The ESM is to serve to complement and safeguard the economic and monetary policy, which has been assigned to the EU as an exclusive responsibility.

The Federal Government infringed the rights of the *Bundestag* under art. 23.2 sentence 2 of the Basic Law by omitting to submit a text of the European Commission on the establishment of the ESM, which was available to the Federal Government on 21 February 2011 at the latest, and the Draft Treaty Establishing the European Stability Mechanism (ESM) of 6 April 2011. Oral and written information, in particular sending the Draft Treaty Establishing the European Stability Mechanism, which had already been discussed in the extended Eurogroup on 17 or 18 May 2011 came too late and did therefore not compensate the infringement. The duty to inform could not be exercised "in an overall package" with regard to processes of the nature existing. The Federal Government was obliged to supply the *Bundestag* not merely with the text of a treaty when deliberations had already been concluded, or after the treaty has been adopted, but had to submit it at the earliest possible time.

The Federal Government also infringed the *Bundestag*'s rights under art. 23.2 sentence 2 by not informing it comprehensively and at the earliest possible time on the Euro Plus Pact.

4. Decision of September 12th 2012

On September 12th 2012 the Federal Constitutional Court pronounced its judgment regarding several applications for a temporary injunction. The main objective of the applications was to prohibit the Federal President from signing the statutes approving the Treaty establishing the European Stability Mechanism (TESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TFCG) passed by the Bundestag and the Bundesrat on 29 June 2012 until the decision in the principal proceedings. The Second Senate of the Federal Constitutional Court refused the applications with two provisos. The TESM could only be ratified if it was ensured at the same time under international law that:

1. the limitation of liability set out under art. 8 (5) sentence 1 of the ESM Treaty (TESM) limits the amount of all payment obligations arising to the Federal Republic of Germany from this Treaty to its share in the authorized capital stock of the ESM (EUR 190 024 800 000) and that no provision of this Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative;

2. the provisions of the ESM Treaty concerning the inviolability of the documents of the ESM (Art. 32 (5), art. 34 and art. 35 (1) TESM) and the professional secrecy of all persons working for the ESM (art. 34 TESM) do not stand in the way of the comprehensive information of the Bundestag and of the Bundesrat.

The Federal Republic of Germany was obliged to express to the other members of the ESM that she does not wish to be bound by the TESM as a whole if the reservations made by it should prove to be ineffective.

a) Extent of review/Admissibility of the main action

Diverging from the usual extent of review in temporary injunction proceedings, the Senate did not restrict its review to a mere weighing of the consequences. Instead, it performed a summary review of the challenged Acts of assent and of the accompanying laws under the aspect of whether the violations of their rights which the applicants admissibly assert can indeed be proven. This was necessary because with the ratification of the

Treaties Germany was to enter commitments under international law whose cancellation would not be easily possible in the event that violations of the constitution should be found out in the principal proceedings. The principal proceedings were held admissible to the extent that the applicants, relying on art. 38 of the Basic law, assert a violation of the overall budgetary responsibility of the Bundestag, which is entrenched in constitutional law through the principle of democracy (art. 20 (1) and 2, art. 79 (3) of the Basic law).

b) Standard of review

As the Senate already held in its decision regarding the aid for Greece and the EFSF of 7 September 2011, art. 38 of the Basic law in conjunction with the principle of democracy (art. 20 (1) and (2), art. 79 (3)) demands that the decision on public revenue and public expenditure must remain with the Bundestag. As elected representatives of the people, the Members of Parliament must retain control of fundamental budgetary decisions even in a system of intergovernmental governance. In this respect, the Bundestag is not allowed to establishing mechanisms of considerable financial importance which may result in incalculable burdens with budget significance being incurred without its mandatory approval. On the contrary: The Bundestag must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Sufficient parliamentary influence must also be ensured on the manner of dealing with the funds provided.

c) Subsumption

Measured against these standards, the applications proved to be unfounded for the most part.

aa) The Act of approval to the insertion of art. 136 (3) TFEU did not impair the principle of democracy. It was provided for by the European Council decision of 25 March 2011 and contains the authorization to establish a permanent mechanism for mutual aid between the Member States of the euro currency area. Different from the ECJ the FCC was convinced that the establishment of the ESM changes the design of the economic and monetary union in a way that it moves away from the principle of the independence of

national budgets which has characterized the monetary union so far. This may be wise or not. It is important, that it does not result in a loss of national budget autonomy because through the challenged Act of assent, the Bundestag does not transfer budget competences to bodies of the EU or to institutions created in connection with the EU.

bb) The approval of the TESM essentially takes account of the requirements set out under constitutional law with regard to the safeguarding of the overall budgetary responsibility of the German Bundestag.

However, the FCC thought it to be necessary to ensure in the framework of the ratification procedure under international law that the provisions of the TESM may only be interpreted or applied in a way that the liability of the Federal Republic of Germany cannot be increased beyond its share in the authorized capital stock of the ESM of 190 bn € without the approval of the Bundestag and that the information of the Bundestag and the Bundesrat according to the constitutional requirements is ensured. Admittedly, it can be assumed that the express limitation of the liability of the ESM Members to their respective portions of the authorized capital stock, which is provided for in art. 8 (5) sentence 1 TESM, bindingly limits the Federal Republic of Germany's budget commitments undertaken in connection with the activities of the ESM to EUR 190 024 800 000. However, it cannot be ruled out that the TESM will be interpreted in a sense that in the case of a revised increased capital call, the ESM Members cannot rely on the liability ceiling.

Such a reservation in the ratification procedure was also required with regard to the provisions of the TESM on the inviolability of the documents (art. 32 (5), art. 35 (1) TESM) and on the professional secrecy of the legal representatives of the ESM and of all persons working for the ESM (art. 34 TESM). Also in this respect one could argue that these provisions are above all intended to prevent a flow of information to unauthorized third parties but not to national parliaments that must bear political responsibility for the commitments based on the TESM *vis-à-vis* their citizens also during further treaty implementation. However, again the provisions do not explicitly address the information of the national parliaments by the ESM and constitutional law as regards the parliament's rights of participation and its rights to be

informed is quite different in the Member States. It therefore is not unconceivable that those prescriptions could have stopped the Bundestag from monitoring the ESM.

On the other hand the amount of the payment obligations of a total nominal value of EUR 190 024 800 000 did not exceed the limit of the burden on the budget to such an extent that the budget autonomy would run void. This even applies if Germany's overall commitment undertaken with regard to the stabilization of the Eurozone of approximately 310 bn € is taken into consideration. As had already been pointed out in the decision of 7 September 2011 legislature has a broad scope of assessment in this respect, which entails the assessment of the future soundness of the Federal budget and the economic performance capacity of the Federal Republic of Germany.

IV. ECB-Case

The Applicants to the FCC who object to euro rescue measures taken by the European Central Bank, in particular to the acquisition of government bonds on the secondary market, arguing that the measures go beyond the authorization by the program of integration laid down in the TFEU, did not ask for a temporary injunction. To what extent the decision taken by the Governing Council of the European Central Bank on 6 September 2012 on a programme concerning the purchase of government bonds of financially weak Member States (OMT-program) complies with the legal requirements of the treaty was therefore not a matter for decision in the proceedings for the issue of a temporary injunctions.

Their constitutional complaints and application are consequently reviewed in the principal proceedings. The oral hearing in this case has taken place in June 2013. So, the next question which will have to be answered is whether the ECB's policy to buy government bonds of distinguished members of the Eurozone under specific conditions is in accordance with the TFEU and its constitutional foundations in the Basic Law.

V. Outlook

The Basic Law sets substantial requirements for the division of competences between the EU and the Member States and, as a necessary consequence, for the democratic legitimation and control of EU decisions as well.

As far as Germany is concerned, this has to be put into effect primarily through the Bundestag. These requirements are also valid for other supranational organizations such as the ESM. In a more specific way the democratic principle as it is laid down in art. 20 par 1 and 2 of the Basic law entails the requirement that the Bundestag remains the place where decisions on the amount of loans and guaranties which Germany may give for other countries, their duration and their conditions have to be decided on in order to make a public debate and accountability possible.

During the ongoing crisis, this may slow down responses to the financial markets' actual or perceived demands and may, as the president of the IMF, Christine Lagarde, has stated in an interview, mean that democracy is indeed proving to be an impediment to overcoming the crisis. Yet, this is a price we must be willing to pay for the sake of our and our children's freedom and self determination.

GOVERNMENT DEFICITS AND INVESTMENTS: A EUROPEAN LEGAL FRAMEWORK

*Giacinto della Cananea**

Abstract

In the academic and institutional debates concerning the role of the European Union with regard to national budgetary policies, there is an increasing concern for the limits that the EU has imposed on government debts and deficits. Much has been written, especially in economic literature, about the conventional nature of such limits. While this literature contains some useful insights, it will be argued that two central aspects of the topic have been insufficiently examined and only partially understood: one is the rule concerning government expenditure for investments, the other is its connection not only with the 'guiding principle' according to which financial conditions must be sound, but also with the common constitutional tradition which is reflected in such principle, that is to say financial stability. It will be argued, therefore, that the critique according to which the EMU has a negative impact on national policies aiming at financing investments is neither normatively nor empirically sound.

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1. Dilemmas of Government Deficits

There is little doubt that the development of a European legal framework for government debts and deficits has been one of the most significant achievements of the Economic and Monetary Union (EMU), whilst being one of the most controversial ones.

According to its advocates, such legal framework is a necessary element in the strategy of the European Union (EU) to ensure that government failures do not preclude a more integrated Europe. It has provided a set of common principles, standards, and legal procedures, though respecting the requisites of subsidiarity ⁽¹⁾. At the same time, it has provided national policy-makers with an important, additional strength in order to overcome the opposition of vested interests to the necessary reforms of government policies, especially those that have a stronger impact on public expenditure, in the logic by which the EU serves to rescue the States from their weaknesses ⁽²⁾.

¹ S. Cassese, *La nuova costituzione economica* (1994), 145.

² For this line of reasoning, see A. Milward, *The European Rescue of the Nation – State* (2000, 2nd ed.).

For other commentators and political leaders, the EU legal framework, in particular for its component concerning government debts and deficits, is intrinsically flawed, because it codifies debt-reduction policies. The underlying assumption is, first, that as a matter of principle no constitutional provision should codify a certain vision of political economy ⁽³⁾. Second, debt-reduction policies sooner or later imply constraints on public expenditure, with a huge and negative impact on social programs ⁽⁴⁾. A variant of this argument is that EU rules weaken the rights, especially social rights, recognized by national constitutions and statutes ⁽⁵⁾. Another variant, and a very questionable one, is that EMU has a negative impact on national policies aiming at financing infrastructures, thus reducing the capacity of the Union as a whole to face the economic and financial crisis.

This article will seek to explore why and how the EU has imposed certain limits on government debts and deficits. Much has been written, especially in economic literature, about the conventional nature of such limits. While this literature contains many useful insights, it will be argued that two central aspects of the topic have been insufficiently examined and only partially understood.

2. *Government Deficits in Economics, Political, and Legal Theories*

An interesting way to introduce the discussion concerning government deficits can be that of pointing out, first, how the substantial convergence of views between lawyers and economists at the end of the Nineteenth century was modified by Keynesian theories and, second, how the budgetary policies that allegedly followed such theories raised a number of difficulties. This will

³ For a thorough discussion of this argument, see A. Wildavsky, *How to Limit Government Spending* (1980).

⁴ But see V. de Rugy, *Is Austerity the Answer to Europe's Crisis?*, 33 *Cato Journal* 244 (2013) (observing that debt-reduction packages are dominated either by tax increases or by spending restraints).

⁵ This is not only a sort of leit-motiv in legal literature, especially in field of constitutional law. It is a topic increasingly referred to by public institutions: see the European Economic and Social Committee's opinion "Pour une dimension sociale de l'Union économique et monétaire" (doc. n. 1566/2013).

provide a basis for understanding the rationales underlying the legal principles that regulate government deficits.

A) *Infrastructures and Deficits in Adam Smith's Wealth of Nations*

Without going too far in the history of ideas, the roots of the traditional thoughts about the role of governments in the economy can be found in Adam Smith's *Wealth of Nations*, one of the most influential works of Western civilization. Though emphasizing the virtues of markets, Smith did not neglect the role of the Sovereign. He identified three kinds of activities that could be regarded as being inherently public functions (6). While the first function concerned the protection of citizens against external and internal threats, that is to say defence and order, and the second consisted in the administration of justice, the third regarded public works. Smith focused, in particular, on works such as the construction of bridges and roads. Interestingly, he distinguished between those public works which were necessary either for the defence of the society or for the administration of justice, that is to say the first two categories on public functions, and the other works that were necessary, "chiefly those for facilitating the commerce of the society, and those for promoting the instruction of the people (7). He acknowledged that, as a matter of principle, these works could be, and sometimes were in fact, carried out by individuals. However, he observed that it was, as it still is, often difficult for them to obtain an adequate profit.

This empirical finding had important normative advantages. First, as realists have long maintained, it reflected a legal reality, that is to say that the role of the State was not limited to the regulation of market forces. It was, rather, during the

⁶ A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1789, 5th ed) (hereinafter *Wealth of Nations*), book IV, chapter IX.

⁷ A. Smith, *Wealth of Nations*, cit. at 6, book V, chapter I, third part (Smith referred to the "erecting and maintaining those public institutions and those public works, which, though they may be in the highest degree advantageous to a *great society*, are, however, of such a nature, that the profit could never repay the expense to any individual or small group of individuals") (emphasis added). See, however, R. Musgrave, *The Theory of Public Finance* (1959), 563 (criticizing Smith on the questionable assumption that he considered only goods, neglecting services, notably those related to education)

Nineteenth century that *laissez-faire* theories took place. Second, Smith was interested in ascertaining the rationales underlying the role of the State as a builder, owner and manager of some essential infrastructures. Third, as Smith concluded, the money for funding such works could derive from taxation. It could also derive from borrowing, he added, provided that this did not generate an “enormous debt”, in contrast with the safeguard of public trust in government bonds (8).

This is, of course, an oversimplification of Smith’s thoughts about the State. However, it may at least give a glimpse of the theories that were regarded as “natural” not only by economist, but also by public lawyers at the end of the Nineteenth century (9). It may, in particular, shed some light on one issue. Although John Maynard Keynes observed that the rights of property and of free trade, as conceived during the eighteenth century, “accorded with the practical notions of conservatives and of lawyers” and that “a change [was] in the air” after the end of the *Belle époque* (10), the thoughts of public lawyers did not rest necessarily on the ideals of *laissez-faire*. They rested, rather, on the idea that the State – acting as a sovereign – has the power and the duty not only to lay down rules governing the market, in order to ensure its proper functioning, but also, in certain cases, to carry out economic activities.

According to Carl Schmitt’s *Nomos der Erde*, there was a sort of compromise between the national sovereignty of the State, of each State, and the shared constitutional principles concerning the regulation of the economy. Schmitt argued that it was Maurice Hauriou, in his *Précis de droit public*, who masterly gave a theoretical basis to this institutional framework (11). He added

⁸ A. Smith, *Wealth of Nations*, cit. at 6, book V, chapter III.

⁹ For a bird’s eye view of the shift from the legal theories of the State prevailing in the nineteenth century to those of the twentieth, see J. Rivero, *Droit administratif* (1987, 12th ed.) 28 and M. Loughlin, *Public Law and Political Theory* (1992).

¹⁰ See J.M. Keynes, *The End of Laissez-faire* (1926), in *Essays in Persuasion* (1931).

¹¹ C. Schmitt, *Das Nomos der Erde im Volkerrecht der Jus Publicum Europeum* (1950), translated by G.L. Ulmen, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum* (2003), 140. In the burgeoning literature on Schmitt, an important study is R. Howse, *Europe and the New World Order: Lessons from Alexandre Kojève’s Engagement with Schmitt’s ‘Nomos der Erde’*, 19 *Leiden Journal of International Law* 93 (2006).

that the “common constitutional standard ... was more important than was the political sovereignty of the individual ... self-contained, and territorial continental states” (12).

This commonality was widely recognized by public lawyers at the end of the nineteenth century, with the notable exception of Albert Venn Dicey’s overemphasis on the peculiarity of the English Constitution, and little point would be served by its repetition. The object of the present analysis is rather different. It is to observe that, for all the support given by public lawyers to *laissez faire* ideals, they did not believe that the (unwritten) economic constitution of their epoch excluded a more direct intervention by public authorities (13). Nor did they believe that government loans were unlawful. Rather, they thought that only extraordinary expenditure, such as those for infrastructures (railways, channels) could justify extraordinary revenues, such as loans (14).

B) Infrastructures and Deficits: Keynes and His Critics

Whether and the extent to that Keynes’ critique to “classic” economists brought him to conceive a radically different theory it is an important question, but it is a question which falls beyond the limits of this article, and more generally beyond the limits of a legal analysis. The aim of this article is, rather, to argue that Keynesian economics undoubtedly gave much more importance to deficit spending although it did not necessarily implied the rejection of free market values (15).

¹² C. Schmitt, *The Nomos of the Earth*, cit. at 11, 211.

¹³ See, in particular, S. Romano, *La libertà di commercio nei mercati municipali* (1925), in *Scritti minori* (Milan, Giuffrè, 1950), II, 275.

¹⁴ See, among others, A. Wagner, *Three Extracts on Public Finance*, in R.A. Musgrave – A.T. Peacock, *Classics in the Theory of Public Finance* (1958), 7 (raising the question whether public expenditure “can be allowed to become so high that the requisite taxation becomes an oppressive burden to the people”); G. Ricca Salerno, *Scienza delle finanze* (1890, II ed.), 99-102. In more recent economic literature, see R.A. Musgrave, P.A. Musgrave, *Public Finance in Theory and Practice* (1989, V ed.), 553.

¹⁵ J.M. Keynes, *The General Theory of Employment, Interest and Money* (1936), 379 (holding that “apart from the necessity of central controls to bring about an adjustment between the propensity to consume and the inducement to invest, there is no more reason to socialize economic life than there was before”).

From the first point of view, which is of more direct interest for our purposes, Keynes pointed out the growing importance of the

“[i]nvestments entered upon by, or at the risk of, public authorities, which are frankly influenced in making the investment by a general presumption of there being prospective social advantages from the investment, whatever its commercial yield may prove to be within a wide range, and without seeking to be satisfied that the mathematical expectation of the yield is at least equal to the current rate of interest, – though the rate which the public authority has to pay may still play a decisive part in determining the scale of investment operations which it can afford” (16).

Keynes then went on to argue that, for all the importance of monetary policy, he was skeptical about its chances of success. He expected:

“[t]o see the State, which is in a position to calculate the marginal efficiency of capital-goods on long views and on the basis of the general social advantage, *taking an ever greater responsibility for directly organising investment*; since it seems likely that the fluctuations in the market estimation of the marginal efficiency of different types of capital, calculated on the principles I have described above, will be too great to be offset by any practicable changes in the rate of interest” (17).

In sum, Keynes argued that government expenditure was a key component of fiscal policy. Public authorities had, therefore, to use it as a policy instrument, in order to stimulate growth and, thus, ensure full employment. This did not mean, for sure, that any kind of measure is indifferent for government. Keynes referred to government investment in infrastructure. He argued that governments can, and should finance the funds for such investments by borrowing money through the issue of bonds, underlying assumption that the outcomes of investments, through taxation, sooner or later will repay the capital and the interests to be given to lenders. Even Keynes’ criticized remark about paying

¹⁶ J.M. Keynes, *The General Theory of Employment, Interest and Money*, cit. at 15, chapter 12, § 8.

¹⁷ J.M. Keynes, *The General Theory of Employment, Interest and Money*, cit. at 15.

people to dig holes could be regarded as a metaphor for works in the public interest.

This line of reasoning is not, however, without problems. The first, and most obvious, problem is whether such public expenditure is really productive. This problem was highlighted not only by Friedrich von Hayek, but also by Lionel Robbins in a famous letter to *“The Times”* (18). According to them, a second problem with deficit spending is closely related to its impact on financial markets. They pointed out the need to safeguard the supply of capital to private industry. They objected, therefore, to the creation of “public debt on a large scale”. Thirdly, they criticized Keynes (and Pigou) for affirming that “this is a time for new municipal swimming baths, etc., merely because people ‘feel they want’ such amenities”. Hayek and Robbins held that there was no reason for central and local authorities to engage in such activities.

C) From Democracy in Deficit to the Deficit of Democracy

The fourth problem with relying on government deficits per se is rather different in nature from the three that have already been considered. It regards neither the economic sphere nor the conditions which must be met for governments to take a “responsibility for directly organising investment”, to borrow again Keynes’ words. Rather, it regards its political and constitutional implications. There is an extensive body of literature concerning the proper relationship between government revenues and expenditure. In particular, the Swedish economist Knut Wicksell argued that a problem which had “never received the attention it deserve[d]” was, on the one hand, how to ensure that a public expenditure “holds out any prospect at all of creating utility exceeding the cost” and, on the other hand, how to ensure the observance, in this respect, of the principle of voluntary consent to taxation (19). He added that, if loans are used instead of taxes, “there is a clear case for the requirement of full unanimity of all parties as the only possible guarantee against prejudicing their

¹⁸ Letter to the Editor of the *“The Times”*, October 17, 1932.

¹⁹ K. Wicksell, *A New Principle of Just Taxation* (1896), in R.A. Musgrave – A.T. Peacock, *Classics in the Theory of Public Finance*, cit. at 14, 72, 89 and 91.

interests” (20). What Hayek and Robbins, as well as others, argued was coherent with this literature. They argued that:

“[m]any of the troubles of the world at the present time are due to imprudent borrowing and spending on the part of the public authorities. We do not desire to see a renewal of such practices. At best they and they tend to drive up the rate of interest”.

What matters, for our purposes, is not the remark concerning the risk that interest rates are driven up, and thus have a negative impact on financial markets. What matters is, rather, the observation that growing and “imprudent” borrowing measures may “mortgage the Budgets of the future” (21). Importantly, this critique does not focus on the deviation from the traditional doctrine according to which government budget must be balanced or in surplus. It argues that, although governments have always requested and obtained loans from bankers, there are limits to the exercise of this kind of power. If such power is exercised unlimitedly, this can lead to a tension with a more fundamental value that liberal democracies must safeguard. If the machinery of government, so the argument goes, generates a high, increasing, and instable public debt, this will inevitably impinge on future governments’ capacity to deal with the debt and to be responsive to their citizens’ future demands.

In this line of reasoning there are two related, but distinct, normative arguments. First, as observed earlier, there is a normative argument based on the ideals of a limited government. More precisely, constitutions serve to ensure that those who govern us take decisions in a manner that makes their costs and benefits as clear as possible and are thus accountable. Deficit spending, instead, tends to generate “fiscal illusions”, that is to say to hide more or less significant parts of the costs. In this sense, deficit spending is regarded as jeopardizing the proper functioning of representative institutions (22). This normative argument has a moral component, though not explicit, that is to

²⁰ K. Wicksell, *A New Principle of Just Taxation*, cit. at 19, 106 (explicitly referring to Wagner’s analysis, quoted earlier).

²¹ Letter to the Editor of the “The Times”, October 17, 1932.

²² G. Sartori, *Democrazia. Cosa è* (1994), 315. See also J.E. Buchanan – R. Wagner, *Democracy in Deficit. The Political Legacy of Lord Keynes* (1978) (for the thesis that the changes in US budgetary policies were based on Keynes’ theories).

say, the need to protect democracy, seen as the worst of all possible forms of government, except the others, to borrow Winston Churchill's well known aphorism.

The moral component is even stronger in the second normative argument. A political system that extensively and increasingly relies on deficit spending, especially if public expenditure funds consumption as opposed to infrastructures, cannot achieve the goal of generating an economic growth that, within a certain period of time, repays capital and interest. It would be obviously difficult to determine empirically what is the limit that should not be crossed. However, there is evidence that the more public expenditure is funded by borrowing money for purposes of consumption, the more it has only distributive effects, instead of increasing the general wealth. In other words, it tends to favor particular groups, if not individuals⁽²³⁾. The question that thus arises, which is a moral question, as observed by John Rawls, probably the most influential political philosopher of the last fifty years, is what justifies the choice to ensure some benefits to those particular groups and individuals today, at the expenses of other groups and individuals in the future, that is to say of another generation, which receives little or no benefit from deficit spending⁽²⁴⁾. In both these respects, excessive government deficits, or a democracy in deficit, may transcend into a deficit of democracy.

3. Constitutional Limits on Government Deficits: A Comparative Analysis

There is little doubt that the development of new economic theories gradually influenced the law. New interpretations of existing constitutions were elaborated, discussed, and enforced. New constitutional provisions were introduced, in order to achieve social justice. Much has been written on the way in which the concept of Welfare State has spread throughout Western

²³ For an analysis from the point of view of political science, see J. White – A. Wildavsky, *The Deficit and the Public Interest. The Search for Responsible Budgeting in the 1980s* (1989).

²⁴ J. Rawls, *A Theory of Justice* (1971), § 44 (for an analysis of justice between generations).

Europe since its inception. While this literature contains many useful insights, it will be argued that two central aspects of the topic have been insufficiently examined and only rarely adequately understood.

The first of the issues which will be considered concerns the rationales for the introduction of constitutional limits to the discretionary powers enjoyed by parliaments. Legal systems have two or three principal mechanisms through which such discretionary powers can be limited and structured, in order to ensure accountability to the public. Notwithstanding the differences, which are not only of detail, it is common for constitutions to exclude that parliaments may decide about public expenditure without the consent of the executive.

The second of the issues which will be examined concerns, more specifically, the constitutional limits concerning the expansion of government deficit or debt. It is well known that this expansion has taken place for a variety of economic and political reasons and little point would be served by its repetition. The object of the present analysis is rather different. It is to consider whether, whatever the differences concerning the form of State and the structure of government, there are at least some shared understandings about the need to limit the expansion of debt and deficit.

A) Public Expenditure and the Limits to the Will of the Majority

When considering public expenditure, the 'standard' remark is that not only its size but also its composition varies from one State to another and that such variables depend on history and culture, as well as on ethical criteria concerning the role of individual and social groups within a given State. In a general sense this is true, but this explanation does not give a full representation of a more complex reality. It neglects some aspects that could suggest a more nuanced and perhaps interesting story. It can be argued that, for all the importance of parliaments' role as 'theatres' of differentiated societies and more specifically as budgetary authorities ⁽²⁵⁾, European constitutions set limits to the

²⁵ Without parliamentary consent, government budgets cannot be approved and ministries and agencies cannot spend outside a provisional and limited part of the preceding year's budget. For a comparative analysis, see D. Coombes

will of parliamentary majorities with regard to the increase of public expenditure.

The unwritten or “historic” constitution of the United Kingdom has a special relevance in this respect, because for a long period of time it has been considered by academics and politicians as a sort of model. The members of the House of Commons do not have the right to propose money bills, which are reserved to the executive branch of government. The underlying reason is still that which was indicated by Walter Bagehot soon after the fundamental electoral reforms of the Nineteenth century. The House was not anymore a guardian of the treasury, in order to limit taxation. It was, rather, more interested in spending ⁽²⁶⁾.

Whatever the institutional and political distinctive traits between democracy in the UK and Germany, the latter is not based on a radically different philosophy. The mechanism governing the functioning of political decision-making processes is to be found in Article 113 (1) of the *Grundgesetz* (1949) ⁽²⁷⁾. Under Article 113 (1), it is for Parliament to approve spending bills. However, it allows Parliament to do so only if the executive approves the acts that increase the expenditure proposed in the federal budget or that imply new expenditure or, finally, that imply them for the future. Interestingly, the Spanish Constitution (1978) follows the same logic. It requires that every proposal or amendment that may alter the balance established by the budget must be accepted by the executive (Article 134 (6)). The French Constitution (1958) probably goes one step further. It lays down a prohibition to accept the proposals and amendments formulated by the members or Parliament if their adoption implies either a reduction of public revenues or the increase of expenditure (Article 40) ⁽²⁸⁾. Only apparently does the Italian Constitution

(ed.), *The Power of the Purse. The Role of European Parliaments in Budgetary Decisions* (1976).

²⁶ W. Bagehot, *The English Constitution* (1867), chapter IV (“The House of Commons ... has long ceased to be the checking, sparing economical body it once was”).

²⁷ See A. Zunker, *Consequences of the Federal System for the Parliamentary Control of the Budget in the Federal republic of Germany*, in D. Coombes (ed.), *The Power of the Purse. The Role of European Parliaments in Budgetary Decisions*, cit. at 25, 46.

²⁸ For further remarks, see P. Lalumiere, *Parliamentary Control of the Budget in France*, in D. Coombes (ed.), *The Power of the Purse. The Role of European Parliaments in Budgetary Decisions*, cit. at 25, 128, 133.

(1948) lay down the same principle. Indeed, following the Wicksellian theory, it allows Parliament to increase public expenditure or to introduce new programmes only if the corresponding revenues are indicated (Article 81). However, the related goal to protect the role of the executive has only partially been achieved ⁽²⁹⁾. Only many years later, in 1988, have some limits been introduced by ordinary legislation, which – by virtue of the principle *lex posterior derogat legi priori* – can be modified by any subsequent act of Parliament.

In sum, the solutions envisaged by national constitutions to prevent an uncontrolled growth of public expenditure vary between an extreme, the absence of a parliamentary initiative concerning money bills, to another, the simple need to indicate the corresponding public revenues. Moreover, the effectiveness of these limits depends on a variety of institutional and political factors, including the willingness of assemblies' presidents, auditing bodies, and the courts to enforce them. Only some constitutions, such as that of Germany, allow individuals to bring actions before constitutional courts. However, it can be said that the issue indicated by less and more recent economic theory, that is to say the need to ensure that a proper relationship is kept between expenditure and revenues, is not neglected by the constitutions of Europe. In this sense, and within these limits, it can be said that there is a common constitutional tradition ⁽³⁰⁾.

B) Limits to Government Deficits and Debts

It was pointed out earlier that the division of powers between the legislative and executive branch of government is not the only way through which modern European constitutions seek to limit the expansion of public debt and deficit. It will be argued now that other limits derive from a variety of constitutional norms that fulfil different functions. Furthermore it will be argued that the development of such limits has not only preceded, but also

²⁹ See V. Onida, *The Historical and Constitutional Foundations of the Budgetary System in Italy*, in D. Coombes (ed.), *The Power of the Purse. The Role of European Parliaments in Budgetary Decisions*, cit. at 25, 215 and his fundamental and ponderous monograph *Le leggi di spesa nella Costituzione* (1969).

³⁰ For this thesis, see G. della Cananea, *Lex Fiscalis Europea*, in *Quaderni costituzionali* 15 (2014), forthcoming.

followed the achievement of the EMU and the more recent steps taken by the vast majority of its members.

The first function that is performed by this second group of constitutional norms is a variation on the theme just explored, that is to say the maintenance of a proper relationship between expenditure and revenues. As Wicksell put it, “no public expenditure [should] ever be voted upon without simultaneous determination of the means of covering their cost”⁽³¹⁾. This implies prescribing the antecedence of revenues with respect to expenditure. Parliamentary majorities cannot, therefore, choose revenues only after determining a certain level of public expenditure⁽³²⁾. Article 34 of the French Constitution is particularly explicit in this respect, while similar mechanisms are established elsewhere either by legislation or by parliamentary rules.

The second function that is performed by constitutional norms is a limiting function. Sometimes, this limiting function is expressed in very broad terms, such as the duty to take the overall economic balance into due account (Article 109 of the *Grundgesetz*; Article 13 of the Austrian Constitution). Sometimes, this limiting function is performed more precisely, as it happened in the recent revision of the German *Grundgesetz*⁽³³⁾.

A third function that is performed by constitutional norms is at the same time a limiting function and one of incentive. Consider, for example, Article 119 (6) of the Italian Constitution. It establishes that “Municipalities, Provinces, Metropolitan Cities and Regions (...) may resort to indebtedness only as a means of financing investment expenditure. State guarantees on loans contracted for this purpose are not permitted”. While the first rule is a variant of the golden rule, according to which local authorities can only (here lies the limitation) contract loans, and thus produce

³¹ K. Wicksell, *A New Principle of Just Taxation*, cit. at 19, 91.

³² See F.A. von Hayek, *Law, Legislation and Liberty*, I, *Rules and Order* (1973), Chapter 6 (arguing that the contrary practice runs against the fundamental principles of a just government).

³³ For further details, see L.P. Feld – T. Daskaran, *Federalism, Budget Deficit and Public Debt: on the Reform of Germany's Fiscal Constitution*, 6 *Review of L. & Econ*, 365 (2010). For a comparison with the US, see R. Kiewet – K. Szakaly, *Constitutional Limitations on Borrowing: an Analysis of State Bonded Indebtness*, 12 *J. Law, Econ & Org.* 62 (1996).

debt, for funding investment (here lies the incentive), the other excludes any State guarantee on such loans. Considered as a whole, both rules aim at avoiding moral hazard and safeguarding financial stability.

C) *Financial Stability: A Common Constitutional Tradition?*

At this stage, some words are required in order to prevent any possible misunderstanding of the argument adumbrated above. Such argument is neither that the liberal democracies of Europe public authorities are placed under the same rules nor that their budgetary policies are largely the same. Indeed, there are important differences concerning the size of public expenditure, its distribution between the various public policies, and the respective weight of the various kinds of revenues. Such differences reflect national traditions, political preferences and, ultimately, moral choices about the role of individuals and social groups.

The foregoing discussion is intended, rather, to lay the proper foundations for an adequate understanding of the principles and rules of law in the context of the EU. The Union's principles and rules of law have not emerged *ex nihilo*. The EU is not simply to be viewed as a compact between States, as an area of economic integration that could be established by nations situated in every corner of the world. Quite the contrary, it is a community based on a set of common values. Such values include not only democracy and the rule of law, liberty and fundamental rights, but also at least a broad concept of stability of public finances. It is in this sense and within these limits that it can be said that a common constitutional tradition has emerged, imposing political institutions not to conduct their budgetary policies in ways which jeopardise financial stability in the medium run.

Precisely because common constitutional traditions are general principles of Community law ⁽³⁴⁾, as opposed to detailed

³⁴ It is an established doctrine of the ECJ, codified by Article 6 TEU, that common constitutional traditions have the status of general principles of Community law. See G. Pizzorusso, *Il patrimonio costituzionale europeo* (2002). See also K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, EUI working paper n. 2012/28 (pointing out the interaction between the Constitution of the EU and those of its Member States).

rules, they leave wide margins of manoeuvre to national policy-makers. However, their impact must not be neglected. As the European Court of Justice argued in *Van Gend en Loos*, the Member States have agreed to mutually limit their sovereign rights⁽³⁵⁾. Accordingly, their constitutional rules concerning the determination and conduct of budgetary policies must be interpreted coherently with the engagements stemming from both the European treaties and the acts issued by the institutions of the EU. The commonalities that already existed before such treaties and acts came into being, therefore, are strengthened by them.

4. Government Deficits in the Economic and Monetary Union

Before considering how the shared value of financial stability is reflected in the law of the EU, it is useful to clarify that such law applies differently within the EMU, also in the light of the recent Stability, Coordination and Governance Treaty of 2011, known as the Fiscal Compact. Next, two aspects will be considered. They are of particular interest, not only for their inherent importance as far as government deficits are considered, but also because of the more general light that they cast on EMU. The first of the aspects that will be considered concerns the rationale for distinguishing the expenditure for government investments from other parts of public expenditure. The second of the issues that will be examined concerns the effects of the rule enshrined into the Treaty. It will be argued that, whatever the conventional nature of the distinction between government expenditure for consumption and investment, the latter has a specific legal status.

A) EMU and Differentiated Integration

Descriptively, it can be said that: i) all the Member States of the EU have agreed to create the EMU, in addition to the Single Market, as instruments for achieving the “ever closer union between European peoples” provided by the preamble to the Treaty of Rome, and; ii) all of them, consequently, are subject to

³⁵ ECJ, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963).

the “guiding principles” that govern the actions of the EU and of its Member States, but iii) only some of them have decided to renounce to their national currency, in favour of the euro, after satisfying the conditions and limits established by the Treaties.

The EU is, therefore, much more fragmented than it is usually believed. The usual metaphor of the concentric circles can be used to convey the sense of this differentiation. Alternatively, to borrow the metaphor of the club ⁽³⁶⁾, it can be said that the Union does not prevent its members from creating more integrated clubs, such as that of the countries whose currency is the euro ⁽³⁷⁾. However, from a legal point of view, it is more correct to say that within the EU membership, which is the first and main element of a legal order ⁽³⁸⁾, is differentiated. Nothing prevents the establishment of areas of closer or enhanced cooperation ⁽³⁹⁾. Other forms of closer integration, moreover, can be established between the countries whose currency is the euro and the others. This is precisely the case of the recent form of cooperation established by the Stability, Coordination and Governance Treaty of 2011 between the Member States whose currency is the euro and some of the others, which do not adopt the euro ⁽⁴⁰⁾. Although only England and the Czech Republic decided not to sign the new Treaty ⁽⁴¹⁾, formally this leaves it outside the area of EU law. As a consequence, the Fiscal Compact does not enjoy, under national constitutions, the legal status which

³⁶ For this metaphor, see R.O. Keohane – J.S. Nye, *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in R.B. Porter et al (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001), 286.

³⁷ See F.G. Snyder, *EMU - integration and differentiation: metaphor for European Union*, in P. Craig – G. de Búrca (eds.) *The Evolution of EU Law* (2011), 687.

³⁸ For this thesis, see S. Romano, *L'ordinamento giuridico* (1946, 2nd ed.).

³⁹ The preamble of the Fiscal Compact explicitly notes “the wish of the Contracting Parties to make a more active use of enhanced cooperation”.

⁴⁰ This differentiation is recognized and emphasized by Article 1 (2) of the Fiscal Compact, according to which “[T]his Treaty shall apply in full to the Contracting Parties whose currency is the euro. It shall also apply to the other Contracting Parties to the extent and under the conditions set out in Article 14”. The last recital of the Preamble refers specifically to such countries.

⁴¹ See P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 *Eur. L. Rev.* 231 (2012) (discussing the reasons for British refusal to sign the Treaty).

is recognized to EU law, but, more generally, that of international agreements

The picture which emerges is an interesting one. The new Treaty is genetically and intrinsically distinct from the treaties upon which the EU is founded and cannot alter the obligations deriving from them, but it specifies such obligations and strengthens them. There is, moreover, a sort of “*norme passerelle*”. The distinction between the Fiscal Compact and the EU treaties, therefore, does not exclude a correlation.

B) The Guiding Principle of Financial Stability

With regard to the treaties, Articles 119 and 126 TFEU combine to lay down the fundamental principles of EU law concerning public finances.

Article 119 is the Treaty (TFEU) provision that governs the economic policies of the EU and of its Member States. It is the provision that, in the past, has attained by far the highest profile in this area of EU law and the fiercest criticism, because it sets the four “guiding principles”. Such principles include stable prices, sound public finances and monetary conditions and, finally, a sustainable balance of payments. The increasing political opposition to those that were perceived as the guiding principles of neo-liberal economic constitution, in conjunction with free competition, probably explains why the drafters of the Lisbon Treaty decided to move this provision from Article 4 of the Treaty establishing the European Community, to the sector-specific provisions concerning the EMU.

Whether its intrinsic importance has decreased, however, is questionable. On a formal level, what matters is that the other provisions of the TFEU still refer to Article 119, as a source of guiding principles. In particular, when dealing with the economic policies of both the Union and its Member States, Article 120 refers to the objectives of the Union and to “the principles set out in Article 119”. On a substantive level, the persisting high profile of Article 119 is demonstrated by the fact that the institutions of the EU constantly refer to those principles, in particular to sound public finances and monetary conditions.

It is important to stress, again, that the limits introduced by the EU do not depend on a specific view about the level of public

expenditure. They depend, rather, on the more general preoccupation to prevent any *moral hazard* (42), which may jeopardise economic integration (43). Provided that the principle of financial stability is respected, in the logic of subsidiarity national budgetary policies can and do differ in many other respects.

C) The Prohibition of Excessive Government Deficits

Article 126 TFEU implements the “guiding principle” according to which public finances must be sound, by laying down a more specific principle. Its text is quite concise – “Member States shall avoid excessive government deficits”. Its content is clarified by the specific Protocol, which defines the concept of deficit and that of “government”, by combining the subjective criterion (the State, regions and local authorities) and the objective criterion (the funds concerning social security).

Leaving aside for a moment what is meant by “excessive”, the effects of the provision regulating national deficits can be appreciated from a twofold point of view. First, the word “shall” does not leave any doubt as to whether the provision has binding effects. This is confirmed by the provision concerning the UK, according to which it must simply “endeavour” to avoid excessive government deficits. In other words, the special rule concerning the UK, which merely establishes a duty of conduct, clarifies the content and effects of the general rule, which instead establishes an effect-based prohibition, and by all means a broad provision. Second, the derogation from the infringement procedures set by the Treaty does not mean that the respect of such rule is simply left to the good will of the States. Indeed, a specific procedure is provided. It introduces a “multilateral surveillance”, which is in the hands of the Commission and the Council. In short, it is the Commission that proposes and the Council that decides whether a Member State has an excessive government deficit.

Several academics and politicians have stressed the negative nature of the norm – a prohibition – and the fact that it is

⁴² J. von Hagen, I. Harden, *National Budget Processes and Fiscal Performance*, in *European Economy Reports and Studies*, 1994, 311, 339.

⁴³ For further remarks, see I. Harden, *The Constitutional Framework of the Euro: the Fiscal Constitution of EMU*, in P. Beaumont – N. Walker, *Legal Framework of the Euro* (1999), 78 (arguing that the EMU has a “post-Keynesian constitution”).

unconditional, with the intent of affirming that such norm should be regarded as a rule, not as a principle. However, whatever the intellectual soundness and political desirability of a sort of automatic mechanism of enforcement, neither the Treaty nor institutional practice sustain this interpretation. To begin with, the institutions of the EU possess the minimum of interpretative leeway that is inherent in any system of legal norms. Even a quick look at the Treaty shows that, for all the importance of the quantitative standards referred to therein, such standards do not have the effects of precluding to a Member State the access to the third stage of EMU (44). Legally, it is not without significance that neither the 60% ratio between the debt and gross national product nor the 3% ratio between the deficit and the GNP is established by the Treaty itself, but by the specific Protocol, which can be amended more easily. It is still more significant that those quantitative standards must be weighed with other standards, of qualitative nature. To the extent that these standards include for example the substantial decline of the ratio between the deficit and the GNP or the level of the debt approaches “the reference value at a satisfactory pace” (45), it can be argued that they serve precisely to leave a sufficient leeway to the institutions of the EU (46), particularly to the Council. Institutional practice confirms this interpretation, even though the Court of Justice has punctually held that the discretionary powers enjoyed by the Council regard the merit of its decisions, not the procedure for assessing whether a deficit exists. The whole procedure cannot, therefore, be put in abeyance (47).

⁴⁴ See W. Buitler, G. Corsini, and N. Roubini, *Excessive Deficits: Sense and Nonsense in the Treaty of Maastricht, Economic Policy*, 1993, 60.

⁴⁵ Article 126 (2) (a) and (b) TFEU.

⁴⁶ See P. De Grauwe, *The Economics of Monetary Integration* (1994, 2nd ed.), 202 (observing that “whereas the Delors Committee considered these rules to be binding, the drafters of the Maastricht Treaty abandoned the idea of strictly binding rules”).

⁴⁷ See ECJ, Case C-27/04, *Commission v. Council* (2004). For further remarks, see R. Perez, *Corte di giustizia e regole fiscali dell’Unione*, 10 *Giorn. dir. amm.*, 1073 (2004).

D) The Pro-Investment Choice and Its Rationales

Within this procedure, if a Member State does not fulfil the requirements under one of those criteria, the Commission shall prepare a report and such report shall refer to a variety of “relevant factors”. The first of such factors is “whether the government deficit exceeds government investment expenditure”, as provided by Article 125 (3). The rationale for this norm will be considered more fully below. For the present, it is worthwhile reflecting a little on some aspects.

First, government investment expenditure is a key element in the Commission’s assessment of national budgetary performance. While the Treaty refers generically and vaguely to the “relevant factors which the Commission must take into account, government investments are specifically referred to, unlike “all other relevant factors”, except the medium-term position of the budget.

Second, whatever the intellectual soundness and practical operability of the distinction between the two components of government expenditure, consumption and investments, such distinction is not only legally relevant, but it produces very important effects. When the Commission assesses national deficits, it has the duty (expressed by the word “shall”) to take into account the component of government expenditure that is related to investments. The Commission’s role is, therefore, to operate not only to assess “whether the government deficit exceeds government investment expenditure”, but also to ensure that the public finances of each Member State fulfil the guiding principle of financial stability⁽⁴⁸⁾.

Thirdly, the rule laid down by Article 126 (3) is not a mandatory rule, that is to say one that requires the States to spend public money for investments. It is, rather, a rule that discriminates between government expenditure for consumption and investment, in order to encourage or incentive the latter. Another way, probably more precise, of putting the same point is that the Treaty lays down a sort of golden rule that encourages the

⁴⁸ O.J. Blanchard - F. Giavazzi, *Improving the SGP Through a Proper Accounting of Public Investment*, CEPR Discussion Paper No. 4220.

Member States to have recourse to borrowing only for funding investments. It is, therefore, a pro-investment choice (49).

Its underlying reasons can be explained as follows. Legal systems have two principal mechanisms through which to protect and promote those public works that Adam Smith regarded as necessary “for facilitating the commerce of the society, and (...) for promoting the instruction of the people”. They may, first, introduce legal norms that work as incentives. To rely solely on this kind of instrument can, however, be inefficacious. For this reason, during the twentieth century new economic theories – inspired by Keynes – have emphasized the more direct involvement of governments in the financing of investments, particularly in infrastructures.

Of course, the functions of the EU in this respect cannot be the same as those of the States. The main differences are the limited competence of the Union, in the logic of subsidiarity, as well as its limited financial capacity. Notwithstanding these differences, which are not of detail, the EU can “contribute to the development of trans-European networks in the areas of transport, telecommunications and energy infrastructures” (50), that is to say the main services for modern industrial democracies. It may in particular “support project of common interests supported by Member States” through loan guarantees or interests-rate subsidies to the financing of specific projects in the area of transport infrastructure (51). For all the significance that such support may have in the perspective of providing European ‘public goods’, it is a support limited both in scope and financial dimension. Much ought to be done by encouraging private actions brought by business holding infrastructure networks or providing public utilities. Much can be done also by encouraging national policy-makers to invest money in public works.

The main mechanism for encouraging government investment expenditure contained in the Treaty is to be found in Article 126 (3). Under such norm any responsibility for choosing a

⁴⁹ For the contrary opinion, see F. Balassone – D. Franco, *Public Investment, the Stability Pact and the ‘Golden Rule’*, 21 *Fiscal Studies* 207, 226 (2000) (alleging that the rules set out in the Treaty and the SGP may negatively influence public investment).

⁵⁰ Article 170 (1) TFEU.

⁵¹ Article 171 (2), third indent, TFEU.

certain level of public expenditure and its composition is reserved to national policy-makers, coherently with the principle of subsidiarity. What the Treaty does, rather, is to incentive them to use borrowing solely for investment expenditure. The underlying rationale is that only government investments are generally regarded as being capable of promoting and sustaining economic growth. Government expenditure for consumption has, instead, merely redistributive effects. Seen from this point of view, the distinction laid down by the Treaty reflects the preoccupation for any unjustified increase of government loans, although it does not exclude the possibility that investments are used for the purposes of fiscal policy.

At this point, it is useful to clarify that the observations made thus far aim at providing an interpretation of the legal provisions of the EU concerning government investment expenditure. Their aim is not to consider critically neither the EU standards concerning government deficits nor the actions carried out by the institutions of the EU, particularly in the context of the economic and financial crisis⁽⁵²⁾. Whether there are deficiencies in those standards, as well as in the institutions' manner of enforcing the Treaty is an important issue, but it is another one.

For our purposes, what matters is to provide a reasonable interpretation of the Treaty. It is also interesting to add that neither the various versions of the Stability and Growth Pact (SGP)⁽⁵³⁾, nor the Fiscal Compact have attenuated the importance attached to government investments. When the Commission made the proposal for the first revision of the SGP, in 2004, it explicitly referred to government investments and the Council accepted such proposal⁽⁵⁴⁾. More recently, Regulation n. 1175/2011, which has confirmed the balanced-budget rule (imposing that the budgets of the contracting parties must be either balanced or in surplus), has reiterated the need that the States provide information concerning the main economic variables that are relevant for the achievement of the stability program, including

⁵² See M. Ruffert, *The European Debt Crisis and European Union Law*, 48 *Common Market L. Rev.*, 1777, 1786 (2011) (criticizing the measures taken by the EU to deal with the debt crisis, precisely because they endanger financial stability).

⁵³ For further details and remarks, see J.V. Louis, *The Review of the Stability and Growth Pact*, 43 *Common Market L. Rev.* 85, 94 (2006).

⁵⁴ Regulation n. 1055/2005 (amending Regulation n. 1466/97), Article 2-bis.

government investments ⁽⁵⁵⁾. This serves to permit the States to have a margin of manoeuvre, especially in view of the need of public investments ⁽⁵⁶⁾. The Fiscal Compact has not introduced any change in this legal framework. This limitation is explicitly acknowledged by Article 2 (1) of the Fiscal Compact, according to which the Treaty “shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded”. This is confirmed by the following paragraph, which provides that the Treaty “[s]hall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Law”. In conclusion, the choice made by the constitutional provision, Article 126 (3), has been confirmed by the subsequent norms and agreements.

E) External Constraints on National Constitutions?

A final question must be considered. It is the question whether the mechanism established by the Treaty and left unchanged by the Fiscal Compact produces undue external constraints on national constitutions. This question should be considered on both formal and substantive grounds.

Formally, neither the Treaty of Maastricht nor the Fiscal Compact required the Member States to amend their constitutions. Rather, the former required them to take the necessary steps in order to ensure that the obligations stemming from the Treaty could be fulfilled ⁽⁵⁷⁾ and the latter does not impose any constitutional change. In particular, the “heart” of the Fiscal Compact ⁽⁵⁸⁾, that is to say the “balanced budget” rule and the obligation to introduce automatic corrective mechanisms, requires the contracting parties to adopt norms of permanent and binding nature, “preferably constitutional”. Furthermore, it explicitly adds

⁵⁵ See Article 3 (b), of Regulation n. 1466/97, as recently amended. See also the Commission’s Communication *A blueprint for a deep and genuine economic and monetary union. Launching a European debate*, COM(2012) 777 final/2.

⁵⁶ See the seventeenth indent preceding the text of the Regulation n. 1466/97.

⁵⁷ Article 3, Protocol on excessive government deficits.

⁵⁸ P. Craig, *The Stability, Coordination and Governance Treaty*, cit. at 41, 234.

that the corrective mechanism must “respect the prerogatives of national Parliaments” (59).

On more substantive grounds, it may be argued that any mechanism of conditional incentive, such as that contained in the Treaty, inevitably influences the conduct of those who are subject to it. But this is an argument that proves too much, first, because this is not a mechanism of conditional funding, but of regulation, which is justified by a shared value, that of financial stability, and, second, because it largely corresponds to the ‘golden rules’ enacted by several legal orders, as observed earlier (60).

There are, therefore, no legal grounds for affirming that the EU treaties and the Fiscal Compact have limited national governments’ capacity to promote investments, though from an economic perspective it can be argued that the latter should be amended (61). It is political economy or political science that may explain why in some countries, taxes have been cut in order to attract new investments, while elsewhere the high level of the debt accumulated in the past precludes any cut, or even requires higher or new taxes. It would be interesting also to understand why in some countries new financial resources are distributed not only to infrastructures, but also to education and research, while elsewhere pension schemes absorb an increasing portion of public budgets.

5. Conclusion

No attempt will be made to summarize the entirety of the preceding analysis. Nor will any attempt be made to set out at least the main lines of a legal theory of government investments. This would require an extensive analysis in its own right, and not just one or few paragraphs at the end of an article that focuses, rather, on the limits laid down by legal orders, those of the EU and its Member States, on government borrowing. Only a brief word is, probably, useful in order to clarify the main aspects of the

⁵⁹ Article 3 (2) of the Fiscal Compact. See, however, F. Fabbrini, *The Fiscal Compact, the “Golden Rule” and the Paradox of European Federalism*, 36 Boston College Int’l & Comp. L.Rev. 1, 25 (2013) (arguing that the new legal regime is less respectful of state sovereignty than that of the US).

⁶⁰ *Supra*, § 3 B).

⁶¹ See R. Masera, *Eurobond per le infrastrutture*, *La Repubblica*, April 16, 2012, 10.

argument presented above. National budgets differ in many respects, because they reflect distinct traditions, as well as divergent political preferences with regard to the size and composition of public expenditure. However, the powers of budgetary authorities are not unlimited. Quite the contrary, they are limited by written and unwritten constitutional norms in several manners. Such limits reflect a shared value, that of financial stability. It is not fortuitous, therefore, that the Treaty refers to such value, including it among the guiding principles of EU and national policies. It is this value that justifies the pro-investment choice, on the underlying assumption that government investment expenditure can have a positive impact on growth, whilst ensuring that financial conditions are sound. It remains to be seen, of course, whether such assumption is realistic and this depends more on the actions of national policy-makers than on those of the EU, which can allow, incentive, and sustain their choices, but not replace them.

THE EURO CRISIS, ECONOMIC GOVERNANCE AND DEMOCRACY IN THE EUROPEAN UNION

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Abstract

The recent sovereign debt crisis has raised further concern about democracy in the European Union. The paper aims at considering some aspects of the European economic governance model, which has emerged in response to the sovereign debt crisis, and assessing how such model accords with the principles of democracy recognized by the Treaty of Lisbon. The author believes that the management of rescue measures does not provide for enough involvement of the European Parliament or of national Parliaments and, therefore, rises a democracy principles issue. In fact, the sovereign debt crisis has clearly indicated the need to enhance the democratic legitimacy of European economic governance. Hence, the democratic issue will remain at the centre of the debates on the future of European integration.

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1. Background

The recent sovereign debt crisis, which has put the euro under so much pressure, has raised further concern amongst scholars about democracy in the European Union¹.

The roots of the crisis can be traced back to the unsound fiscal policies of some Member States which forced other Member States and the European Union to adopt a rather hefty programme of financial assistance to countries threatened by insolvency. Democratic concerns have come to the fore in the wake of such

¹See The Editorial, *Debt and Democracy: "United States then, Europe now"?*, in CMLR, 1833 ss.; M. Poiares Maduro, B. De Witte, M. Kumm, *The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis*, in RSCAS, Policy Papers, 2012/08. There are many studies concerning the legal aspects of the euro crisis and the effects it has had at institutional level in Europe. Amongst the most recent, see, K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, EIU Working Papers, Law 2012/28, 1 ss.; G.L. Tosato, *L'integrazione europea ai tempi della crisi dell'euro*, in Riv. dir. intern., 2012, 681 ss.; G. Napolitano, *La crisi del debito sovrano e il rafforzamento della governance europea*, in G. Napolitano (ed.), *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali*, (2012) 383 ss.; E. Chiti, A. Mendez, P. Teixeira (ed.), *The European Rescue of the European Union*, (2012); A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of Financial Assistance*, in CMLR, 2012, 1613 ss.; H. Overbeek, *Sovereign Debt Crisis in Euroland: Root Causes and Implications for European Integration*, in *The International Spectator*, 2012, 39 ss.; M. Ruffert, *The European Debt Crisis and European Union Law*, in CMLR, 2011, 1777 ss.; P. Athanassiou, *Of Past Measures and Future Plans for Europe Exit from the Sovereign Debt. Crisis: What is Legally Possible (and What is Not)*, in Eur. L. Rev., 2011, 2 ss.; G. Grasso, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, (2012), spec. 114 ss.; G. Pitruzzella, *Chi governa la finanza pubblica in Europa*, in Quad. cost., 2012, 9 ss.; E. Chiti, *Le risposte alla crisi della finanza pubblica e il riequilibrio dei poteri nell'Unione*, in Gior. dir. amm., 2011, 311 ss.; G. della Cananea, *L'ordinamento giuridico dell'Unione europea dopo i nuovi accordi intergovernativi*, in *La Comunità internazionale*, 2012, 3 ss.; G. Peroni, *Il Trattato di Lisbona e la crisi dell'euro: considerazioni critiche*, in Dir. Un. Eur., 2011, 971 ss.; A. Viterbo – R. Cisotta, *La crisi del debito sovrano e gli interventi dell'U.E.: dai primi strumenti finanziari al Fiscal Compact*, in Dir. Un. Eur., 2012, 323 ss. R. Baratta, *Legal Issue of the Fiscal Compact – Searching for a mature democratic governance of the euro*, in Dir. Un. eur., 2012, 647 ss.; L.S. Rossi, *Fiscal Compact e Trattato sul meccanismo di stabilità: aspetti istituzionali e conseguenze dell'integrazione differenziata nell'UE*, in Dir. Un. eur., 2012, 293 ss.; L. Besselink, *The Fiscal Compact and the European Constitutions: Europe Speaking German*, in Eur. Const. L. Rev., 2012, 1 ss.; P. Bilancia, *La nuova governance dell'eurozona: alla ricerca del demos*, in F. Angelini – M. Benvenuti, (ed.), *Il diritto costituzionale alla prova della crisi economica*, (2012) 19 ss.

intervention, as seen also in the reactions of wide sectors of public opinion in Europe. An obvious instance are the protests in Greece against the austerity measures imposed by the Government to put into place reform programs which, it is claimed, have been drawn up in an emergency situation and without adequate public debate². Public opinion in better-performing countries also is critical about having to bear the costs of dealing with the results of poor budgetary discipline of other Member States.

The crisis, moreover, has also revealed the weaknesses of the Economic and Monetary Union (EMU) model drawn up at Maastricht, a model based on the distinction between monetary policy, the exclusive competence of the Union and entrusted to the European Central Bank (ECB), fiscal and economic policy, over which each member State still has sovereignty. The reason for the distinction lies in the idea that monetary policy, which must guarantee price stability, should be entrusted to a technical body operating absolutely independently of political influence by representative bodies. Decisions regarding economic and fiscal policies, on the other hand, which have redistributive impact, necessarily require a solid base of democratic legitimacy which only national political process guarantees³. This “asymmetric”⁴ system, which gives monetary policy over to the exclusive competence of the Union but retains member States' sovereignty in matters of economic and budgetary policy, has not succeeded in preventing some States from running into such debt as to pose a threat to the single currency itself. Hence the need to introduce new mechanisms to ensure greater coordination of economic and fiscal policies in the countries of the euro area. Reinforcement of European economic governance clearly requires a corresponding reinforcement of democratic legitimacy in the European Union.

I shall go on to consider some aspects of the European economic governance model which has emerged in response to

² See the recent B. Spinelli, *Se anche Keynes è un estremista*, in *La Repubblica* 6 February 2013, referring to the writing on the walls in Athens: “*Save us no more!*”.

³ See E. Chiti, A. Mendez, P. Teixeira, *The European Rescue of the European Union*, cit. at 1, 397 ss.

⁴ See K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, cit. at 1, spec. 43 ss.

the sovereign debt crisis⁵, and to assess how such a model accords with the principles of democracy recognised by the Treaty of Lisbon⁶.

2. *Rescue measures for struggling States*

In October 2009 the Greek government's announcement that its budget deficit was 12.5% of GDP rather than the 3.7% announced by the previous government sparked off an immediate reaction in financial markets resulting in a substantial drop in the value of Greek bonds. The crisis, exacerbated by speculation, soon made it plain that Greece was unable to issue new bonds at an acceptable interest rate.

In the face of such a situation, calls for Greece to be left to its own devices came from several quarters. This would have meant default for Greece, departure from the euro and a return to a national currency, with the option in the future to use inflation to balance public spending and support exports⁷. Such a solution, however, would have entailed substantial losses for the banks (above all German and French) who had subscribed to Greek government bonds, with inevitable repercussions also on the stronger economies. Furthermore, Greece's departure would have endangered the whole euro system.

Hence the decision by the Heads of State and of Government of the EU Member States to intervene to help Greece⁸. To this end, a package of intergovernmental measures was assembled, outside the Treaty framework, including a loan facility agreement between Greece and the other euro area States

⁵ On the “governance” in the European Union cfr. P. Bilancia, *The Dynamics of the EU Integration and the Impact on the National Constitutional Law*, 2012, 57 ss., 61 ss.

⁶ For an analysis of the “Provisions regarding democratic principles” which the Lisbon Treaty introduced in Title II of the TEU, and for referenced doctrine and case-law see. F. Donati, *Commento all’art. 9 TUE, Commento all’art. 10 Teu and Commento all’art 11 TUE*, in A. Tizzano (ed.), *Commento al Trattato di Lisbona*, (2013).

⁷ G.L. Tosato, *L’integrazione europea ai tempi della crisi dell’euro*, cit. at 1, 683.

⁸ See A. Viterbo – R. Cisotta, *La crisi della Grecia, l’attacco speculativo all’euro e le risposte dell’Unione europea*, in *Dir. dell’Un. eur.*, 2010, 961 ss.

extending a credit line to Greece in the form of bilateral loans⁹, and an intercreditor agreement between creditor States. A Memorandum of Understanding (MoU) signed by Greece and the Commission as representative of the euro area countries also forms part of the package and sets out the obligations to be met for the loan to be granted. The MoU not only requires cuts in public spending in order to contain the deficit to GDP ratio but actually also sets down the cuts that should be implemented. There is, moreover, an undertaking by Greece to carry out certain structural reforms, in the health sector and the labour market, for instance. The strict conditionality of financial assistance to specific economic and social reforms, will be confirmed in all subsequent rescue measures.

In the meantime the crisis worsened, and spread to other countries (Portugal and Ireland). The EMU system introduced by the Maastricht Treaty, however, includes a number of prohibitions and restrictions limiting the possibility of financial support by the Union and Member States to those Member States facing severe difficulties.

The system aims to guarantee price stability, which is the main objective of Union monetary policy¹⁰ and it was precisely with this aim in mind, laid down by Germany as a condition of entry into the single currency, that a number of rules have been introduced in order to guarantee fiscal discipline by Member States. In particular, Art. 125 of the Treaty on the Functioning of the European Union (TFEU) prohibits the Union and Member States from sharing liability for, or assuming the obligations of, another Member State (no bail-out clause). The provision aims to ensure that Member States remain subject to market rules when raising debt. In this way States would be encouraged to follow sound budget policies, being unable to count on aid from the

⁹ The package provided for a total 110 billion euro of financial assistance, 30 of which contributed by the IMF and 80 by the States of the euro area. Each State has undertaken to share in the loan according to its capital contribution in the ECB. This intervention proved insufficient so much so that in July 2011 a restructuring programme for the Greek debt was drawn up, based on an exchange of government debt bonds in the hands of banks and insurance companies with other instruments at lower rates and longer due dates. This restructuring signified a loss for institutional investors on Greek public debt of around 50%.

¹⁰ See Arts. 119(2) TFEU and 127(1) TFEU.

Union or other member States to bail them out of an insolvent position¹¹.

Art. 123 TFEU prohibits the ECB and other national central banks from granting overdrafts or any other form of credit facility to Union or Member State authorities and bodies governed by public law, and from buying up their own debt instruments from these bodies. Art. 124 TFEU also prohibits any measure which offers the Union or Member States privileged access to financial institutions.

The only form of financial aid provided for by Union legislation is that under Art. 122(2) TFEU, which allows the Council, following a proposal by the Commission, to grant, “under certain conditions” financial assistance to a Member State who should be “in difficulties or [...] seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”.

Under this provision, the Regulation establishing a European Financial Stabilisation Mechanism (EFSM) was adopted in May 2010¹². The creation of the EFSM made it possible for the Council, following a proposal by the Commission, to decide by qualified majority to grant financial assistance to Member States in the form of credit lines and conditional to the undertaking by the beneficiary State to re-establish a sound economic or financial situation. However, such financial assistance as was available to the EFSM for this purpose was limited to available Union budget funds, which at the time were around 60 billion. This sum might seem enormous in absolute terms but was actually totally inadequate considering the size of the financial crisis then obtaining.

The inadequacy of the resources available in Union budget funds persuaded the Heads of State or of Government that in

¹¹ Findings of the Court of Justice, Plenary Session, 27 November 2012, in case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General* para. 136. On the prohibition concerned, see M.L. Tufano, *Il principio del no bail-out nel diritto comunitario*, in *Dir. dell’Un. eur.*, 2002, 505 ss.; J.V. Louis, *The No-Bail Out Clause and Rescue Packages*, in *CMLR*, 2010, 971 ss.

¹² Regulation (UE) n. 407/2010 by the Council of 11 May 2010, which sets up a European mechanism for financial stabilisation. Regarding the legitimacy of recourse to Art. 122 TFEU as the legal basis for setting up the EFSM, see the comments of K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, cit. at 1, 25 ss.

order to face the crisis it would be necessary to operate outside the Union's legal framework. Recourse to international law, furthermore, would make it possible to overcome the resistance of some States, in particular the United Kingdom, who were not in favour of using Union resources to help euro area countries in difficulty.

Thus, together with the establishment of the EFSM, government representatives of the 17 euro area countries reached an agreement under which the European Financial Stability Facility (EFSF) was created: a company set up under Luxembourg law in which the euro area States hold an interest and which finances itself on the international markets through bond issues backed by each Member State up to the sum of its capital contribution to the EFSF. The agreement was an international agreement *sui generis* for it allowed the EFSF to begin to operate without the agreement being first ratified by the national Parliaments of the signatory States¹³. A subsequent agreement under international law between the EFSF and the 17 euro area States set out the terms and conditions for financial assistance of up to a total 780 billion Euro. Assistance granted by the EFSF also is strictly conditional: the Commission, representing the Eurogroup countries, and the beneficiary Member are required to sign an MoU which details the spending cuts and structural reforms conditioning the financial assistance package. The EFSF is a temporary measure, running to 30 June 2013¹⁴.

The EFSM and the EFSF were however perceived by the markets as falling short of a definitive solution to the problems arising from the sovereign debt crisis. Furthermore, doubts were voiced about the compatibility of such instruments with the prohibition set out under Art. 125 TFEU concerning financial assistance. It was also argued that the sovereign debt crisis, having been caused by mistaken economic and fiscal policies on the part of some governments, could not be held to fall under those

¹³ Regarding the reasons which motivated the Heads of State or of Government to use instruments outside the Union framework to deal with the sovereign debt crisis see B. De Witte, *Treaty Games – Law as Instrument and as Constraint in the Euro Crisis Policy*, in *Governance for the Eurozone. Integration or Disintegration?*, 2012, 139 ss..

¹⁴To date beneficiaries of financial assistance granted by the EFSF have been Ireland, Portugal and Greece.

“exceptional occurrences” beyond the control of a Member State which justify recourse to the measures under Art. 122 (2) TFEU.

In the European Council meeting of 28 and 29 October 2010, the Heads of State or of Government consequently agreed on the need to introduce a permanent crisis resolution mechanism and agreed to move to a revision of the Treaties in that sense. With Decision 2011/199 of 25 March 2011, the European Council made use of the possibility under Art. 48(6) TUE to amend the TFEU by means of a simplified revision procedure¹⁵. By effect of such revision, a third paragraph was added to Art. 136 TFEU which expressly permits Member States whose currency is the euro, to “establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole” provided that “the granting of any required financial assistance under the mechanism [...] be made subject to strict conditionality”¹⁶.

Subsequently, on 2 February 2012, the 17 States of the euro area signed the treaty creating the European Stability Mechanism (ESM), a permanent mechanism of financial support to safeguard the financial stability of the euro area as a whole¹⁷, and which would replace the EFSM and the EFSF¹⁸.

¹⁵ On this point, see B. De Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, in *European Policy Analysis*, 2011, in www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf.

¹⁶ Regarding the legitimacy of the simplified procedure used for the amendment of Art. 136 TFEU, see Court of Justice, Plenary Session, 27 November 2012, in case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General*, cit. at 11.

¹⁷ The purpose of the ESM is set out under Art. 3 of the Treaty establishing the Mechanism and reads: “The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.”

¹⁸ On institutional and operational aspects of the ESM, see, among others, G. Napolitano, *Il Meccanismo europeo di stabilità e la nuova frontiera costituzionale dell'Unione*, in *Giorn.dir.amm.*, 2012, 461 ss.

The ESM is an international organization under international public law¹⁹, participated by euro area States, having a capital stock of approximately 700bn euro²⁰. Liability of each ESM Member State is limited to the amount of capital it has subscribed to. ESM assistance, granted on the basis of strict conditionality, is reserved to the States who have signed the Fiscal Compact (see para. 6 below), and therefore accepted fiscal discipline and strict supervision by the Commission. Similarly to the EFSF, financial assistance granted by the ESM can take different forms, such as loans²¹, purchase of bonds on the primary or secondary market²², and loans for the recapitalisation of the member's national banks or financial institutions²³.

The ESM is governed by the Board of Governors, composed of the finance ministers of the euro area States, with the participation – as observers – of the President of the ECB and the Commissioner for economic and monetary affairs. The Council has wide powers regarding, among other things, setting up the facility and the choice of financial instrument to assist the States in difficulty²⁴, adopting changes to the share capital and issuing new shares²⁵. The Board of Governors also appoints the Board of Directors and the Managing Director.

Decisions in matters of financial assistance must be taken “by mutual agreement” of the Board of Governors²⁶, except for emergency cases in which resolutions may be passed by a majority of 85%. Control, then, of the ESM remains firmly in the hands of national governments. It will be up to each State, therefore, to guarantee that its representative on the Board of Governors shall operate according to the constituting principles.

There has been much discussion regarding the compatibility of financial assistance measures adopted during the crisis (the aid package for Greece, the EFSM, the EFSF and the

¹⁹ For this definition, see the conclusions of the European Council of 24 March 2011.

²⁰ Capital is subscribed for 80 billion; the rest of the sum can be called up as necessary (see Art. 8 of the ESM Treaty).

²¹ Art. 16 ESM Treaty.

²² Arts. 17 and 18 ESM Treaty.

²³ Art. 15 ESM Treaty.

²⁴ Art. 19 of the ESM Treaty.

²⁵ Arts. 8 and 10 of the ESM Treaty.

²⁶ Art. 5(6) ESM Treaty.

ESM²⁷) with the provisions of the Treaties and in particular with the no bail-out clause in Art. 125 TFEU²⁸. It has been argued convincingly that such provision was made to avoid “moral hazard”, that may occur if a State would be allowed to rely on rescue measures by the Union or other Member States in case of debt crisis. The principle behind Art. 125 of the TFEU is, then, to avoid unsound fiscal policies by Member States and thus to guarantee the stability of the euro area as a whole. A similar scope governs the prohibition of central bank financing (Art. 123 TFEU), privileged access by the public sector to financial institutions (Art. 124 TFEU) and excessive government deficits (Art. 126 TFEU). It may, therefore, be argued that any assistance granted based on a strict conditionality criterion, imposing upon the beneficiary the adoption of a rigorous plan for cuts to public spending and structural reform to reduce deficit and public debt, not only does not contrast with the prohibition under Art. 125 TFEU, but rather contributes to attaining the object of Articles 123-126 TFEU²⁹.

This conclusion has been confirmed by the Court of Justice in the Pringle case³⁰, where it has been clarified that EU law does not preclude the conclusion and ratification of the EMS. The Court’s decision did not, however, address the issue concerning democratic legitimacy of decisions taken in the EMS framework³¹.

²⁷ For an analysis of the various mechanisms of financial assistance aiming to contrast the effects of the sovereign debt crisis, see A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of Financial Assistance*, cit. at 1, 1616 ss.

²⁸ In the sense that steps taken to deal with the sovereign debt crisis violate some of the provisions under the TFEU, and in particular the prohibition on financial rescue under Art. 125 TFEU, see M. Ruffert, *The European Debt Crisis and European Union Law*, cit. at 1, 1785 ss. And, in reply, see R. Smits, *The European Debt crisis and European Union Law: Comments and Call for Action*, in *CMLR*, 2012, 827 ss.

²⁹ See, amongst others, K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, cit. at 1, 24; A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of Financial Assistance* cit. at 1, 1627.

³⁰ Court of Justice, Plenary Session, 27 November 2012, C-370/12, *Pringle v. Irlanda*, cit. at 11.

³¹ In the sense that the Pringle decision has not resolved doubts regarding compatibility of ESM with democratic principles, see, for example, J. Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, in German L. J., Vol. 14,

As a matter of fact, the adoption of an inter-governmental approach normally affects democracy, and especially in exceptional circumstances requiring emergency action, parliamentary chambers at national level may only ratify choices already substantially decided elsewhere³². The debate, as we know, was particularly heated in Germany, in view of the fact that the German Constitutional Court has always held that the principle of democracy enshrined by fundamental law sets out that fundamental choices in fiscal matters should remain under the control of the people's representative body³³. The Constitutional Court, however, held that the ESM, involving limited financial liability for Germany to the sum of its subscribed share, freely approved by the Bundestag, is compatible with the principle of democracy guaranteed by the fundamental Law³⁴.

3. European Central Bank interventions

In view of the seriousness of the sovereign debt crisis, the ECB also has played an important role in supporting those States most seriously hit by the crisis by buying public debt bonds on the secondary market.

Once the extent and seriousness of the crisis had emerged, the ECB Governing Council in its meeting of 14 May 2010 approved the Securities Market Program (SMP), a program for the purchase on secondary markets of euro area government bonds.

2012, 185 ss.; P. Augustijn Van Malleghem, *Pringle: A Paradigm Shift in the European Union's Monetary Constitution*, in German L. J., Vol. 14, 2012, 164-165. See also V. Borger, *The ESM and the European Court's Predicament in Pringle*, in German L. J., 2013, 113 ss.;

³² See Editorial, *Debt and Democracy: "United States then, Europe now"?*, cit. at 1, 1837.

³³ See the decision of 7 September regarding aid to Greece.

³⁴ See BVergG, decision of 12 September 2012, cit. On the decision, see, among others, F. Pedrini, *Le "cautele" di Karlsruhe in ordine al Fondo "salva Stati" (commento alla sentenza del Tribunale costituzionale del 12 settembre 2012)*, in *Quad. cost.*, 2012, 894 ss.; G. Grasso, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, cit. at 1, 124 ss. (and other citations therein); K. Schneider, *Yes, But ... One More Thing: Karlsruhe's Ruling on the European Stability Mechanism*, in German L. J., 2013, 53 ss.; M. Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012*, in German L. J., 2013, 21 ss.

As a result of this decision, the ECB purchased bonds of troubled States of the euro area on the secondary markets for a sum of around 210 billion euro.

According to the ECB, these operations do not violate the prohibition of central bank financing of public expenditures under Art. 123 of the TFEU, which bans only operations on the primary market. The purchase of debt instruments bonds targeted by speculators, from this view, would be carried out to “safeguard an appropriate monetary policy transmission and the singleness of the monetary policy”, which might be hindered by an excessive disequilibrium in interest rates among Member States. However, it appear obvious that the main objectives of this kind of measures is to assist crisis states and to promote stability in the euro area³⁵.

In the meeting on 6 September 2012, the ECB Governing Council decided nonetheless to replace the SMP with Outright Monetary Transactions (OMT), a mechanism which allows an unlimited purchase on the secondary market of sovereign debt instruments of euro area States. The ECB has underlined that the OMT will make it possible to “address severe distortions in government bond markets which originate from, in particular, unfounded fears on the part of investors about the reversibility of the euro” and specified that as such operations aim to counter “risks to price stability over the medium term” they are “strictly within [the ECB's primary] mandate”³⁶.

Activating OMT is subordinate to the Member State adhering to an EFSF/ESM programme as well as committing to structural reforms to restore financial stability. By this means a strong link is formed between ESM interventions, aimed at guaranteeing assistance to States in difficulties and those of the ECB aimed at guaranteeing appropriate monetary policy transmission.

The ECB's intervention looks hardly compatible with the model drawn at Maastricht which guarantees that the ECB (and

³⁵ Scholars have expressed doubts concerning the compatibility of this type of intervention by the ECB with Union law, and in particular with prohibitions set out under Arts. 123 and 125 of the TFEU. See considerations by Ruffert, *The European Debt Crisis and European Union Law*, cit. at 1, 1787-8. See, also, K. Tuori, *The European Financial Crisis - Constitutional Aspects and Implications*, cit. at 1, 28-29.

³⁶ See BCE, *Bollettino Settembre 2012*, 5, 11.

national central banks) have a completely independent position. In this model, monetary policy not only requires no democratic legitimacy but, rather, must be entrusted to an independent technical body abstracted from the pressures and conditionings of representative bodies.

The crisis situation casts doubts on this model. With the SMP and ODT, in actual fact, the border line between operations of purely monetary policy aiming to guarantee price stability and measures of financial assistance has become rather hazy. The crisis situation, it has been noted, reflects a trend towards the “politicisation” of monetary policy³⁷, as confirmed by the circumstance that the ECB, together with the IMF, has been actively involved, albeit in a consulting capacity, in the drawing up of all the rescue plans for States in critical situations (the aid package for Greece, and the EFSM, EFSF and ESM). At present under discussion is a proposal for regulation attributing to the ECB powers of vigilance over the banking system. Heads of State or of Government agreed at the euro summit of 29 June 2012 that, once the central regulatory mechanism of banks is put into place, the ESM would be able to directly recapitalise banks. This further confirms the complementary nature of actions by the ESM and the ECB.

The powers of the ECB have, therefore, undergone a significant transformation, allowing it in actual fact to operate as lender of last resort also for Member States³⁸ in order to contribute to their rescue and maintain the stability of the euro area as a whole³⁹. It would appear difficult, therefore, to justify the subtraction of this type of action by the ECB from any form of democratic control⁴⁰.

³⁷ See K. Tuori, *The European Financial Crisis - Constitutional Aspects and Implications*, cit. at 1, 38.

³⁸ See P. De Grauwe *The European Central Bank: Lender of Last Resort in the Government Bond Markets?*, in *Governance of the Eurozone. Integration or Disintegration?* (2012) 17 ss.

³⁹ See K. Tuori, *The European Financial Crisis - Constitutional Aspects and Implications*, cit. at 1, 17.

⁴⁰ See Editorial, *Debt and Democracy: “United States then, Europe now”?*, cit. at 1, 1837 ss.

4. *The Eurobond Debate*

The financial support measures granted to crisis States has not removed the difficulty encountered by some States to find funding at reasonable rates in the financial markets. The persistent difference between national bond interest rates clearly creates competitive disadvantages for the weaker States who are forced to bear greater financing burdens just when they are committed to harsh austerity policies to balance their budgets. From here springs the debate over the feasibility of introducing “Eurobonds” or, as the Commission calls them in its Green Paper, “Stability Bonds”⁴¹.

Issuing common European national debt bonds, considered “at par in importance with the introduction of the single currency”⁴², would enable Member States to obtain financing at a uniform rate. The elimination of spreads in sovereign debt instrument prices could help reduce economic and competitive strains which the weaker countries are forced to face, and would substantially reduce the risk of a new European sovereign debt crisis.

The guarantee offered by States pooling their borrowings could be without joint liability, in the sense that each State would guarantee bond subscribers only for its quota of revenue flows. A second option would be to have eurobonds with joint liability, in the sense that each EU member would be fully liable for the entire issuance independently of its own part of revenues.

The introduction of the stability bond backed up by proportional guarantees would not require an amendment to the Treaties. It would in fact be a mechanism under certain aspects similar to that already tried and tested with the EFSM and the ESM, considered compatible with the no bail-out clause under Art. 125 TFEU. The advantages of this type of common bond issue would however be limited, because the guarantee offered by the countries with lower ratings would end up limiting the creditworthiness of this type of stability bond, involving therefore necessarily higher financing costs for the countries participating in the common issuance.

⁴¹ Commission Green Paper on the Feasibility of Introducing Stability Bonds, Brussels, 23 November 2011, COM(2011) 818.

⁴² See European Parliament Resolution of 16 January 2013 on the feasibility of introducing Stability Bonds (2012/2028(INI))

Creditworthiness of the stability bond would be greatly increased if backed by a joint guarantee on the part of all the States taking part in the joint issue. The substitution (in whole or in part) of national bond issues with this type of stability bond would thus enable all States benefiting from the joint issue to enjoy more favourable rates for their debt financing, independently of the condition of their respective national finances. However, this could trigger a moral hazard, in the sense that crisis countries might be induced to rely on the stability bonds and consider not necessary to tighten their fiscal policy discipline; to this respect, the greater the proportion of national bonds substituted, the greater the tendency towards more lenient policies might be.

In order, then, to introduce stability bonds backed by joint guarantees on the part of the issuing States, an amendment to Art. 125 TFEU would not be enough; at present this Article prohibits sharing of liability for government debt by the Union and Member States⁴³. The need to prevent or in any case limit the moral hazard, in actual fact, would require a further amendment to the treaties to allow tighter coordination between economic and fiscal policies of euro area States. But a further step towards economic and financial integration requires parallel reinforcement of the democratic legitimacy of the EMU.

It must also be remembered that, according to the German Federal Constitutional Court, the persisting European Union democratic deficit requires that the decisions on revenue and expenditure of the public sector remains in the hands of the Bundestag. From this springs the prohibition on accepting the setting up of a permanent mechanism “which could involve the undertaking of commitments arising through the free decisions of other Member States, particularly if they present consequences whose effects are difficult to calculate”. According to the Constitutional Court, as elected representatives of the people, the members of the national parliament must remain in control of

⁴³ In the sense that Art. 125 TFEU prohibits issue of eurobonds guaranteed jointly by issuing States, see Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanism of Financial Assistance*, cit. at 1, 1631.

fundamental budget policy decisions, in an intergovernmental governance as well⁴⁴.

The principles established by the German Constitutional Court undoubtedly strictly limit the possibility of introducing stability bonds with joint liability, in the absence of a case by case prior authorization by the Bundestag. Only a strengthening of the democratic legitimacy of the Union could contribute to overcoming such limits.

5. Coordination of economic and fiscal policies in the EMU model prior to the crisis

The decision to introduce the euro was based on the conviction that the co-existence of a plurality of national monetary policies hindered the correct functioning of the single market. The attempts to introduce exchange-rate stabilisation mechanisms, such as, for example, the European Monetary System, had proved insufficient to avoid market distortions arising from fluctuations in national currency values. Hence the move to monetary union to protect the single market from exchange rate variations thereby guaranteeing those conditions of stability necessary to encourage the circulation of factors of production⁴⁵.

The authors of the Maastricht treaty were, however, well aware of the fact that while money is a prerogative of a sovereign State, Europe is not a federal State and in particular Member States would not be willing to cede control of their economic policy. Furthermore they well knew that economic policy decisions have redistributive consequences and impact on social

⁴⁴ See the decision by the BVerfG of 7 September 2011 regarding aid to Greece and the decision of 12 September 2012 regarding the ESM. See M. Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal treaty of 12 September 2012*, cit. at 35, 21 ss.; S.K. Schmidt, *A Sense of Déjà Vu? The FCC's Preliminary European Stability Mechanism Verdict*, in German L. J., Vol. 14, 1 ss.; K. Schneider, *Yes, But ... One More Thing: Karlsruhe's Ruling on the European Stability Mechanism*, cit. at 35, 53 ss.

⁴⁵ On the issues which led to the introduction of the single currency, see G.L. Tosato – R. Basso, *L'unione economica e monetaria*, 2007, 14 ss.

service provision. For this reason they require democratic legitimacy which only national parliaments can guarantee⁴⁶.

To guarantee that the EMU held together, notwithstanding the weaknesses of a model based on the separation of monetary and economic policy, rigid criteria of sound public finance and price stability were imposed to Member States for admission to the euro area.⁴⁷ Moreover, Member States have been encouraged to maintain fiscal discipline. To this end, together with the prohibitions on financial bail-out⁴⁸, public-spending funding by central banks⁴⁹ and privileged access to financial institutions by the public sector⁵⁰, a general prohibition of excessive deficit was laid down, by imposing a limit on government deficit and debt with respect to gross domestic product⁵¹.

The Treaties furthermore impose on the Member States the obligation to coordinate their respective economic policies and entrust to the Union the task of promoting this coordination⁵². The EMU system drawn up at Maastricht introduced a procedure in this regard requiring the adoption by the Council, on the basis of conclusions by the European Council, of a recommendation which sets out broad guidelines for the economic policies of the Member States and the Union. The recommendation is not legally binding, essentially representing a soft law instrument targeted at encouraging Member States to follow a sound and prudent budgetary policy. The Council is required to inform the European Parliament regarding the recommendation⁵³.

Preventive measures were also introduced to supervise the development of the economic policies of the Member States and

⁴⁶ See the comments by K. Tuori, *The European Financial Crisis - Constitutional Aspects and Implications*, cit. at 1, 9.

⁴⁷ See Art. 140 TFEU, which requires a series of parameters to be met regarding price stability, public finance sustainability, limited fluctuation of exchange rates and long-term interest-rate levels, detailed in an appropriate Protocol annexed to the Treaties.

⁴⁸ Art. 125 TFEU.

⁴⁹ Art. 123(1) TFEU.

⁵⁰ Art. 124 TFEU.

⁵¹ Art. 126(1) and (2) TFEU. Protocol on the procedure for excessive deficit indicates that government deficit and debt cannot exceed, respectively, 3% and 60% of gross domestic product.

⁵² See Arts. 2(3) and 5(1) TFEU.

⁵³ See Art. 121(2) TFEU.

also adjustment measures in the event that a Member State should find itself with an excessive public deficit.

In the first of these categories is the “multilateral surveillance” provided for under Art. 121 TFEU. In this regard, the Commission and the Council may issue warnings or recommendations (not legally binding) to the Member States whose economic policies are not in line with the broad guidelines set by the Council or which risk jeopardising the proper functioning of the EMU⁵⁴. The European Parliament is simply informed of the results of this multilateral surveillance⁵⁵. The Stability and Growth Pact⁵⁶ has tried to strengthen this preventive control procedure. Here, Regulation (EC) No. 1466/97 laid down the obligation of the States to deliver to the Council and the Commission medium-term programmes for meeting deficit and public debt criteria set under European Union law. The Council may recommend that the State concerned modify such programmes where they are deemed inadequate, and in any case it monitors activation, assisted by the Commission and the Social and Economic Committee. In those cases where the programme is found to be inadequately implemented, the Council may issue a recommendation (again, not legally binding) to the State concerned inviting it to adopt adequate adjustment measures.

Should the preventive arm not reach the hoped-for results, the corrective measures set out under Art. 126 TFEU are supposed to take over. The Council, following a proposal by the Commission and considering submissions by the State concerned, may establish that there is an excessive deficit and, again upon proposal by the Commission, adopt a recommendation addressed to the State that they bring an end to the situation within a certain time period. Should this recommendation produce no effect, the

⁵⁴ See Art. 121(3) and (4) TFEU.

⁵⁵ See Art. 121(5) TFEU.

⁵⁶ The SGP consisted initially of Council Resolution of 17 June 1997, and of two Council Regulations of 7 July 1997: Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, and Council Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. As is known, the SGP was reformed in 2005 allowing for greater tolerance for countries going over the 3% threshold ratio of debt to GDP (France and Germany at that time) but who had put into place public spending restructuring.

Council may adopt the measures deemed necessary for reducing the deficit and, in the event, also adopt further measures among which specific sanctions, including a non-interest bearing deposit until the deficit should be adjusted, or appropriate fines. The European Parliament is not involved in this procedure, being merely informed of the Council decisions⁵⁷. Regulation (EC) No. 1467/97, adopted as part of the stability and growth pact, later introduced a series of measures to speed up and clarify the implementation of the excessive deficit procedure. In concrete terms, however, the excessive deficit procedure has actually been started up several times, addressed at one time or another to most of the Member States, but it has never closed with the application of sanctions.

The principles of economic constitution defined in the Maastricht Treaty, then, retain Member State's sovereignty in economic and fiscal policy, with a duty of coordination in the framework of a mutual surveillance procedure and subject to corrective measures that can be imposed within the excessive deficit procedure. This model has not been modified by successive amendments to the Treaties. The Lisbon Treaty limited itself to introducing an article dedicated to the countries of the euro area which allows the Council to adopt specific measures to strengthen coordination and surveillance of budget discipline and to set out appropriate guidelines for economic policy⁵⁸, and also to formalise the constitution of the Eurogroup, that is, only members of the Council representing States whose currency is the euro⁵⁹.

In the absence of an effective power of European economic governance, no major issue of democratic legitimacy arises: choices of economic policy lie in the hands of the Member States and are legitimised by their respective national parliaments. In this prospect, the absence of effective role by the European Parliament in the definition of the economic policy guidelines for Member States triggers no major democratic problem either. Nor does the failure to have the European Parliament take a part in the excessive deficit procedure appear to harm democratic principles,

⁵⁷ Art. 126(7) TFEU.

⁵⁸ Art. 136 TFEU.

⁵⁹ Art. 138 TFEU.

as it is a procedure which aims essentially to guarantee fulfilment of obligations already provided for by Treaties.

It is nonetheless clear that a transformation of this model which would grant to Union bodies effective guideline and coordinating powers, such as would void or in any case drastically limit the choices of national parliaments in deciding their own economic policy would require that action by the bodies of the European Union be supported by a strong democratic legitimacy base, which the Treaties have not yet guaranteed.

6. The strengthening of the economic governance of the European Union

The sovereign debt crisis has revealed the weaknesses of the EMU model defined in the Maastricht Treaty as reinforced with the Stability and Growth Pact. In fact, the guideline, coordinating and surveillance instruments provided for have proved too weak and have not prevented unsound budgetary policies by certain Member States, threatening the entire euro system. Alongside interventions of financial assistance, aimed at dealing with the sovereign debt crisis in the immediate term, provision was made for a strengthening of the powers of the Union in matters of coordination of economic and fiscal policy of Member States, to avoid in the future sovereign debt crisis in the euro area. Similarly to what happened for financial assistance measures, Member States have made use of both European Union law and of agreements under public international law.

In the first category is the “six pack”, a package of five regulations and one directive aimed at improving coordination of Member States' economic policies and tightening the excessive deficit procedures⁶⁰. The main objective of the six pack is to

⁶⁰ Six pack includes: Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement and budgetary surveillance in the euro area; Regulation (EU) no. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) no. 1466/97 on the strengthening of the surveillance of budgetary positions and surveillance and coordination of economic policies; Regulation (EU) No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the

strengthen “multilateral surveillance” and the procedure for excessive deficit provided for under Arts. 121 and 126 TFEU and finalised with the Stability and Growth Pact. In particular, the reform reinforced the conditions which would trigger the excessive deficit procedure⁶¹, reduced the time periods for the procedure and toughened the sanctions. In addition, the reform reduced the risk that sanctions could be blocked by a Council decision⁶², through the introduction of a “reverse qualified majority” voting procedure: if previously sanctions were decided by the Council by qualified majority, it is now up to the Commission to set the sanctions which the Council can block only by a qualified majority vote. Furthermore, Regulation (EU) No. 1174/2011 introduced a new procedure for the prevention and correction of macroeconomic imbalances, understood as the negative trends of the economy of a single State which could risk spreading to the whole EMU. Such a procedure is based on a preventive-corrective set of measures where the Commission and the Council work together to issue recommendations and adjustment plans to the Member State concerned with the possibility of applying financial sanctions up to 0.1% of GDP. Finally, Directive 2011/85/UE introduced further limitations to the fiscal independence of a Member State, in order to guarantee that parameters and objectives set under European Union law will be met.

The reinforcement of European economic governance clearly poses a question of democratic legitimacy⁶³. In this regard, Regulation (EU) No. 1175/2011, which modifies Council Regulation no. 1444/97/CE on the strengthening of the

prevention and correction of macroeconomic imbalances; Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) no. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; Council Directive 2011/85/UE of 8 November 2011 on requirements for budgetary frameworks of the Member States.

⁶¹ Following the reform, in fact, for the procedure under ex Art. 126 TFEU to be triggered it is now enough to have excessive public debt, even if the budget is within the parameters.

⁶² As happened, for example, under the procedure for excessive deficit commenced in 2002 and 2003 against Germany and France.

⁶³ Point 9 of the preamble to Regulation (EU) No. 1174/2011, acknowledges that “strengthening economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments.”

surveillance of budgetary positions and coordination of economic policies, introduced what it termed an “Economic Dialogue”. By this procedure, the competent parliamentary committee may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup to appear before the committee to discuss the measures adopted for the coordination of the Member States' economic policies. The participation of the European Parliament in the choices of economic governance offered by the “economic dialogue” would, therefore, still seem to be insufficient⁶⁴.

Finally, in November 2011, the Commission put forward the proposal for the so-called “two pack”, a new package made up of two regulations aimed at further reinforcing the tools of economic and budgetary surveillance and adjustment of excessive deficits for the euro area countries⁶⁵. The proposal, still to be approved, obliges the euro area States to submit to the Commission and to the Council by 15 October each year, the budget proposal for the following year. The Commission assesses the budget proposal against the obligations deriving from European Union law and the recommendations of the Council. The Member States in serious financial difficulties will be subjected to a tougher monitoring than that provided for under Art. 126 TFEU in the framework of excessive deficit procedure.

Both the “Euro Pact Plus”⁶⁶ and the Treaty on Stability, Coordination and Governance in the Economic and Monetary

⁶⁴ See C. Fasone, *The Struggle of the European Parliament to Participate in the New Economic Governance*, *EUI Working Papers*, RSCAS 2012/45, 11 ss.

⁶⁵ See COM(2011)819 final, “Proposal for a Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area” and COM(2011) 821 final, on “common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.”

⁶⁶ The euro plus pact, an agreement of a political nature without any immediate legal effect, was signed by the euro area States along with Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania. The pact is open for participation by other Member States as stated in the annex to the European Council Conclusions of 24 and 25 March 2011 (EUCO 10/1/11 REV 1).

Union, commonly known as “Fiscal Compact”,⁶⁷ are agreements under international public law.

The Fiscal Compact, signed on 2nd March 2012 by 25 out of 27 Member States⁶⁸, largely confirms the rules laid down in the six pack⁶⁹. It aims to strengthen financial stability in the euro area through greater coordination of the economic and fiscal policies of the Member States⁷⁰ and is closely linked to the ESM in the sense that only those States who have underwritten the Fiscal Compact can benefit from the assistance thereunder.

Although the Fiscal Compact is an inter-governmental agreement outside the EU legal framework, the contracting parties agreed that the substance of the Fiscal Compact should be incorporated in the legal framework of the European Union within five years at most. In any case the Fiscal Compact must be interpreted and applied in conformity with European Union law

⁶⁷ On the Fiscal Compact, see, among others, R. Baratta, *Legal Issue of the Fiscal Compact – Searching for a mature democratic governance of the euro*, cit. at 1, 647 ss.; L.S. Rossi, *Fiscal Compact e Trattato sul meccanismo di stabilità: aspetti istituzionali e conseguenze dell’integrazione differenziata nell’UE*, cit. at 1, 293 ss.; L. Besselink, *The Fiscal Compact and the European Constitutions: Europe Speaking German*, cit. at 1, 1 ss.

⁶⁸ On the events which led the Heads of State or of Government to proceed with an international treaty rather than via an amendment to the primary law of the European Union, see editorial *Some thoughts concerning the Draft Treaty on a Reinforced Economic Union*, in *CMLR*, 2012, 1 ss., which shows how the decision to go ahead with the Fiscal Compact was in great measure due to the need to get over the UK veto on strengthening budgetary discipline in the Member States through amendment of the Treaties. Regarding the content of the Fiscal Compact see contributions in G. Bonvicini – F. Brugnoli (ed.), *Il Fiscal Compact*, (2012).

⁶⁹ According to S. Peers, *The Stability Treaty: Permanent Austerity or Gesture Politics?*, in *Eur. Const. L. Rev.*, 2012, 404 ss., none of the provisions of the Fiscal Compact would be necessary from a legal point of view insofar as they are already provided for in European Union Law (in particular, the “six pack”) or could easily be provided for by acts of European Union Law. Rather, according to this author, the Fiscal Compact is of import politically, easing for those States participating in the EMS and the EFSF approval from their respective Parliaments. Scholars have raised several doubts regarding the legitimacy of the Fiscal Compact (see for all P. Craig, *The Stability, Coordination and Governance Treaty: Principles, Politics and Pragmatism*, *ELR*, 2012, 231 ss.) settled however by the Court of Justice in the above-referenced Pringle decision.

⁷⁰ See Art.1 of the Fiscal Compact.

and does not limit the competency of the Union in questions of economic and monetary policy⁷¹.

The most significant aspect of the Fiscal Compact is the “balanced budgetary position” rule⁷², which the contracting parties are obliged to enter into national law preferably at a constitutional level⁷³. This rule imposes certain limits to the annual structural balance of general government and to the debt/GDP ratio. Should these limits be exceeded, provision is made for an automatically triggered correction mechanism to come into effect which includes the obligation of the party concerned to implement the necessary measures to correct the deviations. The Fiscal Compact sets out that such a mechanism shall “fully respect the prerogatives of national Parliaments”. Notwithstanding this (somewhat vague) provision, the fact is that it is the Commission who defines the principles regarding the nature, size and time-

⁷¹ See Art. 2 of the Fiscal Compact.

⁷² See Art. 3 of the Fiscal Compact. For an analysis of the institutional aspects deriving from the balanced budget rule as governed by the Fiscal Compact, see F. Fabbrini, *The Fiscal Compact, the 'Golden Rule' and the Paradox of European Federalism* (May 1, 2012), in <http://dx.doi.org/10.2139/ssrn.2096227>. The author shows how the obligation on Member States to adopt such a rule entails a strong centralisation in the make-up of European economic governance, far greater than that found in the federal make-up of the US where the federal government does not have the power to influence budgetary processes in the States. The author highlights the paradox which sees Member States on the one hand systematically dismissing an invitation to create a federal structure for the EMU, arguing that this would violate their sovereignty in economic and budgetary policies, and on the other hand setting up a system of European economic governance which impacts on State sovereignty to a far greater extent than would be allowed in a federal state.

⁷³ According to C. Pinelli, *La dimensione internazionale della crisi finanziaria*, in <http://www.gruppodipisa.it/wp-content/uploads/2012/09/Pinelli.pdf>, 7,, “insofar as it impacts on the monopoly of the Member States over the power to decide constitutional matters on their national territory”, the Fiscal Compact raises serious issues of contrast with the respect for Member States' “national identities, inherent in their fundamental structures, political and constitutional” (Art. 4 (2) TUE). For an analysis of Constitutional Law No. 1 of 2012, which introduced the balanced budget into our body of laws and on the compatibility of this with the fundamental principles of the Constitution, see M. Luciani, *Costituzione, bilancio, diritti e doveri dei cittadini*, in http://www.astrid-online.it/rassegna/06-02-2013/Luciani_Varenna-2012.pdf. For a stiff criticism of the Fiscal Compact, from the point of view that it would alter the principles of equality among Member States, see F. Bilancia, *Note critiche sul c.d. “pareggio di bilancio”*, in Riv. telem. giur. Assoc. it. costit., n. 2/2012, 4.

frames of the corrective actions to be adopted without the participation of the European Parliament or of the national Parliaments⁷⁴. The role entrusted to the European Parliament is therefore marginal.⁷⁵ Considered from this aspect, the Fiscal Compact would appear to accentuate the democratic deficit issue.⁷⁶

The State which is subject to an excessive deficit procedure shall put in place an economic and fiscal partnership programme which should include a detailed description of the structural reforms to be addressed and implemented for an effective and lasting fixing of its excessive deficit. The Fiscal Compact sets out that the content and format of such programmes “shall be defined in European Union law”⁷⁷, most likely in a decision by the Council as provided under Art. 126(9) TFEU.

The contracting States have undertaken to work together to develop a policy which strengthens the proper functioning of the EMU and economic growth through enhanced convergence and competitiveness⁷⁸. Furthermore, the contracting States are required to take account of best practices benchmarks when planning economic policy reform⁷⁹.

Provision is made for Heads of State or of Government to meet informally at least twice a year with the President of the European Commission. The President of the ECB will also be invited to take part (Euro Summit meetings), to discuss matters relating to the governance of the euro area and of its rules as well as the strategic orientations of economic policy required to increase convergence in the euro area⁸⁰. Whilst the ECB President may take part in the Euro Summits, the President of the European Parliament can take part only upon invitation.

⁷⁴ Art. 3(2) of the Fiscal Compact entrusts to the European Commission the definition of “common principles [...] concerning in particular the nature, size and time-frame of the corrective action to be undertaken.”

⁷⁵ See L.S. Rossi, *Fiscal Compact e Trattato sul meccanismo di stabilità: aspetti istituzionali e conseguenze dell'integrazione differenziata nell'UE*, cit. at 1, 301.

⁷⁶ R. Baratta, *Legal Issue of the Fiscal Compact – Searching for a mature democratic governance of the euro*, cit. at 1, 675.

⁷⁷ Art. 5(1) of the Fiscal Compact.

⁷⁸ Art. 9 of the Fiscal Compact.

⁷⁹ Art. 11 of the Fiscal Compact.

⁸⁰ Art. 12 of the Fiscal Compact.

National Parliaments and the European Parliament are required to define the organisation and promotion of a conference of representatives of the relevant committees in order to discuss fiscal policies and other matters pertaining to the euro area⁸¹. It is to be hoped that on such occasion the sensitive issue of democratic legitimacy of European economic governance will be addressed. Economic and fiscal policy, which determines redistributive effects, do in fact require strong democratic legitimacy. If Member States retain sovereignty in this area, as provided by the Maastricht EMU model, democratic legitimacy can be granted at national level. If, on the other hand, this model is superseded by means of a progressive reinforcement of European economic governance, it must be ensured that this governance itself shall have sufficient democratic legitimacy.

7. Closing Remarks

The sovereign debt crisis which recently hit the euro area confirms the structural weakness of the EMU model adopted with the Treaty of Maastricht. This model is based on the principle of Europeanised monetary policy and Member States fiscal sovereignty, save (weak) preventive and corrective measures to avoid excessive deficit. This model has not prevented sovereign debt crisis that have threatened the whole euro system.

A substantial financial assistance rescue plan composed by a number of different instruments (bilateral loan agreements, EFSM, EFSF, ESM) has been implemented. This plan, which has been cleared by various constitutional courts⁸² and the European Court of Justice⁸³, has prevented the default of those States more exposed to financial speculation and so also the collapse of the euro area itself. However, democracy principles remain at issue. The management of rescue measures, in fact, does not provide for enough involvement of the European Parliament or of national

⁸¹ Art. 13 of the Fiscal Compact.

⁸² See decisions of the Supreme Court of Estonia of 12 July 2010 on the ESM (no. 3-4-1-6-12), by the Conseil constitutionnel of 9 August 2012 on the Fiscal Compact (decision no. 2012-653 DC), by the Bundesverfassungsgericht of 12 September 2012 on the ESM and on the Fiscal Compact (BVerfG, 2 BvR 1390/12).

⁸³ See Decision in the Pringle case C-370/12, cit. at 11.

Parliaments. It is entrusted principally to institutions which operate either according to the inter-governmental method such as the EMS, or from a position of total independence of democratically representative bodies, such as the ECB. The use of public funds necessary for this type of intervention and the definition of terms and conditions for the financial assistance, including structural reforms impacting on social rights⁸⁴, have been agreed substantially in places that lie on the outskirts of representative democracy circuits

Alongside the measures of financial assistance, European economic governance has been strengthened by tightening preventive and corrective measures aimed at coordinating economic and fiscal policy and avoiding excessive deficit in Member States. The redistributive effects of economic and fiscal policy choices, however, require a democratic legitimacy which can no longer be provided by national parliaments, as previously occurred in the Maastricht EMU model.

In its meeting on 13/14 December 2012, the European Council agreed on a roadmap for the completion of the EMU⁸⁵ based on a deeper integration and reinforced solidarity. The conclusions of the European Council indicate that with the strengthening of euro area governance the general objective remain to ensure democratic legitimacy and accountability at the level at which decisions are taken and implemented. But no concrete indications were provided as to how to actually ensure that the European economic and fiscal governance should be exercised with due respect for democratic principles. The problem moreover is complicated by a “democratic asymmetry” which springs from the fact that there is no exact overlap between the people of the euro area and those represented at the European Parliament. Democracy on the one hand demands that all those concerned be given a chance to participate through their

⁸⁴ See comments by G. Grasso, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, cit. at 1, spec. 145 ss.

⁸⁵ Conclusions of the European Council of 13/14 December 2012, EUCO 205/12, which incorporate the proposals contained in the two papers drawn up by the President of the European Council, in close cooperation with the Presidents of the European Commission, the Eurogroup and the European Central Bank, presented on 26 June 2012 and 2 October 2012 respectively.

representatives and, on the other, hand, requires that those not concerned be left without voice⁸⁶.

The sovereign debt crisis has clearly indicated the need to enhance the democratic legitimacy of European economic governance. The democratic issue will therefore remain at the centre of the debates on the future of European integration.

⁸⁶ See K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, cit. at 1, 46.

BACK TO “FLEXIBLE” CONSTITUTIONS? THE IMPACT OF FINANCIAL CRISIS AND THE DECLINE OF THE EUROPEAN CONSTITUTIONALISM

*Andrea Simoncini**

Abstract

The essay investigates the consequences of the current economic crisis on the European legal systems. In particular, the article suggests that the crisis is not the main cause of the damage suffered by constitutional systems. According to the author, the reasons of these transformations are deeper and more structural than the urgent need to fight against financial crisis. This kind of emergency simply introduced a new factor into the complex evolution of contemporary legal systems i.e. the crisis of the overall legitimacy of public institutions. Therefore, reflections on the decrease of trust in political bodies bring to the loss of rigidity of national Constitutions, because a reduction in legitimacy has repercussions on the legal superiority of constitutional sources.

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1. The theories

Many of the theories on the current conditions of national constitutional states and of the European Union may be summarized thus: *the present economic crisis is clearly impairing the soundness of the guarantees and limits provided by constitutional law (at both national and European levels).*

More specifically, the efforts to remedy the devastating effects of the crisis led to the adoption of measures, and the creation of institutions (at both national and European levels) which – in concrete terms – did not fall within the scope of constitutional legitimacy, or at least raised serious doubts on the “principle of constitutional rigidity”¹. As a consequence, today national and European institutions are in fact governed by “rules” or subjected to “authorities” that are different from, or external to, the very constitutional system that established them.

This analysis usually yields two possible scenarios.

The first may be defined the “resilience of constitutional structures”. In this case, once the “*extra ordinem*” stage has ended, the powers return within “*ordinem*”. The priority is to focus on solving the crisis by addressing its economic-financial causes, seeking to curtail its duration and therefore its distorting effects, rather than on issues of constitutionality.

The second is the scenario of “irreversible deformation”: the damage done by the *extra ordinem* phase is irreversible and thus tends to produce stable results.

In this case, the priority is to focus on legal-institutional aspects and to establish “counter-measures” to avert the disappearance of both constitutional rigidity and constitutional values.

A sort of “third position”, encompassing elements of both scenarios discussed above, was recently proposed: a “*ius-stitium*” (Agamben², Cartabia), the creation of a “temporary constitutional law”, a constitutional amendment that establishes a different regime in times of crisis. Guarantees are therefore not entirely forgone, but those which are not essential are attenuated; thus, the emergency phase which, in the first and second cases above,

¹ F. Angelini, M. Benvenuti (eds.), *il diritto costituzionale alla prova della crisi economica. Atti del convegno di Roma, 26-27 aprile 2012* (2012).

² G. Agamben, *State of Exception* (2005).

would simply "*non habet legem*", is governed at least to some extent.

2. *My view*

The following observations presume a different starting point.

Indeed, I believe that the current economic crisis *is not the cause* of the damage suffered by constitutional systems.

I believe that the causes of these transformations or deformations predate the 2008 economic crisis, and are due to reasons that are much deeper and more structural than the urgent need to establish *extra-ordinem* measures and institutions to fight the financial crisis, which by now has also heavily affected sovereign debts.

In my opinion, if the crisis has had a role, it was that of "accelerating" this structural decline or of "triggering" latent tensions. It acted upon the *magnitude* of phenomena, therefore, but not on their quality.

However, the crisis did "add" a specific contribution in one respect. It introduced a new factor into the complex evolution of contemporary (national and European) constitutional systems: the *crisis of the overall legitimacy* of public institutions, of their *reliability*. I will come to this later.

A non-secondary consequence of my theory is that, while making every effort to resolve the financial crisis is clearly necessary and unavoidable, the path to be taken is neither that of *resilience* nor that of *irreversible deformation*. Rather, efforts must be focused on the *deep* and *structural* causes of constitutional law's current crisis, to avoid that the corrections – formulated on the basis of the emergency – wreak worse damage than the actual evils.

3. *The decline of contemporary European constitutionalism: "return to the Statuto"?*

If we wish to strike at the real core of the crisis of contemporary constitutionalism, in my view the phenomenon that we are witnessing may be defined as a progressive *flexibilisation* of existing constitutions.

I will not use the term “deconstitutionalisation” (although it may perhaps be more appropriate), because in many cases there is no express or implied repeal. Constitutional texts remain in force – indeed, they proliferate; and what disappears is the “normative added value” that characterizes constitutions, or at least contemporary “rigid” constitutions.

To reprise an expression from Italian history, it may be said that we are witnessing a sort of “return to the *Statuto*”³, i.e. the loss of the distinctive trait of post-totalitarian, post-WWII constitutions as against liberal constitutionalism: their superiority to the law and to the acts undertaken by public powers.

Post-totalitarian constitutionalism is based on the notion that there is a superior law (a higher law) to ordinary laws and administrative acts⁴. Therefore, liberal rule of law was not only enriched with an additional hierarchical rank, but rather with a new *dimension*, different and superior to legality: *constitutionality*. All public powers, including the Parliament, must observe this insurmountable “measure”.

I believe that these qualities, that have characterized post-WWII national constitutions over recent decades, have been showing increasing signs of failure; there has been a growing *adjustability* of constitutional norms as against other (not necessarily only public) sources of law.

This process has multiple causes, which are not always of equal significance. In any case, all predated the 2008 financial crisis and are therefore logically independent of it. As I have already mentioned, in many cases the crisis was an “amplifier”, a “trigger”, but since a scientific consideration of the matter should strive to identify the root and incidental causes of a given

³ This expression is taken from the title (“*Torniamo allo Statuto*”) of an article published by Sidney Sonnino, a Deputy of Parliament of the *Destra Storica* party, on 1 January 1897 in the publication entitled *Nuova Antologia*. In that article, he expressed the hope of returning to observe the *Statuto*, the first constitution of the Italian Kingdom issued in 1848 and which, unlike the current republican Constitution of 1948, is *flexible*, i.e. is freely amendable by ordinary legislation.

⁴ Whether, on a Kelsenian perspective, this law is deemed superior in legal terms as *Grundnorm* within a hierarchical legal system, or whether in Schmittian terms it is considered a political act of supreme decision on the unity of the State, or, finally, whether it is considered the “supreme law of the land”, as per the North American legal tradition.

phenomenon – and seek to distinguish between the two – I will discuss at least some of the structural causes.

First, I will describe some of the effects of the “flexibilisation” of our constitutions, focusing on two areas which are used to identify the content of constitutions: the *form of government* and the *form of state*.

My analysis will not explicitly extend to the other typical area of constitutional law, i.e. the protection of fundamental rights. This issue would require a different analysis. However, it may be recalled that the protection of fundamental rights depends not only on the Charters which expressly enshrine them, but also on the constitutional limitation of public powers; in this sense, the following observations will also be relevant to rights.

4. Impact on parliamentary forms of government

4.1 Flexibilisation of the system of legal sources

What constitutionalists mean by *form of government* is surely, by definition, the least rigid part of a constitution. In relation to the core of this notion, i.e. the relationship between Parliament and Government, jurists concur that the Italian “founding fathers” only established a very concise and essential statement of some fundamental “boundaries”, leaving ample space to conventions, customs and constitutional practice⁵.

However, one aspect of the form of government that has always been well-defined in the Constitution is the “system of legal sources”, i.e. the regulation of the “form” of parliamentary laws, of legislative initiative and of the procedure for approving legislation, of all other primary legal sources within the system (the principle of the “limited number” of primary sources) and, finally, of the Government’s power to issue primary and secondary legislation. Legal scholarship has always supported this observation with the conviction that studying the system of legal sources is one of the few indicators that can shed light on the actual evolution of a country’s form of government, especially for those having parliamentary systems⁶.

⁵ L. Elia, *Governo (forme di)* (1970).

⁶ For an account of the influence of the Constitutional Court on the form of government by means of its case-law on sources, see A. Simoncini, *Corte e*

As may be known, these “norms on norm-making” are the only part that Hans Kelsen deemed worthy of being called a real “constitution”, as they concern the procedures and conditions for a legislative act to be *valid* and thus *existent*, in Kelsenian terms.

Therefore, especially if a temporal perspective on this part of our constitution is adopted, I believe it possible to state that much regulation on the system of primary legal sources may now be considered “deconstitutionalised”.

The two clearest examples of this are the decree-law and the legislative decree; both of these legislative powers of the Government have in practice evolved well beyond the schemes establishing them (in Articles 76 and 77 of the Constitution).

In practice, since 2008, this deviation has not undergone any particular qualitative evolution.

	XIII (from 9/5/1996 to 29/5/2001)		XIV (from 30/5/2001 to 27/4/2006)		XV (from 28/4/2006 to 28/4/2008)		XVI (from 29/4/2008 to 13/03/2013)	
	Total	Monthly average	Total	Monthly average	Total	Monthly average	Total	Monthly average
Laws	906	14,93	686	11,64	112	4,66	384	6,79
Leg. Decrees	378	6,23	288	4,89	114	4,74	223	3,94
Decree-laws	204	3,36	216	3,66	48	2	118	2,09

Regardless of the reference to the “current exceptional situation of international crisis and market instability” made in the preamble of the decree-laws adopted during the crisis⁷, they are similar in content to many urgent decrees issued before.

It is equally certain that on this front, the current government has even managed to give rise to *new* forms of “violation” of the constitutionally-established system of legal sources.

concezione della forma di Governo, in V. Tondi della Mura, M. Carducci, R.G. Rodio (eds.), *Corte costituzionale e processi di decisione politica* (2005).

⁷ See for example the Decree-Law 22 June 2012 No. 83 “Urgent measures for the Country's growth”.

By way of example, I will mention only one significant episode. The “*salva-Italia*” (“Italy-saving”) decree-law imposed an extraordinary tax on the financial activities covered by the “*scudo fiscale*” (“tax shield”). The tax had to be paid by 16 February 2012, and the payment procedure had to be established by the Italian Revenue Agency with an official decision. However, the Agency published this procedure only on 14 February 2012, two days before the deadline; in light of the (justified) panic of banks, intermediaries and other subjects affected by the tax, the Ministry of Economy, which in Monti’s technical government coincided with the President of the Council of Ministers (until Minister Grilli took over), published the following communication on 15 February:

“The Ministry of Economy and Finance states that in light of the objective operational difficulties expressed by the financial intermediaries obliged to pay the tax on the activities covered by the tax “shield” [...], the established deadline of 16 February will be postponed, *with the earliest possible legislative provision*.”

This provision will state that the payments that are not made before the date of the entry into force of the prorogating provision *will not constitute a payment violation.*” (emphasis added).

Therefore, a press release “having force of law” (one could say!), from which two significant pieces of information emerge: first, the notion of the legislative amendment being inserted in the “earliest possible legislative provision” appears almost to prove the absolute interchangeability of all primary normative instruments available to the government (which in turn confirms the old image of the decree-law as a “speed train” to which an indefinite number of wagons may be attached). The second is the pledge to “disapply” the fiscal penalties for failure to pay taxes; a pledge which the government took by means of a press release.

The crisis is hardly relevant here; the notion that the Government is the “lord of the sources” (to recall the image portrayed by Marta Cartabia at a recent convention)⁸, a notion that is increasingly gaining strength, responds to an evolutionary trend present in many European forms of parliamentary government,

⁸ M. Cartabia, *Il governo signore delle fonti? Introduzione*, in M. Cartabia, E. Lamarque, P. Tanzarella (eds.), *Gli atti normativi del governo tra Corte costituzionale e giudici* (2011).

with an increasingly pre-eminent role of the executive over the legislative. This may not be so in the United Kingdom, where it has indeed always been true, but rather in other parliamentary or, to an even greater extent, semi-presidential governments.

The trend is to reverse the fundamental assumption of parliamentary regimes that the Parliament is the sole body with legislative power, and the Executive may exercise such power only in exceptional cases: today, we increasingly see Governments that enjoy parliamentary majorities, usually guaranteed by strongly majoritarian electoral systems, and wield a sort of *undifferentiated primary normative power*, free from limitations and procedures, and which can assume the form most suitable or appropriate to individual decisions (decree-law, legislative decree, bill, secondary legislation of deregulation).

What caused this evolution?

It is impossible to undertake a detailed analysis here; I will limit myself to some notes.

First, it is intrinsically difficult for rigid constitutions to ensure the observance of their provisions on issuing laws and acts having force of law; we might define this as an *inevitable* weakness of the constitutional review of legislative acts for formal flaws. Indeed, unlike substantive flaws, which affect one or more norms, formal flaws act like a “cluster bomb”: the parent measure’s unconstitutionality is transmitted in a chain reaction to all the norms approved on its basis, which are usually copious and important (such as the decree-laws on which entire financial operations are based⁹). G. Zagrebelsky realistically observes that constitutional judges very often hesitate to annul norms with only formal, and not also substantive, flaws; and they only annul formally flawed laws if they are also substantively flawed¹⁰.

⁹ On this last point see N. Lupo, *L’omogeneità dei decreti-legge (e delle leggi di conversione): un nodo difficile, ma ineludibile per limitare le patologie della produzione normativa*, in G. D’Elia, G. Tiberi, M.P. Viviani Sclein (eds.), *Scritti in memoria di Alessandra Concaro* (2012).

¹⁰ In this connection, although considered less effective, see the *pre-emptive* review for constitutionality (such as that operated by the French *Conseil Constitutionnel*), performed prior to the law’s entry into force and appears to be more incisive (for an account of the French experience see P. Passaglia, *L’invalidità procedurale dell’atto legislativo: le esperienze italiana e francese a confronto* (2002).

However, I believe that there are two other, more structural, reasons, that explain this *flexibilisation*.

First, the growing value of the “*time*” factor in lawmaking.

The case of decree-laws in Italy is a clear example: today, timeliness in lawmaking is usually more important than its content. To reach a late decision is very often tantamount to not deciding.

It is undeniable that many of our parliaments’ procedural rules are still fundamentally linked to the model of the principal normative act: law enacted by Parliament. This must be approved article by article, subjected to a final vote, and examined by a commission and then by the entire House. This basic structure, inherited from liberal parliaments, was transposed unchanged into our Constitution and into Parliament’s internal regulations.

The structure certainly worked well as long as the function of Parliaments was mainly one of *discussion* (within consociational political contexts), but from a certain moment – the great geopolitical changes of the early 1990s, and the introduction of obligatory policies of economic convergence at European level during the same period – that is, since the dialogue function was replaced by the notion of a “deciding democracy”¹¹ in which it became necessary to ensure efficiency and coherence in government directions especially on decisions of an economic nature, this structure began to show its limitations. Decree-laws, capable of immediately entering into force, became the only instrument available for timely decisions.

It cannot be denied that in recent years, the Constitutional Court has shown greater sensitivity to the issue of decree-laws and formal reviews for constitutionality; judgments no. 171 of 2007, 128 of 2008 and especially 22 of 2012 display a significant change in approach compared to the acquiescence previously shown, especially in relation to the “manifest extraneousness” of modifications made by Parliament. However, the difficulty of voiding the entire decree-law and delegating legislation for failure to fulfil the conditions established in Articles 76 and 77 of the Constitution is still well-entrenched. Indeed, the practice of

¹¹ This is the expression used by the then President of the House of Representatives Luciano Violante, in the Premise to *Modificazioni al Regolamento della Camera dei deputati*, Camera dei Deputati, Rome, 1998, p. XI.

issuing “urgent” decrees, which is now – paradoxically – the principal lawmaking procedure in Italy, is not substantially affected by these judgments¹².

However, I wish to highlight that the meagre tenure of the constitutional system of legal sources is a phenomenon that does not concern only national constitutional law; a similar trend is taking place on the European level.

It is indeed clear that some of the most significant recent decisions at European level – such as the adoption of the European Stability Mechanism and the related European Stability Facility – were taken by means of international treaties between some of the EU members, rather than through usual sources of European law such as regulations and directives.

As highlighted by Bruno De Witte¹³ with reference to a recent important case, during an Ecofin meeting, following the approval of a European regulation to create the European Financial Stabilisation mechanism, the European Council of Ministers of Economy and Finance “changed register” and the 17 Eurozone countries adopted a decision obligating those very states to create a European Financial Stability Facility. This decision was entirely foreign to European law and taken on the basis of a measure of international law, and was then named Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union.

As may be known, pursuant to this measure, other EU Member States adopted, approved and ratified additional international treaties, always beyond the scope of European law (although their application and their observance was ensured by EU bodies such as the Commission and the Court of Justice): the ESM Treaty (comprising 17 upon 27 Member States) and the Fiscal Compact (25 out of 27 Member States).

¹² A. Sperti, *Il decreto-legge tra Corte costituzionale e Presidente della Repubblica dopo la seconda svolta*, in M. Cartabia, E. Lamarque, P. Tanzarella (eds.), *Gli atti normativi del governo tra Corte costituzionale e giudici* (2011) .

¹³ B. De Witte, *The use of International Law in the framework of the Economic Union: Reasons and Consequences*, to be published on this Journal.

As De Witte recalled, this tendency too, of failing to observe the system of sources established by the EU treaties, is not a recent occurrence that can be ascribed to the crisis.

For example, one may consider the Schengen Treaty of 1985 and 1990, or the Social Policy Agreement, concluded as a treaty alongside the Maastricht reform. Both of these measures excluded the United Kingdom.

The entire so-called – before the Amsterdam and Lisbon Treaties – Third Pillar constituted an area of essentially international/European law existing alongside European law.

In this case too, the crisis cannot be considered a specific cause, but rather only an intensification of a phenomenon that was already unfolding: the low tenure of the system of European sources.

What are the reasons for this? A great deal of space would be required for an exhaustive answer. However, there are surprising analogies with the reasons found within the Italian constitutional system.

First, at the European constitutional level too – a level at which, as may be known, supranational and intergovernmental “characters” have always had to confront each other – once the supranational nature had reached its highest fulfilment with the creation of the Euro and the enlargement to 27 Member States, a powerful intergovernmental counter-force emerged. Indeed, executive power in Member States are regaining a great deal of strength despite efforts to counter this force with a more thorough realization of the principle of subsidiarity.

But there is a further issue – again, raised by De Witte – that is naturally continuous with the causes of the great proliferation of urgent decree-making in Italy: why did the Eurozone states, on the same day that the EU Council adopted a regulation on the European Stability Mechanism, adopt the European Financial Stability Facility with an act of international law?

As may be known, the latter is an executive agreement, i.e. an immediately enforceable international agreement that enters into force when signed by governments, without need for ratification on part of national parliaments; with this type of agreement, a private company under Luxembourgish law was

created¹⁴, the 17 Member States of the Eurozone being its shareholders. Immediately after, the same states adopted a series of agreements to establish their voting rights within the company.

What was the purpose?

To effectively guarantee payment of the Eurozone states' debts, it would have been necessary to amend the Lisbon Treaty (to overcome the ban established in the European treaties on European institutions guaranteeing for or taking on the debts of Member States); therefore, it would have been necessary to launch a long and complex Treaty amendment process, according to a timeframe that the financial markets would never have observed. Yet, it was necessary to provide an immediate response to the markets' requirements; hence the need for a legal act that could immediately enter into force, and to create a "private" entity – belonging to the states – that could operate from the very next day. As may be known, it was only after this immediate act that the abovementioned amendment to the Lisbon Treaty was adopted; and, later, that the treaty on the European Stability Mechanism, which stabilized and inherited the European Financial Stability Facility, was created.

As further confirmation of the convergence of European and national constitutional law in terms of the "flexibilisation" of systems of legal sources, the recent European Court of Justice judgment in *Pringle* (Case C-370/12) must be mentioned. In that case, the Luxembourg court had to ascertain the compatibility of Decision 2011/199/EU of the European Council of 25 March 2011 with the Treaty system. The Decision amended Article 136 TFEU to enable adoption of the ESM¹⁵ following a simplified procedure.

The Court rejected the questions raised by the Irish Supreme Court and held that the Decision was legitimate. In light of the extraordinary emergency faced by Europe and of the need for interventions such as the Fiscal Compact and the ESM, there could be no doubt as to the outcome of the case. Nevertheless,

¹⁴ http://www.efsf.europa.eu/attachments/efsf_articles_of_incorporation_en

¹⁵ Article 1 of Decision 2011/199 states the following: "The following paragraph shall be added to Article 136 of the Treaty on the Functioning of the European Union: '3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.'"

many of the issues highlighted by the Irish Court raise significant perplexities.¹⁶

4.2 Flexibilisation of the regulation of economic policy

Another aspect of the constitutionally-established form of government which has apparently become “flexible” is that of decisions on economic and monetary policy.

I do not think that there is much need for examples in this regard; since the very beginning of the European single market, the ownership of decisions on matters of economic and monetary policy has been less and less national.

In this case too, the early 1990s are the crucial moment. The Maastricht Treaty and the decision to create the single currency, the European System of Central Banks and the genesis of the European Central Bank are the steps of a substantive “Europeanisation” of political decisions on economic and monetary matters.

Moreover, in this context too, it can be said that the “rigidity” of constitutions in granting power to national states’ various organs has gradually “faded” as economies have become globalised; the urgent need for coordination and for supranational direction of economic policies is not, therefore, a phenomenon that can be ascribed to the 2008 crisis.

First with the Maastricht Treaty and its famous parameters, then with the single currency, Member States – especially Italy – began to understand that the means through which they usually financed their internal economies (debt and devaluations) were no longer available.

¹⁶ Indeed, the possibility of modifying the TFEU by means of the simplified form of “decision” adopted by the Council is relevant only to modifications that do not regard Part I of the Treaty, while the provision that Eurozone Member States may introduce a “stability mechanism to be activated if indispensable to safeguard the stability of the Euro area as a whole” is, frankly, difficult to bring under Part II of the Treaty. Likewise, I find it difficult to refrain from acknowledging that this provision ends up extending the EU’s competences (another condition which is excluded if the simplified procedure is to apply). Finally, I consider significant the objection that in monetary issues, the Union has exclusive competence. This excludes, therefore, Member States from concluding international treaties, while both the ESM and the Fiscal Compact are, as we know, precisely that.

Some may argue that this does not actually amount to “flexibilising” the Constitution, as it was already a consequence of Italian membership of the European Union. The situation would thus fall squarely within a normal relationship between European and internal law.

However, in this field, the economic crisis itself led to a conspicuous leap in the quality of the “supranationalisation” of economic policies.

Indeed, here too, the most significant measures adopted at the European level are not measures of European law, but rather international treaties. I shall not examine the Treaty on the ESCB, but rather the other convention, between 25 of the 27 Member States of the EU, adopted to complement it – the Fiscal Compact.

In this connection, two important elements must be highlighted.

First, as we have already mentioned, after Maastricht and the single currency, debt and the monetary lever had already been conclusively attracted into the sphere of European governance; only the fiscal lever remained in the hands of Member States. With the Fiscal Compact Treaty, fiscal policy too is subject to supranational coordination. The “Europeanisation” of economic policy is therefore complete.

Second, with a decidedly problematic provision in terms of legal sources, the Treaty establishes that:

“[t]he rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, **preferably constitutional**, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes” (emphasis added).

But to fully comprehend the legal and institutional dynamics surrounding the implementation of this Treaty, its history must be examined.

The Fiscal Compact was adopted on 2 March 2012 and entered into force on 1 January 2013; it was ratified in Italy with Law No. 114 of 23 July 2012. The balanced-budget constitutional amendments required by the Treaty were introduced by means of Constitutional Law No. 1 of 20 April 2012 (entitled Introduction of the balanced-budget principle into the Constitution); given that the procedure for enacting a constitutional law in Italy is

decidedly complex¹⁷, one may ask how was it possible to approve a constitutional law only one month after the Treaty was signed and (even!) before it was ratified and entered into force.

The answer lies not in a European or international legislative act, but rather in a simple letter, sent privately on 5 August 2011 from the then President of the European Central Bank Jean Claude Trichet and the Governor of the Bank of Italy Mario Draghi (who later succeeded the former in chairing the ECB) to the President of the Council of Ministers Silvio Berlusconi¹⁸. In this letter, they asked Italy to “urgently strengthen the reputation of its sovereign signature” and to this end required the adoption of certain measures deemed to be absolutely undelayable (liberalisation of local public services and professional services, review of the collective bargaining system and of the labour market, anticipation of the balanced budget to 2013 through spending cuts, interventions on the pensions system, public employment expenditure cuts, a clause for automatic reduction of public deficit and monitoring local expenditure).

The letter continues:

“In light of the seriousness of the financial markets’ current situation, we deem it crucial that all of the actions listed above [...] be adopted as soon as possible through decree-law, followed by a parliamentary ratification within September 2011. A constitutional amendment to make budgetary rules more stringent would also be appropriate”, continued Draghi and Trichet. “There is also the need for a strong commitment to abolishing or fusing intermediate administrative structures (such as the provinces, or *Province*)”.

Thus, it is to “implement” – to use an euphemism – this private letter, signed by two central bankers, that Italy commenced the constitutional amendment resulting in Constitutional Law No. 1 of 2012.

¹⁷ Article 138 of the Italian Constitution: “Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting.”

¹⁸ For the complete letter, see Corriere.it, *Trichet e Draghi: un'azione pressante per ristabilire la fiducia degli investitori*, http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml?fr=correlati, 20 May 2013, 2011.

In this case, the flexibilisation of the constitutional system reaches a symbolic apex, if it is considered that two entirely “technical” organs, that represent the banking system and the European institutions, literally “instructed” the government and the Parliament on the way forward, even going so far as to specify the *means* (the decree-law and the constitutional amendment) and the *timeframe* within which to act.

It cannot be doubted that the amendment of Article 81 of the Constitution and related Law No. 243 of 2012 implementing the balanced budget are one of the economic crisis’ most recent and significant effects on the constitutional system of powers and competences.

I do not wish to undertake here a detailed examination of this reform and its differences (however important) from the parallel amendment of the Spanish Constitution.

I will simply note that the reform confirms the trend of, on one hand, the definite strengthening of the role of the Executive in economic-financial decisions (although the creation of the Independent Budget Office in Parliament may be an interesting innovation) and, on the other, the consolidation of the increasingly unavoidable link with European institutions on these issues.

4.3 Flexibilisation of the role of the President of the Republic

The last part of the form of government affected by *flexibilisation* that I wish to discuss is the President of the Republic’s role. Much has been said in recent months about the President. Some commentators used the events of the last two years of Napolitano’s presidency to state that in fact, we have shifted towards a “quasi semi-presidential” system; see the famous “King Giorgio” headline in the New York Times¹⁹.

Now, those who are familiar with the position of the President of the Republic within the Italian Constitution know that it is much less clearly defined than it may seem.

In particular, the constitutional space occupied by the role of the President is of “variable geometry”: in “ordinary” times, when political life carries on without particular turbulence, the

¹⁹ See R. Donadio, *From Ceremonial Figure to Italy’s Quiet Power Broker*, *New York Times*, 20 May 2013.

President tends to fade into an almost “symbolic” figure, but in times of crisis, the President recovers all his powers which, it must be recalled, have their roots in royal powers.

For this reason, rather than only “one” President of the Republic, our constitutional system has had several different Presidents, each of whom interpreted his role in different ways.

Still, it cannot be doubted that in the five years between 2008 and 2013, Giorgio Napolitano’s approach brought the constitutional role of the President well beyond the positions gained even by the most active and expansive presidencies.

I refer in particular to the appointment of Senator for life Mario Monti as head of the current Government, and to the evolution of what is traditionally defined as the presidential power to express views.

In creating the Monti government, President Napolitano appeared to appoint a veritable “President’s government”, setting the topics, the agenda and – it may legitimately be inferred – the composition of the Cabinet.

The crisis of the government that led to the premature end of the 16th Legislature began with the Chamber of Deputies’s vote of 11 October 2011 to reject Article 1 of the General National Financial Report. The next day, President Napolitano declared that “the undeniable manifestation of severe tensions within the government and the coalition, with the consequent uncertainties on the adoption of the required or announced decisions” raised “questions and concerns having indubitable institutional impact²⁰”.

The political situation that had emerged was completely unsustainable, in terms of international credibility; for this reason, Italy experienced what I consider to be a unique event, regardless of its inventive history of government crises: the resignation of the government, subject to a “condition precedent”. On 8 November 2011, after a meeting with President Napolitano, the President of the Council of Ministers Berlusconi announced that he would resign as soon as the law on financial stability was approved. However, the credibility of the President of the Council was already too damaged; for this reason, the next day, the President

²⁰ Press release of the President of the Republic, 12 October 2011.

of the Republic, “acting as Head of State”, released a communication which is worth quoting:

“In light of the pressure on Italian government bonds on the financial markets, which today reached alarming levels, as Head of State I deem it necessary to clarify the following, so as to clear any ambiguity or misunderstanding:

1) There is no uncertainty concerning the choice of the President of the Council Berlusconi to resign from the Government which he currently leads. This decision will be effective as soon as the law on financial stability for 2012 has been approved.

2) On the basis of agreements between the Presidents of the Senate and of the Chamber of Deputies and the majority and opposition parliamentary groups, the law on financial stability will be approved in a few days.

3) Consultations will then be held immediately by the President of the Republic to solve the government crisis.

4) Therefore, shortly, either a new government will be formed, and will be capable of taking all further decisions required with the confidence of the Parliament, or Parliament will be dissolved so as to immediately commence the electoral campaign, which will take place in a brief time frame.”

This is a veritable power of “government” wielded in times of crisis. In my opinion, this is unprecedented, even in light of the varied practices hitherto followed by Italian Presidents.

The other area in which I believe that a clear “demarginalisation” of the constitutional role of the President of the Republic has taken place is his power of “free” communication (i.e. communications not made through formal expressions of opinion to the Chambers of Parliament as per Article 66 of the Constitution). In recent years, the number of official communications issued by the Quirinal has grown exponentially²¹. These include not only communications on strictly institutional issues – such as the abuse of emergency decrees²², but also more general ones, on political-economic

²¹ Between April 2012 and March 2013, over 680 official press releases were published on the Quirinal’s website.

²² One of the most important cases is surely the press release of 23 February 2012 which summarizes the problems relating to the conversion of decree-laws into laws by including parliamentary modifications which are inconsistent with the individual decree-law’s content. The press release was “inspired” by the abovementioned Judgment No. 22 of 2012 of the Constitutional Court, which,

matters. While the power of communication is a clear sign of the President's "diffuse" political responsibility²³, as opposed to his lack of political responsibility narrowly construed – I believe that recent practice shows an increasingly active President, fully within the circuit of political decisionmaking²⁴, and who is capable of tangibly influencing and directing the choices made by the Government and the Parliament²⁵. It is not a coincidence that – for the first time in the history of the Republic – the possibility of Napolitano's re-election has surfaced in these very days.

5. Effects on regionalism

5.1 Flexibilisation of the constitutional division of powers between central state and regions

As mentioned above, in times of economic crisis, an evident process of *flexibilisation* has affected not only the form of government, but also the form of state (the relationship between the central state and local autonomies).

I believe that this context too supports my view that the causes of the current phenomena are not to be found in the crisis, but rather that the crisis led to the "explosion" of dynamics that have actually been unfolding for a long time.

The economic crisis is surely making the constitutional norms on the division of powers between the central state and the regions more flexible; and, in particular, making the boundary between state and regional powers extremely transient, if not outright uncertain, in favour of the state.

A paradigmatic example is the "social card", upon which the Constitutional Court decided in Judgment No. 10 of 2010. Due to the serious economic crisis, the state issued a measure – the social card – to grant a "purchasing card" to citizens in extremely

for the first time, voided provisions inserted in a decree-law by the Parliament during its examination of the related conversion bill.

²³ On this issue, see, in general, the studies of M.C. Grisolia, *Potere di messaggio ed esternazioni presidenziali* (1986).

²⁴ T. Groppi, A. Simoncini, *Introduzione allo studio del diritto pubblico ed alle sue fonti* (2012).

²⁵ O. Chessa, *Il Presidente della Repubblica parlamentare: un'interpretazione della forma di governo italiana* (2010).

difficult economic conditions so that they could meet at least their basic food needs.

The regions challenged the decree on the grounds that it infringed their exclusive powers in matters of social services and their financial autonomy; the latter was threatened by the fact that a restricted fund had been created for a subject that fell within the regions' competences.

The significance of this decision – and of later related ones – is that the Court explicitly acknowledged that the case concerned social assistance, and displayed awareness of how this provision contrasted with its settled case-law against the use of restricted funds for social policies managed by the central government (e.g. nurseries). However, the Court's reasoning was equally explicit in stating that the current situation is exceptional, extraordinary and urgent “due to the situation of international economic and financial crisis that in 2008 and 2009 also affected our Country”; a crisis that thrust a part of the population in a condition of “extreme need”. The circumstances are such that the state's exclusive competence enshrined in Article 117(2)(m) of the Constitution (on guaranteeing basic levels of social and civil rights), which is usually fulfilled by establishing “minimum standards and levels”, may be expanded and thus provide the basis for a detailed intervention²⁶.

When “primary rights” are involved, the state may intervene by directly granting “specific aid”, and go beyond simply setting structural levels “if it is unavoidable, as in the case before us, due to peculiar circumstances and situations such as an exceptionally adverse economic situation” (emphasis added).

Thus, at a first glance, it may seem that the economic crisis is to blame for the *flexibility* of the state's legislative power established in Article 117(2)(m). In both its literal and logical-systematic formulation (especially in light of the power of substitution enshrined in Article 120 of the Constitution), this competence certainly does not mean that the state is granted a “*passepartout*”, a power to intervene in all regional competences – a situation often confirmed by the very Court.

But can we really be sure of this?

²⁶ E. Longo, *I diritti sociali al tempo della crisi. La Consulta salva la social card e ne ricava un nuovo titolo di competenza statale*, 1 Giur. cost. 164 (2010).

Or has the flexibility introduced by the 2001 reform been a “structural” element of the state/region division of powers from the very beginning?

By way of example, I will limit myself to mentioning “cross-cutting” issues (such as the environment, competition, basic levels of assistance, etc.), in relation to which the Court has always acknowledged the state’s power to “intervene” in regional matters, albeit only on certain aspects.

The issue of the so-called “*chiamata in sussidiarietà*”, or flexible subsidiarity, through which great elasticity in the division of powers is recognized.

The alternating processes of “dematerialisation” and “rematerialisation” in allocating powers, that inevitably led to an expansion of the competences of the central state as against the periphery²⁷.

And we cannot fail to mention the case-law of European derivation that, since Judgment No. 126 of 1996, has constantly affirmed that “in derogation from what has been said on the observance of the internal constitutional framework of powers, European law may, for reasons related to the European Union’s organization, legitimately establish its own implementing forms. Therefore, national law that derogates from the framework of the usual constitutional distribution of internal powers, with the exception that fundamental and mandatory constitutional principles must be observed”.

Therefore, also in respect of the social card, the crisis may have exacerbated the symptoms of the ongoing disease, but the *cause* of the pathology is to be found elsewhere. Where? Again, the issue appears very complex; I believe that mainly two factors are decisive.

The first factor is of a technical-formal nature; the very technique of dividing powers “by subject” (exclusively and concurrently) has shown an intrinsic flexibility, due to its inevitable “jurisdictionalisation”. When the spheres of power are distinguished by means of lists of objects, values, functions, subjects, these are affected by the inevitable semantic “flexibility”

²⁷ R. Bin, F. Benelli, *Prevalenza e “rimaterializzazione delle materie”*: scacco matto alle Regioni, 6 Reg. 1185 (2009).

of any legislative provision and, ultimately, shift the real definitional power to the final judge of competences, the Constitutional Court²⁸. A recent interesting example is that of the cuts on expenditure for the regional political system, imposed by the “local authority-saving” decree-law (*decreto “salva-enti”*)²⁹. A judgment issued by the Constitutional Court held that all regions must observe the decree³⁰.

The second factor is political: to be able to function, a *composite* state – whether federal or regional – presupposes a real “*physiological*” difference between local and national levels of political direction.

By “*physiological*” distinction, I mean that in a composite state, differentiating between the centre and the periphery yields positive results when the differences between localising and centralising pressures are related to actual political-cultural differences and a general shared constitutional framework; thus, when political-institutional, and not only judicial, tools exist for the resolution of any conflicts that may arise.

This position was expressed in the famous Federalist Paper No. 10, in which James Madison himself warned against factionism as a fatal flaw of democracy, and stated that a large federal republic would be the antidote to this very risk³¹.

Without one of these two elements (difference or unity), the system cannot find a balance between centrifugal and centripetal forces; the history of all composite state systems shows that the centralistic force ultimately prevails, to the detriment of local autonomies.

The case of Italy is paradigmatic. We experienced a first period (1970s-1990s) in which regionalism was dominated by national parties and was substantially the same as the selection process used by the national political classes. Regions were not the

²⁸ As noted by S. Calzolaio, *Il cammino delle materie nello stato regionale* (2012): “paradoxically, the reaction to the fragmentation of competences has led to a situation in which the State has been granted more competence, in some sectors, than it actually wishes to exercise: thus, a dissociation takes place – for example on the subject of the environment – between substantially absolute entitlement to the subject and “discretionary” attribution of the legislative competence to regions”.

²⁹ Decree-law of 10 October 2012, No. 174.

³⁰ Judgment No. 198 of 2012.

³¹ On this point, A.J. Bellia, *Federalism* (2011).

“gymnasiums” for the creation of a new and different political class, as had been envisaged by the constituent fathers; rather, they were local “segments” of a unitary political career, which was ultimately managed by the strength and centrality of national parties. This phase was followed by another, starting from the 1990s, in which national parties suffered a crisis and “hyper-autonomist” forces emerged to question the basic constitutional framework within which regionalism had developed (the contemporary idea of the confederation between the four northern regions is but the most recent step in this direction).

What do these two stages have in common? It is the push to strengthen the “centre”: in the first stage, this occurred due to the absence of differentiation; in the second, to an “excess” of the same. The economic crisis has thus filtered into the crisis of regionalism, which has deep roots, further “exacerbating” tensions especially by placing the financial crisis of the social state at the centre of debate.

Indeed, we should not forget that state finances’ risk of default is having a dramatic effect especially on the cuts to public health expenditure, which, as may be known, constitute a very significant proportion of regional budgets.

6. The economic crisis and democracy

6.1 Loss of trust in democratic institutions

Above, I have argued that the most evident elements of crisis in our constitutional system of powers are to be ascribed to a structural decline and not to the economic emergency.

In this second part, I wish to highlight some factors of the crisis which I believe are to be attributed *specifically* to the economic-financial crisis that has been affecting the world, and therefore Europe, since 2008.

My argument can be summarized thus: *since 2008, citizens have been progressively and inexorably losing faith in the capacity of democratic institutions to represent and defend the collective interests for which they were created.*

In other words, we are witnessing a real collapse in the “reliability” of public powers, despite the fact that these are subject to constitutional discipline and are democratically legitimated.

It is almost as if constitutional representative democracy, the political form created after the totalitarian experiences of the last century, can no longer ensure a true correspondence between “governors and governed”.

To illustrate my theory, I will examine some empirical data gathered by Eurobarometer in July 2012³².

Figure 1 shows the trend in the opinion of the national economic system: a heavily negative opinion as from the economic crisis of 2008 is evident, and, I would say, predictable.

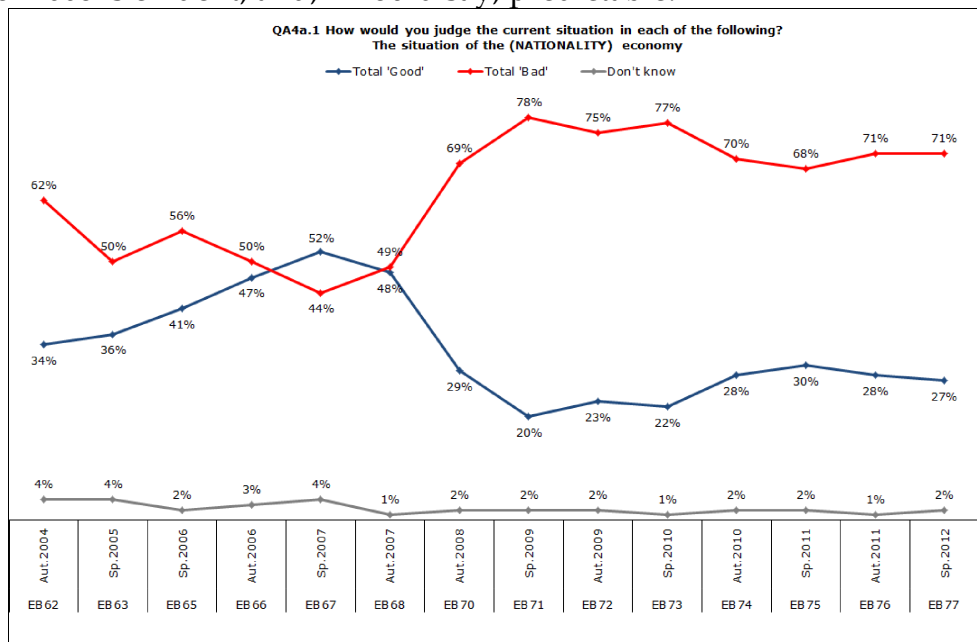


Figure 1 (Source: Eurobarometer)

However, I believe that the judgment on the current situation divided by countries, shown in Figure 2, is much more surprising and significant.

³² [Http://ec.europa.eu/public_opinion/archives/eb/eb77/eb77_en.htm](http://ec.europa.eu/public_opinion/archives/eb/eb77/eb77_en.htm)

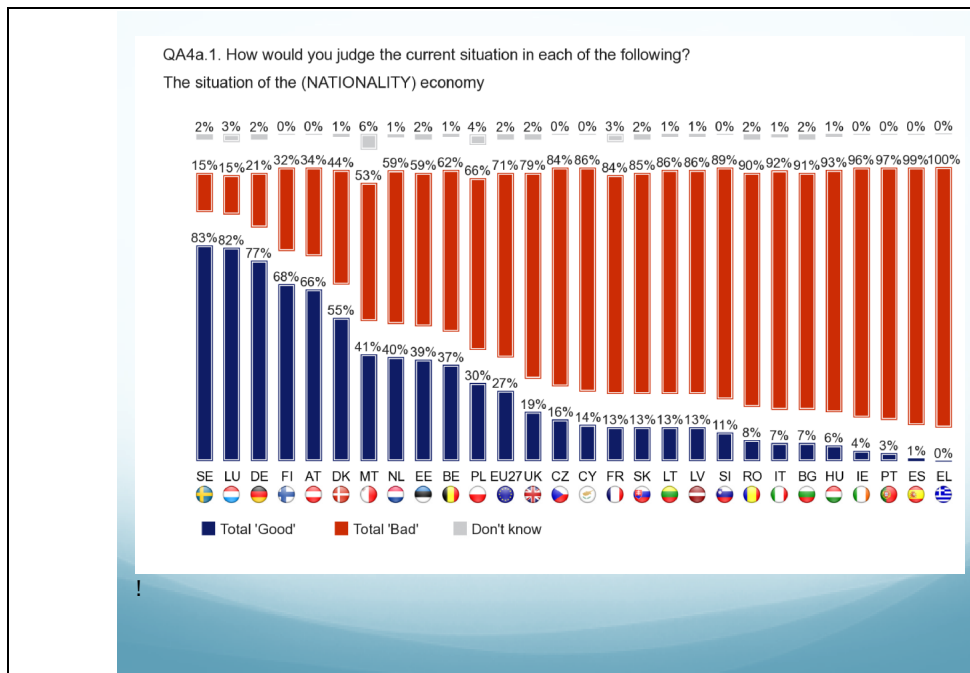


Figure 2 (Source: Eurobarometer)

The current differences between the Member States of the European Union in evaluating the economic situation are startling.

In Sweden, Luxembourg and Germany, *over two thirds* of the population believe that the situation is excellent. In any case, in Finland, Austria and Denmark *over half* the population believes that the situation is entirely good.

But this happens only in 6 states out of 27; in the remaining 21 upon 27, the exact opposite is true.

And if we consider the negative part of the graph, in 17 out of 21 states, *over two thirds* of the population believe the opposite; that is, that the situation is entirely negative.

We are thus before a divided and unbalanced Europe on the issue of the economic-financial crisis; a Europe in which the general aggregate negative opinion (71% “total bad”) derives from the arithmetic average between three states with an enthusiastic opinion and nine states in which discontent exceeds 89%!

Therefore, a first conclusion that can be drawn from these examinations is that the crisis definitely does have an impact, which however is not the same for everyone.

The immediate consequence of this opinion is the decrease in trust in national and European institutions.

Figure 3 shows the aggregate trend from 2004 to today.

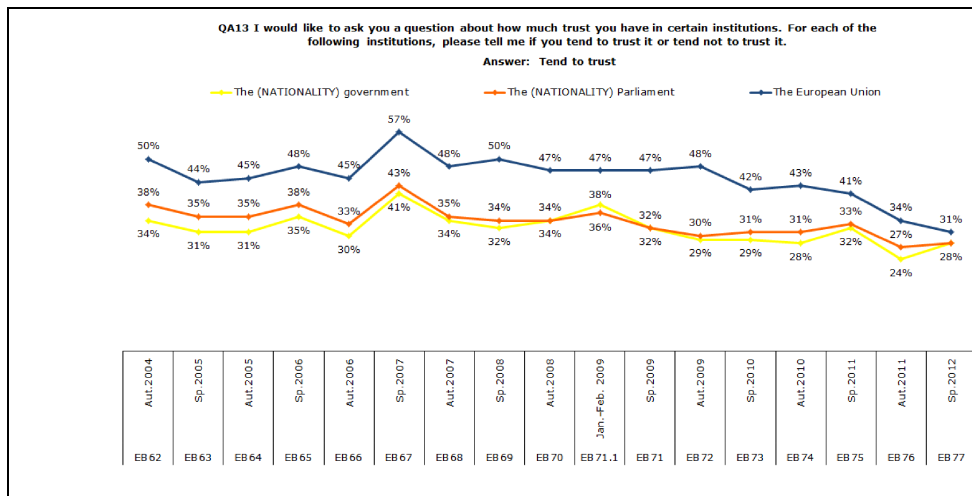


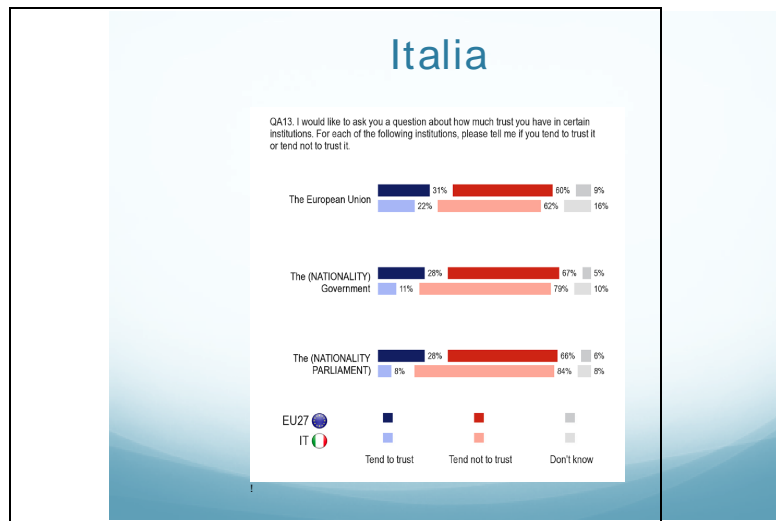
Figure 3 (Source: Eurobarometer)

As may be seen, trust in European institutions has always been higher than trust in national parliaments and governments, peaking in spring 2007 (when the Union enlarged to 27 Member States), while from the beginning of the economic crisis, in 2008, a slow decline began, until 2011 (in five years, seven points were lost), to collapse between 2011 and spring 2012 (in just over a year, ten percentage points were lost). There was a substantial convergence with the levels of trust (or rather, *mistrust*) in national institutions.

In other words, today, two-thirds of European citizens lack trust in European and national institutions.

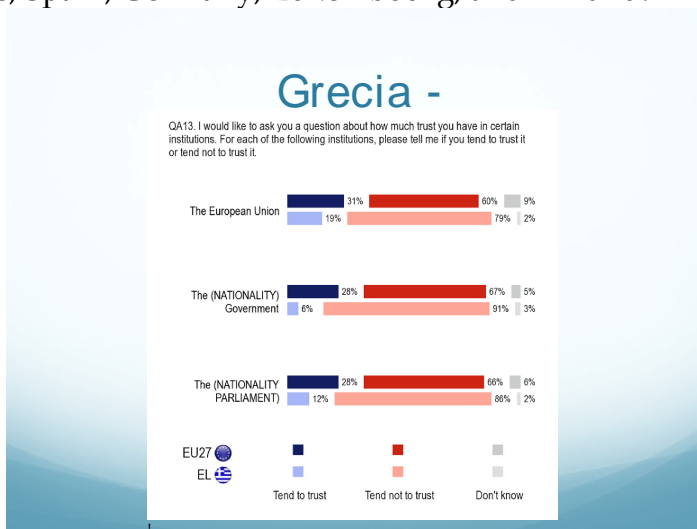
If we consider some individual country data, the results are alarming:

For example, Italy:



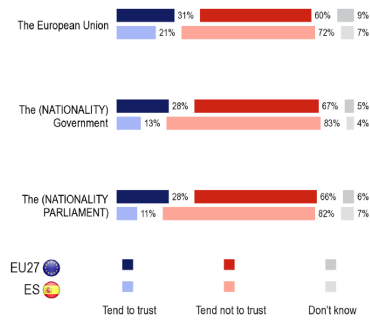
79% of interviewees does not trust the Government, 84% does not trust the Parliament; but the news that 62% does not trust European institutions is truly surprising, in light of the fact that in 2004 trust in European institutions exceeded 70%.

But let us examine the data on other European countries: Greece, Spain, Germany, Luxembourg, and Finland.



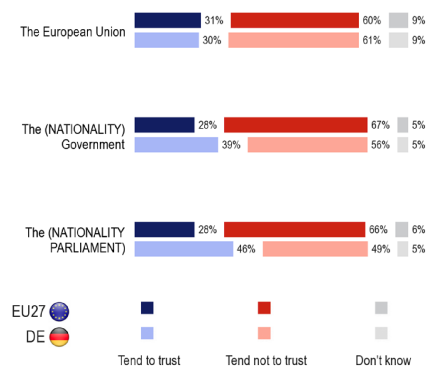
Spagna

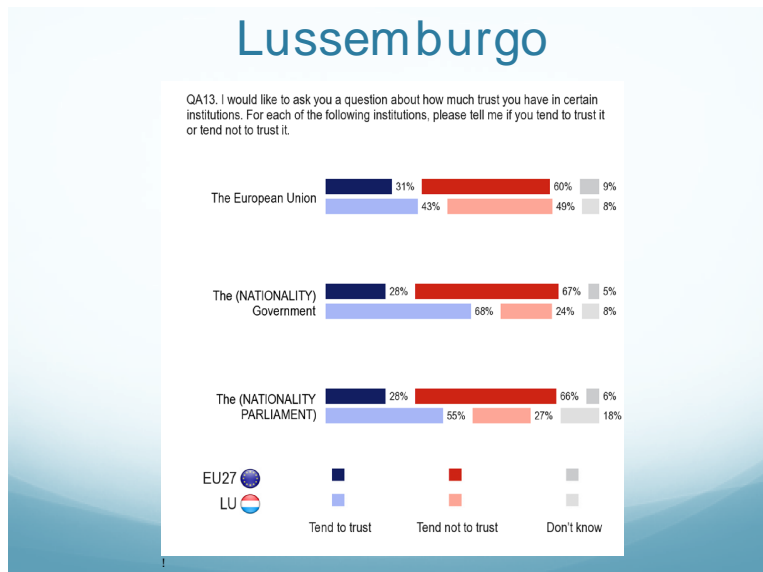
QA13. I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust it or tend not to trust it.



Germania

QA13. I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust it or tend not to trust it.





Two key observations may be drawn.

First, in the opinion of citizens, all public institutions have lost reliability.

However, whereas this observation may be considered *structural* in relation to national institutions before the crisis, I believe that it is possible to state that the “disaffection” for European institutions is an entirely new phenomenon. The rejection of the Constitutional Treaty certainly revealed difficulties

and differences within the European Union on fundamental questions such as its overall structure and nature. But at least on the technical level, European institutions had always enjoyed a relatively grater positive opinion than that on national institutions. Today, this is no longer the case; European institutions, accustomed to the technical strength of their decisions, must face the problem of regaining credibility and reliability, just like national institutions.

The second observation appears to be a paradox.

In the countries where the economic situation is considered better (Germany, Sweden, Luxembourg), citizens trust their own government and parliament more than they do European institutions; this means that the positive conditions of their economy are mainly attributed to national, and not to European, institutions.

Instead, in those countries where the economic situation is considered bad, citizens have very little trust in institutions in general, but they have more trust in European institutions than in their own governments and parliaments.

Therefore, Euroscepticism as a general attitude is growing, but, paradoxically, it grows more where the situation (economically at least) is better; this confirms that in these cases, there is greater trust of national institutions rather than European ones.

This data surely cannot be a source of comfort for Brussels institutions.

7. Conclusion: the current crisis as an opportunity to rethink the foundations of legal-constitutional systems?

It could be said that this article has painted too pessimistic a picture of the tenure of constitutional democracies, due to its emphasis on structural factors of crisis that were exacerbated by new shocks due to the economic-financial crisis. It could also be stated that the present age, if no longer the age of constitutions – destined to be obsolete – is however the great age of *constitutional judges*, of constitutional (especially supranational) courts, which remain the bulwark that defends the law against public power, which has always sought to reject all fetters.

There is no doubt that the judicial source of constitutional law is increasingly substituting itself to political sources, but it would be a serious mistake to think that the concrete implementation of constitutional law is of concern to judicial power alone.

Indeed, while in the context of the protection of *subjective* constitutional rights (Modugno) it is certain that judges have significant power and are usually more effective than the “rights policies” that have often been invoked (Weiler), in the context of the limitation of powers vis à vis fundamental freedoms, or in of the definition of powers, the role of judges is extremely weak. It is sufficient to examine how the Italian Constitutional Court “was subjected to” the constitutional reform of 2001 – on the powers of the state and regions – and unwillingly found itself in the position of supplementing the absence of implementing legislation with its own case-law, which was often perceived as oscillating and debatable.

Reflecting on the crisis of trust in European- and national-level political institutions brings us back to the first part of our analysis. Indeed, there is a commonality between the loss of “rigidity” of national and European constitutions and the low trust in the circuit of political decision-making overseen by those Constitutions.

In this connection, it is necessary to recall what Alessandro Pizzorusso effectively clarified³³: the “*legal superiority*”, in hierarchical terms, of post-WWII rigid constitutions has always been in “the expression of a *more intense political will* contained in these documents, as against ordinary legislation”(emphasis added); that is, constitutions have always enjoyed a sort of political added value because they express choices, values and a common good upon which social coexistence may be constructed.

Therefore, a crisis in “trust” cannot avoid having repercussions, sooner or later, on the legal “superiority” of constitutional sources.

³³ A. Pizzorusso, *Delle fonti del diritto*, in A. Scialoja, G. Branca (eds.), *Commentario al codice civile* (1977).

THE JUDICIAL 'BAIL OUT' OF THE EUROPEAN STABILITY
MECHANISM: COMMENT ON THE *PRINGLE* CASE

(Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and
The Attorney General*, [2012] not yet reported)

*Gianni Lo Schiavo**

Abstract

Since the beginning of the crisis, many responses have been taken to stabilise the European markets. *Pringle* is the awaited judicial response of the European Court of Justice on the creation of the European Stability Mechanism (ESM), a crisis-related intergovernmental international institution which provides financial assistance to Member States in distress in the Eurozone. The judgment adopts a welcome and satisfactory approach on the establishment of the ESM. This article examines the feasibility of the ESM under the Treaty rules and in light of the *Pringle* judgment. For the first time, the Court was called to appraise the use of the simplified revision procedure under Article 48 TEU with the introduction of a new paragraph to Article 136 TFEU as well as to interpret the no bail out clause under Article 125 TFEU. The final result is rather welcome as the Court endorses the establishment of a stability mechanism of the ESM-kind beyond a strict reading of the Treaty rules. *Pringle* is the first landmark ECJ decision in which the Court has endorsed the use of new and flexible measures to guarantee financial assistance between Member States. This judgment could act as a springboard for more economic, financial and, possibly, political interconnections between Member States in the Euro area.

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1. *Introduction*

The recent sovereign crisis in Europe has had important consequences for the established rules of the Economic and Monetary Union ('EMU'). The creation of financial assistance arrangements to Member States in distress is a critical phenomenon in this sense. The need for a new permanent stability

mechanism in Europe has acted as an essential step for the credibility of the EMU and for the sustainability of Euro area public finances.

At a political level, the creation of a new stability mechanism would assure that Member States in the euro area had a credible financial backstop to counteract credit crisis. At an institutional level, financial assistance to euro area Member States in distress and the creation of a *permanent* stability mechanism required a new institutional arrangement for crisis management beyond the limitations of the European Union budget and the existing Treaty rules. These political and institutional challenges led to the creation of the European Stability Mechanism ('ESM').

Against this background, the *Pringle*¹ case is a seminal judgment of the European Court of Justice (hereafter the 'ECJ' or the 'Court') on one of the most remarkable crisis-related reforms, the establishment of the ESM.² The judgment is twofold. The first part delves into the constitutional feasibility of the simplified Treaty revision procedure to create the ESM, namely the insertion of a new paragraph 3 to Article 136 TFEU through the European Council Decision 2011/199. The second part deals with the possibility for the Eurozone Member States to conclude and ratify an international agreement such as the ESM by way of interpretation of the Treaty rules and the general principles of European Union law. The questions posed to the Court are new in the post-Lisbon environment and raise a number of interesting legal issues, such as the constitutional impact of the ESM Treaty (hereafter the 'ESMT') on the EMU and, more generally, on the European constitutional system.

Before the delivery of the judgment, the adoption of the ESMT by Eurozone Member States had provoked a number of constitutional challenges in Member States. In particular, the Estonian Supreme Court was asked whether the ESMT was compatible with the Estonian Constitution. The answer of the

¹ Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*, [2012] not yet reported.

² For a more general appraisal of the origins of the ESM see A. de Gregorio Merino, *Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance*, 49 Com. Mkt L. Rev. (2012), 1613-1646.

Estonian Court was positive.³ Furthermore, the German Constitutional Court, in a much-awaited judgment, was invited to assess the compatibility of the ESMT with the German *Grundgesetz Norm*. The Karlsruhe judgment on 12 September 2012 paved the way for the entry into force of the ESMT.⁴

In *Pringle*, the ECJ endorses the Council Decision to amend the Treaty and declares the compatibility of the ESMT with the European rules brought to its attention by the referring Court. Most importantly, the value of the *Pringle* judgment lies in the interpretation, for the first time, of a number of core EMU provisions such as the no bail out clause under Article 125 TFEU. Moreover, *Pringle* has the clear merits of endorsing the Treaty amendment of Article 136 TFEU and of clarifying the relationship between the ESMT and the TFEU.

Before commenting upon the most interesting issues raised by the judgment, the legal background and the content of the ruling will be recalled.

2. *The legal and factual background*

Pringle should be seen in the wider context of the EMU. As is well known, the Treaty of Maastricht introduced a title on Economic and Monetary Policy. This framework has been defined as “asymmetric”⁵. This is because the monetary ‘pillar’ is far more advanced than the economic ‘pillar’. On the one hand, since 1999, monetary policy competences have been transferred to the European System of Central Banks (ECBS) where the European

³ See the English translation to the Estonian’s Supreme Court judgment of 12 July 2012 available at <http://www.riigikohus.ee/?id=1347>.

⁴ BverfG, BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, 12 September 2012 available in English at https://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html).

There was also another judgment decided by the German Constitutional Court on 19 June 2012, 2 BvE 4/11, concerning the German Bundestag’s rights to be informed by the Federal Government (press release available in English at <https://www.bundesverfassungsgericht.de/en/press/bvg12-042en.html>).

⁵ See F. Amtenbrink & J. de Haan, *Economic governance in the European Union: fiscal policy discipline versus flexibility*, 40 *Common Market Law Review* 1078 (2003); J.-V. Louis, *The Economic and Monetary Union: law and institutions*, 41 *Common Market Law Review* 575 (2004).

Central Bank ('ECB') is the principal institution for monetary policy in the Eurozone together with national central banks. On the other hand, economic policy is still dominated by Member States' competences.

As to monetary policy, Article 3(1)(c) TFEU states that the Union has an exclusive competence. As to economic policy, the wording of Article 5(1) TFEU affirms that "the Member States shall coordinate their economic policies within the Union (...)". Economic policy is still retained by Member States and the EU has not been conferred any specific competence except from a role of coordination. Member States' competences in the economic policy framework are still 'considerable'.⁶

The imbalance between monetary and economic policy has been stigmatized by the outbreak of the financial crisis. The limited competences of the Union to control and supervise Member States' budgets have had a clear impact on the EMU framework. Member States have been obliged to resort to special arrangements to assure fast liquidity to weaker Member States. In the early phases of the crisis, these measures have taken the form of bilateral loans to Greece⁷ as well as pan-Euro area loan facilities to Member States in economic distress. The European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) were established for these purposes.⁸

⁶ R. Palmstorfer, *To bail or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law*, 32 *European Law Review* 773 (2012).

⁷ On 25 March 2010 Euro-area Member States decided to establish an *ad hoc* intervention as part of a joint Eurozone-IMF financing package via the conclusion of "coordinate bilateral loans" that would complement the assistance provided by the IMF. See the text of the two agreements at www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/30/2d/05/302d058d2ca156bc35b0e268f9446a71c92782b9/application/pdf/sn_kyrwtikoimf_2010_06_04_A.pdf

⁸ The EFSM, adopted with Council Regulation 407/2010 establishing a European financial stabilization mechanism, OJ 2010, L 118/1, had a lending capacity of € 60 billion, whereas the EFSF was set up by the Eurozone Member States as a temporary intergovernmental lending facility which had a lending capacity of € 440 billion. See more extensively, A. de Gregorio Merino, *Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance*, cit. at 2, 1615-1621. See, further, P. Craig, *The Lisbon Treaty, Revised Edition: Law, Politics, and Treaty Reform* 466-468 (2013).

In order to ensure balance and sustainable growth, during the European Council meeting of 28 and 29 October 2010, the Heads of State and of Government convened on the need for the Member States to create a *permanent* crisis mechanism in order to safeguard the financial stability of the euro area. The President of the European Council agreed to undertake consultations for an amendment of the Treaty required to that effect. Heads of State and Government agreed that, as this permanent mechanism would be designed to safeguard the financial stability of the euro area as a whole, Article 122 paragraph 2 TFEU would no longer be needed. Hence, on 16 December 2010 the Belgian Government submitted a proposal for the review of Article 136 TFEU, pursuant to Article 48 paragraph 6 TEU, with a view to add a paragraph 3 to that article. Decision 2011/199 was adopted on 25 March 2011.⁹

This European Council decision adds a new paragraph to Article 136 TFEU according to which:

“The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”.

Pursuant to Article 2 of the decision, Member States proceeded with the completion of procedures for the approval of the decision in accordance with their respective constitutional requirements. The amendment entered into force on 1 January 2013.

At the same time, Member States whose currency is the euro concluded the ESMT with a view to assume the tasks of the EFSF and the EFSM. The ESM has been conceived as a Luxembourg-based international organisation composed of a Board of Governors, a Board of Directors and a Managing Director. The ESM provides, where needed and subject to conditionality, financial assistance to euro area Member States in financial difficulties.¹⁰ Following the adoption of the ESMT, all the

⁹ 2011/199/EU: European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, [2011] OJ L 91

¹⁰ A. de Gregorio Merino, *Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance*, cit. at 2, 1621 et seq..

euro area Member States have proceeded with the ratification of the ESMT according to their constitutional requirements and have paved the way for the entry into force of the agreement before the actual entry into force of the Treaty amendment.

When a Eurozone Member State in distress needs financial assistance, the parties involved would prepare and sign a Memorandum of Understanding ("MoU") which shall reflect the severity of the weaknesses to be addressed in order to receive assistance.¹¹

The ESMT provides for a number of programmes to assist the Eurozone Member States. Financial assistance might be used to recapitalize the financial institutions of a specific Member State.¹² The ESM can provide precautionary financial assistance when the economic condition of a Member State is sound enough to retain access to the market, but financial aid is necessary in order to avoid a crisis.¹³ Further, the ESM can grant loans to Eurozone Member States who have lost access to financial markets either through excessive costs or lack of lenders. The Primary Market Support Facility (PMSF) allows the ESM to buy bonds in the primary bond market of the Eurozone Member State either to facilitate that it returns to the financial markets or to increase the efficiency of other ESM financial aid.¹⁴ Intervention in the secondary bond markets is designed to reduce interest rates in the secondary market and to help Eurozone Members struggling with the refinancing of their banking systems.¹⁵

Spain has been the first Eurozone Member State to make use of the ESM funds. It has been granted financial assistance to recapitalize the country's banking sector.¹⁶ More recently, Cyprus has been granted financial assistance through the ESM in the aftermath of its banking crisis in early 2013.¹⁷

¹¹ ESMT, Article 13(3).

¹² *Ibidem*, Article 15.

¹³ *Ibidem*, Article 14.

¹⁴ *Ibidem*, Article 17.

¹⁵ *Ibidem*, Article 18.

¹⁶ Relevant information on the Spanish financial assistance programme can be found at <http://www.esm.europa.eu/about/assistance/spain/index.htm>

¹⁷ Relevant information on the very recent Cypriot financial assistance programme can be found at <http://www.esm.europa.eu/about/assistance/cyprus/index.htm>

The ESM entrusts the EU institutions with crucial tasks in granting and supervising financial assistance. The European Commission and the ECB assess the needed financial needs¹⁸ as well as the sustainability of the Member State's public debt and the corresponding risk of financial stability to the Eurozone as a whole.¹⁹ Following the decision to grant aid and in liaison with the ECB, the Commission negotiates the MoU with the concerned Member State.²⁰ Thereafter, the Commission signs the MoU on behalf of the ESM.²¹ In the implementing phase, the ESM and the ECB monitor compliance with the conditionality laid down in the MoU.²² The ECJ is entrusted with the task of adjudicating disputes between the ESM and a Member State or among several Member States relating to the interpretation and application of the ESMT when an ESM decision on the matter is contested.²³

During the process of ratification of the ESMT Mr. Pringle brought an action before the High Court of Ireland. In turn, he contested the lawful adoption of the Decision 2011/199 because, in amending the Treaty, it entailed an alteration of the competences of the EU and it was inconsistent with EU rules on economic and monetary policy and with general principles of EU law. Further, the claimant asserted that the entry into force of the ESM would create obligations to Ireland which, among others, would be in contravention with the Treaty rules on economic and monetary policy and would encroach with the exclusive competence of the Union in relation to monetary policy. Then, he criticized that the creation of an autonomous and permanent international institution would circumvent the rules contained in the Treaty as regards economy and monetary policy.

Following the claims brought forward by Mr. Pringle, the Irish High Court dismissed his action in its entirety. Mr. Pringle appealed before the Supreme Court of Ireland which decided to refer a number of questions to the Court of Justice for preliminary

¹⁸ ESMT, Article 13.

¹⁹ *Id.*.

²⁰ *Ibidem*, Article 13.3.

²¹ *Ibidem*, Article 13.4.

²² *Ibidem*, Article 13.7.

²³ *Ibidem*, Article 37.3.

ruling.²⁴ Given the urgency of the subject, the ECJ applied the accelerated procedure. The case was assigned to the full Court.

3. *The judgment*

Following the Advocate General ("A.G.") Kokott 'views' on 26 October 2012,²⁵ the Court delivered its judgment on 27 November 2012. The Court's judgment comprises three questions.

3.1 *The question concerning the validity of Decision 199/2011*

The first question referred to the Court concerns the validity of the Treaty amendment of Article 136 TFEU and the use of the simplified revision procedure under Article 48 paragraph 6 TEU.

After having established that the Court has jurisdiction and that the question is admissible,²⁶ the Court scrutinises the impact of the amendment to the TFEU and ascertains whether the effects of such amendment concern solely provisions of Part Three of that Treaty and whether such amendment increases the competences attributed on the Union in the Treaties.

The ECJ reaches the conclusion that the ESM pursues the objective of maintaining the stability of the euro area as a whole whereas the Eurosystem pursues the objective of price stability. The Court observes that it is clear that the establishment of the ESM does not encroach on the monetary policy as the ESM's objective "to safeguard the stability of the euro area as a whole, that is clearly *distinct* from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy. Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for *the sole reason that it may have indirect effects on the stability of the euro*".²⁷ Further, it specifies that

²⁴ See *Pringle v. Ireland*, [2012] IESC 47, para.5 (S. C.) (Ir.) available at http://www.courts.ie/_80256F2B00356A6B.nsf/0/E7504392B159245080257A4C00517D6A?Open&Highlight=0,Pringle,~language_en

²⁵ A. G. Kokott View on *Pringle* delivered on 26 October 2012.

²⁶ *Pringle* judgment, paras 30-44.

²⁷ *Ibidem*, para. 56 (emphasis added).

the ESM has the primary objective of managing financial crises which might arise and does complement the new regulatory framework for strengthened economic governance of the Union as envisaged in a number of new measures.²⁸

It follows that the establishment of that mechanism does not encroach upon the exclusive competence of monetary policy held by the Union and does not affect the restricted role of the Union in the area of economic policy.²⁹ The Court concludes that Decision 199/2011 satisfies the conditions established under Article 48 paragraph 6 TEU by means of a simplified revision procedure.

The Court concludes that Decision 199/2011 does not establish any new competence on the Union as the Treaty amendment does not create any legal basis for the Union and is silent as to any possible role for the Union's institutions in the field.³⁰

3.2 The right to conclude and ratify the ESM Treaty and EU law

The Court subsequently focuses on the question whether the power to conclude and ratify an agreement such as the ESMT is compatible with some European Treaty articles.

On substance, the Court analyses the provisions relating to the exclusive competence of the Union in the monetary policy and the power to conclude international agreements.

With regard to the monetary policy competence, the ECJ denies that the role and the tasks of the ESM would fall within the monetary policy under the TFEU. According to Articles 3 and 12(1) of the ESMT, the ESM is not entitled to set the key interest rates for the euro area or to issue euro currency, but it seeks to provide financial assistance entirely granted by the ESM from paid-in capital or by the issue of financial instruments.³¹ Furthermore, the Court recalls that even if the activities of the ESM might have an influence on the rate of inflation, such

²⁸ *Ibidem*, paras 58 and 59.

²⁹ *Ibidem*, paras 63 and 64.

³⁰ *Ibidem*, paras 73-75.

³¹ *Ibidem*, para. 96.

influence would constitute “only indirect consequence of the economic policy measures adopted”.³²

As to Article 3 paragraph 2 TFEU on the exclusive power to conclude international agreements, the Court states that the ESM does not affect common rules or alter their scope.³³

Further, the Court conducts an extensive analysis on the interpretation of the ESM with the economic coordination provisions under Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU.

The judgment states that “the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism”.³⁴ Even though the Court distinguishes between the ESM’s conditionality and economic policy coordination, it emphasises that the ESM comes within the economic policy element of the EMU as the conditionality attached to the ESM stability support shall be compatible with the TFEU-based coordination of economic policies.³⁵ Similarly, the Court excludes that the ESM affects the excessive deficit procedure under Article 126 as the ESMT, provides “that the conditions imposed on ESM Members who receive financial assistance must be consistent with any recommendation which the Council might issue under [the excessive deficit procedure]”.³⁶ The ECJ holds that the nature of the ESM is “to mobilise funding and to provide financial stability support to ESM Members who are experienced, or threatened by severe financial problems”.³⁷

Then, the Court interprets the ESM in light of Articles 123 and 125 TFEU. First, the Court specifies that Article 123 TFEU is addressed specifically to the ECB and to the central banks of the Member States, and not to Member States as a whole, which are entitled to create mechanisms of financial stability. Member States are not covered by that provision.³⁸

³² *Ibidem*, para. 97.

³³ *Ibidem*, para. 107.

³⁴ *Ibidem*, para. 110.

³⁵ *Ibidem*, paras 111-112.

³⁶ *Ibidem*, para. 113.

³⁷ *Ibidem*, para. 110.

³⁸ *Ibidem*, para. 125.

Second, the Court examines more in details the spirit of the provision of Article 125 TFEU. Even if not in such a detailed way as the A.G. did,³⁹ the Court stresses that “the ESM will not act as guarantor of the debts of the recipient Member State by referring to the spirit of the article inserted by the Treaty of Maastricht. In fact, the latter will remain responsible to its creditors for its financial commitments”.⁴⁰ The nature of that rule, as it can be seen in the preparatory work relating to the Treaty of Maastricht, lies in the aim of the article itself which is to ensure that the Member States follow a sound budgetary policy by assuring that they are subject to the logics of the market when they enter into debt. Hence, the ECJ concludes that the no bail out clause is not infringed by “the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy”.⁴¹

Further, the judgment is devoted to the interpretation of Article 13 TEU which provides that each institution shall act within the limits of the powers conferred on it by the Treaty. First, the Court examines the role allocated to the Commission and to the ECB. It recalls that, in cases of non-exclusive competences of the Union, Member States can confer powers to the Union institutions, on condition that the Member States do not alter the essential character of the powers conferred on those institutions by the Treaties. Moreover, the Court states that the provisions of the Treaty do not establish a specific competence to establish a permanent stability mechanism. Article 20 TEU on enhanced cooperation does not preclude a role for the Commission and the ECB in the ESM.⁴²

As to the role allocated to the Court, the judgment confirms that Article 273 TFEU does not preclude the possibility to confer a judicial role to the Court in cases of international agreement outside the Union framework. On the contrary, the conditions laid

³⁹ A.G. Kokott View, paras 100-166.

⁴⁰ Pringle judgment, para. 138.

⁴¹ *Ibidem*, para. 137.

⁴² *Ibidem*, paras 168-169.

out in the ESMT under Article 37 appear consistent with the provision under Article 273 TFEU.⁴³

3.3 *The question concerning the ratification of the ESM Treaty*

Finally, the Court assesses whether the Member States can conclude and ratify the ESM Treaty before the entry into force of Decision 199/2011. Very briefly, the Court states that that decision does not confer any new power to the Member States and, thus, concludes that the ESM Treaty is not subject to the entry into force of Decision 2011/199.⁴⁴

4. *Commentary*

The ruling in the *Pringle* case is a seminal ECJ judgment.⁴⁵ The Court endorses the amendment of Article 136 TFEU and concludes that the ESMT is compatible with the rules of the Treaty. It was a rather awaited judgment, especially because of the incumbent entry into operation of the ESMT and the need to provide rapidly a safety net for Member States in distress. Along the lines of this contribution, the full Court ECJ ruling constitutes the ECJ “bail out” of the ESM. This is for two reasons.

First, by clarifying the extent of powers to exercise the Treaty amendment powers under Article 48 TEU, the Court allows the revision of Article 136 TFEU.

Second, the judgment, for the first time since the adoption of the Maastricht Treaty, analyses core provisions in the economic and monetary policy title (in particular Articles 122 and 125 TFEU) and it clarifies the extent of power to provide financial assistance between Member States. In sum, the judgment legitimizes the possibility to use an international instrument between Member

⁴³ *Ibidem*, paras 171-177.

⁴⁴ *Ibidem*, paras 184-185.

⁴⁵ At the time of writing some commentaries on *Pringle* have been published: V. Borger, *The ESM and the European Court's Predicament in Pringle*, 14 *German Law Journal* (2013) 113-140; P. Van Malleghem, *Pringle: A Paradigm Shift in the European Union's Monetary Constitution*, 14 *German Law Journal* 141-168 (2013); P. Craig, *Guest Editorial Article*, 20 *Maastricht Journal on Comparative and European Law*, 3-11 (2013); B. de Witte & T. Beukers, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, 50 *Common Market Law Review* 805-848 (2013).

States to reinforce financial assistance in the Eurozone. Such solution appears sensible and the judgment itself stands out as a significant precedent with a view to take further action to reduce the impact of the financial crisis.

After having briefly mentioned some aspects on admissibility and jurisdiction, the commentary will address the extent of powers to conclude an international agreement as it happened for the ESM. Then, it will concentrate on the extent of revision powers in the Treaties in the context of economic and monetary policy. Finally, it will assess the judicial interpretation of the Treaty rules on economic and monetary policy with particular emphasis on the no bail out clause under Article 125 TFEU.

4.1 Admissibility and Jurisdiction

4.1.1 Jurisdiction

The new Lisbon framework did not pose particular problems to the Court to exercise its jurisdiction on the case. The Court affirms that it has jurisdiction under the Treaty to establish the feasibility on the use of the simplified revision procedure under Article 48 paragraph 6 TEU.

Competences and powers of the EU have been substantially increased and it is no surprise that Decision 199/2011 can be subject to the Court jurisdiction. This is because the European Council has become a stand-alone EU institution with the power to adopt decisions which can, in principle, be subject to the Court jurisdiction.⁴⁶

This is the first time that the Court pronounces itself on the new simplified revision procedure introduced by the Lisbon Treaty. The position of the Court is quite clear in affirming its jurisdiction as Article 48 paragraph 6 TEU does not specify which institution has jurisdiction on the revision procedure. De Witte held that the Court would be involved on disputes about the scope of Article 48 paragraph 6 TEU.⁴⁷ This has been precisely the case.

⁴⁶ Article 13 TEU and Article 267 TFEU.

⁴⁷ Bruno De Witte, *The reform of the revision rules by the Lisbon Treaty*, in P. Eeckhout, A. Biondi & S. Ripley (ed.), *EU law after Lisbon* 124 (2012).

4.1.2 Admissibility

As to the first question, the Court reaffirms the *TWD* doctrine and excludes that Mr. *Pringle* had standing before the Court for a direct challenge to the European Council decision.

Under Article 263 paragraph 4 TFEU “[a]ny natural or legal person may (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them (...)”. In other words, any natural or legal person shall demonstrate that the Union act is addressed to him or that it is of direct and individual concern to him in order to have standing before the ECJ.⁴⁸

Differently, an indirect challenge to a Union act - *in casu* the decision of the European Council - can be made through the preliminary ruling procedure under Article 267 TFEU without any specific condition on the standing.

As it is well established in the Court case law, the *TWD* doctrine maintains that if an individual has *locus standi* for bringing an annulment action before the European judicature - *id est* the Union act is of direct and individual concern to the applicant - and such action is not exercised in due time, a preliminary ruling on the same matter is inadmissible.⁴⁹

Mr. *Pringle* had not, beyond any doubt, direct and individual concern to bring action against Decision 2011/199. This is because the challenged decision is an act of general application and does not directly and individually concern Mr Pringle. It flows from the content of the Decision itself that it did not apply as such to a limited category of individuals among which Mr.

⁴⁸ Note, however, that the Lisbon Treaty added a new indent to article 263 paragraph 4 TFEU according to which “any natural or legal person (...) may institute proceedings (...) against a *regulatory act* which is of direct concern to them and *does not entail implementing measures*” (emphasis added).

⁴⁹ Case C-188/92, *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland*, ECR [1994] I-00833, paras 23-24. The *TWD Textilwerke Deggendorf* case concerned the reimbursement of an unlawfully granted aid. The German Government informed the company, and told it also to the Commission’s decision could be challenged under Article 263 TFEU. The company did not challenge the Commission’s decision, but instead sought to raise the legality of the Commission’s decision via the national courts. See also case C-550/09, *E and F*, [2010] ECR I-6213, paras 45-46. On the *TWD* doctrine see more extensively Roland Schwensfeier, *The TWD principle post-Lisbon*, 37 *European Law Review*, 156-175 (2012).

Pringle.⁵⁰ On the contrary, the European Council decision is of general application. This was uncontested and the Court has correctly declared the action as admissible.

As to the second question, it is well established that preliminary rulings are an instrument of judicial cooperation that allow the Court of Justice to provide “national courts with the criteria for the interpretation of European Union law which they need to decode the dispute before them”.⁵¹

However, a number of conditions need to be respected for the preliminary ruling order. As to the one contested in the *Pringle* case, the order of reference should give sufficient information on the Treaty rules invoked. Accordingly, both the Court and the A.G. contended that some provisions indicated in the order of reference did not come into question for the outcome of the dispute. In particular, the Court stresses that Articles 2 and 3 TEU do not come within the scope of the second question. This position reinforces the duty on the part of the referring court to specify the EU provisions that the referring court should or shall ask for reference to the benefit of the national proceedings.

4.2 Substance

4.2.1 Judicial endorsement of international agreements outside the EU legal framework?

The *Pringle* judgment raises three questions on the extent of powers to conclude and ratify the ESMT under EU external relations law. First, the judgment questions the conclusion of an international agreement outside the EU legal framework. Second, it affirms the use of the Commission and the ECB institutions in cases outside the Union legal framework. Third, it assesses Article 273 TFEU and the role of the ECJ itself in the framework of the ESM.

⁵⁰ *Pringle* judgment, para. 42.

⁵¹ *Ibidem*, para. 83.

4.2.1.1 *The ESM and international agreements between Member States*

First, it is clear that the ESM Treaty was concluded as an *inter se* international agreement, thus between some Member States and outside the Union framework. The European Treaties do not contain rules to provide *permanent* financial assistance to Member States in distress.

Conversely, the Lisbon Treaty introduces rules, codified from case law, that give exclusive competences to the Union for the conclusion of international agreements with international organizations and third countries. In particular, Article 3 paragraph 2 TFEU affirms that the Union has exclusive competence to conclude an international agreement in so far as its conclusion would "affect common rules or alter their scope". Correctly, the Court excludes that the ESMT refers to those situations.

However, the ECJ makes two mistakes. First, Article 3 paragraph 2 TFEU refers to international agreements with third countries and not between Member States. It appears that reference to such article is wrong as the ESMT is an international agreement between Member States and not with third states or international organizations. Article 3 paragraph 2 TFEU should not have been mentioned in this case.

Second, the Court holds that the ESMT neither affects "common rules nor alters their scope".⁵² The ESMT shall not be seen as an initiative impinging on exclusive or shared competences of the Union, *in casu* monetary policy. This argument serves the Court to conclude that the ESM does not affect common rules because economic policy is not an area of *common* rules. However, the Court seems to be wrong when it refers to *common* rules as the ESMT shall be considered close to an economic policy instrument.⁵³ This area is not - strictly speaking - a common policy within the meaning of Article 3 paragraph 2 TFEU.

On a more positive note, this ECJ assumption entails some duties on the part of Member States. To such purpose, the Court reaffirms the *Gottardo* case law according to which, even when concluding international agreements outside EU competences,

⁵² See *Ibidem*, paras 102-104. Emphasis added by the author.

⁵³ See, clearly, Pringle judgment, para. 60.

Member States need to comply with EU law when exercising their competence in their reserved competence area.⁵⁴ This means that the Member States need to respect EU law even when they act outside its scope.

4.2.1.2 *The ESM and the role of the Commission and the ECB*

Second, the judgment gives some interesting indications on the use of Union institutions in international agreements.⁵⁵ *Pringle* gives ground to the Court to assess the use of the Commission, the ECB and the Court itself in situations where EU institutions are given competences outside the Union framework. Some case law already existed and is mentioned by the Court. The Court refers to the *Bangladesh* case⁵⁶ and to the *Lomé* case.⁵⁷

The *Bangladesh* case concerned the constitution of a fund of aid to Bangladesh as an extra-EU instrument. The European Parliament challenged the validity of a collective decision by all Member States to grant such aid and to confer power to the Commission to manage that aid to be given. In the *Lomé* case the European Parliament contested a decision of the Council to establish a system outside the EU budgetary procedure to administer Member States' assistance to some third countries within the framework of the Lomé Convention. This reference to the previous case law allows the Court to affirm in *Pringle* that additional tasks can be conferred to Union institutions so long as

⁵⁴ Case C-55/00, *Elide Gottardo v. Istituto nazionale della previdenza sociale (INPS)*, [2002] ECR I-00413, para. 32. This case concerned Mrs Gottardo, an Italian citizen who worked as a teacher in Italy, Switzerland and France, and wished to obtain an old-age pension in Italy. She would be entitled to an Italian old-age pension if account were also taken of her Swiss contributions in the overall calculation of her contributions pursuant to the 1962 Italian-Swiss convention on social security.

⁵⁵ See, more extensively, S. Peers, *Towards a new form of EU law? The use of EU institutions outside the legal framework*, 9 *European Constitutional Law Review*, 37-72, in particular at 46-55 and 61-65 (2013); and P. Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework*, 9 *European Constitutional Law Review*, 263-284 (2013).

⁵⁶ Cases C-181 and 248/91, *Parliament v. Council and Commission (Bangladesh aid)*, [1993] ECR I-3865, para. 20.

⁵⁷ Case C-316/91, *Parliament v. Council* [1994] ECR I-625.

they “do not alter the *essential character* of the powers conferred on those institutions by the EU and FEU Treaties.”⁵⁸

Paragraph 158 confirms that the *Bangladesh* and *Lomé* case law is still good law and that Member States can confer additional tasks to the Union institutions also when they use the intergovernmental means or they act outside the Union framework. However, one may argue whether the doctrine according to which it is possible by international agreements to confer additional functions to EU institutions, so long as the basic competences of the EU are not affected, has not been stretched too much. In other words, to what extent may EU institutions be “borrowed” for international arrangements between Member States? Some conditions need to be respected: the Union shall not have exclusive competence; the tasks conferred to EU institutions shall not entail any power to make decision of their own; and the additional tasks shall not alter the essential character of the powers conferred to them by the Treaties. Unfortunately, the Court does not go more into the details of each condition and bases its reasoning on previous case law rather than proposing some new grounds to assess these conditions.

In other words, It is submitted that the judgment should have clarified better the degree of involvement of the EU institutions in the ESM decision-making process. It is true that the ESMT indicates that the Board of Governors plays a central role in the ESM. It acts as the main body to take decisions to grant financial assistance to Member States in difficulty. The Commission and the ECB should only play a role of assistance. However, the ESMT suggests that both the Commission and the ECB may exert some quasi-decisional powers. A strict reading of the ESMT would suggest that these powers would run counter to the second condition mentioned by the Court. Some more indications from the Court could have been considered.

Furthermore, the relationship between the use of Union institutions and the enhanced cooperation under Article 20 TEU needed further clarifications. According to this article Member States may make use of enhanced cooperation between themselves within the framework of the Union's non-exclusive competences by making use of Union institutions. The applicant argued that

⁵⁸ Pringle judgment, para. 158 (emphasis added).

Article 20 TEU on enhanced cooperation should be used. This argument is correctly rejected by the Court as Article 20 TEU refers only to cases where the Union has competences to establish a permanent mechanism and this was not the case.⁵⁹ However, the Court fails to give more indications on how to use the procedure under Article 20 TEU. How would the enhanced cooperation procedure under Article 20 TEU be used in areas covered by Union policies?⁶⁰

4.2.1.3 *The ESM and the role of the ECJ*

Third, *Pringle* sheds some light on the interpretation of Article 273 TFEU. This provision affirms that the Court “shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties”. It serves to avoid a divergent interpretation of EU law by other jurisdictions and to assure unity in the interpretation of EU law.⁶¹ Accordingly, the ESMT states that if decisions of the Board of Governors are contested, the dispute is submitted to the Court of Justice.⁶²

The Court’s reading of Article 273 TFEU is quite broad. First, the Court recognizes that Article 273 TFEU may be invoked also *ex ante causa*. It means that it is not necessary that the actual dispute has arisen.⁶³ Second, the expression “subject matter” can concern the Treaties, and *a fortiori* EU law, as the ESMT requires that the stability support be fully consistent with EU law.⁶⁴ However, one may question the fact that the Court affirms that the

⁵⁹ *Ibidem*, paras 168-169.

⁶⁰ However, on the interpretation of the provisions on enhanced cooperation in the context of the unitary patent system see the recent joined cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic v Council of the European Union*, nyr, commented in F. Fabbrini, *Enhanced Cooperation under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary*, 40 *Legal Issues of Economic Integration* 197-224 (2013).

⁶¹ See more extensively K. Lenaerts, D. Arts & I. Maselis, *Procedural law of the European Union*, 502 et seq. (2006).

⁶² ESMT, article 37.

⁶³ *Pringle* judgment, para. 172.

⁶⁴ *Ibidem*, para. 174.

dispute will be *likely* to concern the interpretation or application of EU law. Does this mean that in some cases the Court's jurisdiction will not be in place as regards some ESM Treaty disputes on unrelated EU law subjects? The Court does not give hints on this. Finally, the Court includes under Article 273 TFEU also disputes where international organisations are party to.⁶⁵

Overall, the Court's reading on Article 273 TFEU is a welcome development. It is submitted that the Court adopts an extensive and open interpretation on the possibility to conclude international agreements outside the Union framework and to make use of EU institutions to that effect. This might reinforce Member States to rely on international agreements concluded between each other in order to tackle the debt crisis in future.

4.2.2 *The extent of simplified revision powers and the ESM: between policies and competences*

The third question before the ECJ explicitly affirms that "Decision 2011/199 confirms the existence of a power possessed by the Member States".⁶⁶ It is clear that the entry into force of the Treaty amendment did not affect the power to adopt the ESMT alone. This conclusion questions whether the Treaty amendment is really necessary to adopt international agreements between Member States to establish permanent financial assistance facilities. Does Article 136 paragraph 3 TFEU really add a new legal dimension to international agreements between Member States or is the amendment only the result of a political compromise between Member States and the EU institutions? It appears that the revision of Article 136 paragraph 3 TFEU is not a necessary element to the entry into force of the ESMT from a legal point of view.

Having said that, it is important to appraise the simplified revision procedure as *Pringle* gives significant indications on the relationship between the simplified revision procedure under Article 48 TEU and the nature of the EMU.

Revision procedures are contained in Article 48 TEU. The Treaty provides for an ordinary and a simplified revision

⁶⁵ *Ibidem*, para. 175.

⁶⁶ *Ibidem*, para. 184 (emphasis added).

procedure. As underlined above,⁶⁷ the first question concerned the possibility to amend the Treaty through the simplified revision procedure of Article 48 TEU paragraph 6 TEU by inserting a third indent to Article 136 TFEU.

The functionality of the simplified revision procedure is to avoid recourse to the ordinary revision procedure where a Convention composed of the representatives of the Member States' governments is necessary. According to the simplified revision procedure, the proposed amendment will be adopted directly by the European Council acting by unanimity of its members without a Convention. However, two essential conditions are necessary to make use of Article 48 paragraph 6 TEU: first, the amendment shall concern solely the provisions of Part Three of the TFEU on Union internal policies and actions (Articles 26-197 TFEU); second, the revision shall not increase competences conferred on the Union by the Treaties.⁶⁸ The Court assesses these conditions in turn and comes to the conclusion that the amendment is compatible with the procedure under Article 48 paragraph 6 TEU.

In general terms, it is the first time that the Court interprets Article 48 TEU and the conditions therein. This allows us to make three critical remarks on this contentious part of the judgment.

First, it is important to note that the content of the article amendment refers to the possibility to allow the conclusion of an international treaty, such as the ESM and not a Union arrangement. This shows that the simplified amendment procedure can also be used to insert provisions that do not necessarily concern EU law.

Second, and more interestingly, the essential question that the Court addresses is whether the new amendment impinges on monetary and economic policy. It is well known that the EMU is composed of two "pillars": monetary policy and economic policy.⁶⁹ The former is an exclusive competence; the latter is a

⁶⁷ See *supra* Section 3.1.

⁶⁸ More generally on the simplified revision procedure see S. Peers, *The future of EU Treaty Amendments*, in T. Tridimas & P. Eeckhout (eds.), *Oxford Yearbook of European law* 31-42 (2012).

⁶⁹ See *supra* Section 2.

“peculiar” competence reserved to Member States through a system of coordination of economic policies.⁷⁰

The Court has the opportunity to interpret the concept of “economic” and “monetary” policies as contained in the Treaty. However, the Court appears to limit its interpretation by stating that the EU’s economic policy competence has merely a coordinating nature. In such way, the Court does not recognize that the Union competence in this field can go beyond the simple coordination and, at the same time, it does not exclude that it can include also *ad hoc* financial assistance under Article 122 paragraph 1 TFEU.⁷¹

The Court’s conclusion on the Treaty amendment is clear: the amendment of Article 136 TFEU concern solely economic policy and not monetary policy which therefore is not altered by the new provision.⁷² This reasoning is remarkable as it allows for future use of the simplified revision procedure in the EMU Title whenever the envisaged revision does not impinge on monetary policy *stricto sensu*. Even if financial assistance measures “may have *indirect* effects on the stability of the euro” (emphasis added), it can be argued that paragraph 56 gives ground to reform economic policy measures through the simplified revision procedure. In other words, the simplified revision procedure can be used even if the amendment has direct effects on the stability of the euro, but only indirectly on price stability, and thus on monetary policy.

An example could be the use of the simplified revision procedure to put forward amendments to create the Banking Union as long as the proposed amendment does not directly impinge on monetary policy. However, it is difficult to believe that the procedure under Article 48 paragraph 6 TEU may be used to reform the Treaty on prudential supervision of credit institutions. Article 127 paragraph 5 TFEU, which refers to the role of the ESCB to “contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential

⁷⁰ R. Palmstorfer, *To bail or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law*, cit. at 6, 773.

⁷¹ On article 122 TFEU see below Section 4.2.3.1.

⁷² Pringle judgment, para. 56.

supervision of credit institutions and the stability of the financial system”, is a provision contained in the monetary policy chapter.

A restrictive reading of the Article 48 paragraph 6 TEU conditions would exclude the use of the simplified amendment provision to change the Treaty on the role of the ESCB in banking supervision.

However, one might argue whether Article 127 paragraph 5 TFEU refers to the *core* of monetary policy or rather to the “indirect” tasks of the ESCB’s activities on monetary policy. If we follow the second interpretation, it is submitted that Article 48 paragraph 6 TEU could be used to such purposes. However, one might still argue what content the new provision should have. If the amendment increases new competences to the Union, it would still infringe one of the conditions on the simplified amendment procedure. On the contrary, if it relates to institutional issues, which are also mentioned in Article 48 paragraph 6 TEU itself – “institutional changes in the monetary area” –, a simplified amendment would still be possible. This, for instance, would allow Member States to insert a new provision on an institution or an authority for the resolution of credit institutions in the euro area under the simplified revision procedure.

Arguably, the simplified procedure could also be used to revise some more problematic Treaty provisions such as Articles 123 or 125 TFEU by providing exceptions to the strict prohibitions contained therein.⁷³ However, the reasoning of the Court appears too cautious and *Pringle* does not explain better what the threshold for “indirect effects” is.

Third, paragraph 56 contains also an interesting “policy” development as compared to previous jurisprudence. It is the first time that the Court interprets the concept of “stability of the euro area as a whole” as the main objective of the ESM. This is “clearly distinct from the objective of maintaining price stability”,⁷⁴ the main objective of the monetary policy. The expression “stability of the euro area as a whole” is contained in the first sentence of Article 3 of the ESMT as well as in the new indent of Article 136 TFEU. The Court’s interpretation seems to suggest that the Euro

⁷³ On articles 123 and 125 TFEU see *infra* 4.2.3.1 and 4.2.3.2.

⁷⁴ *Pringle* judgment, para. 56.

area pursues a new objective which could pave the way to a future refocusing of the EMU.

However, the judgment fails to give more clarifications of it. This lack of reasoning opens a number of questions. Is "the stability of the euro area as a whole" something more or less than price stability? What is the relationship between the "stability of the euro as a whole" and price stability? Is it an objective pertaining only and *exclusively* to the economic policy? The Court affirms that the ESM can have some indirect effects for the monetary policy. However, it does not specify what these effects are. Further, what is the relationship between "coordination and economic policy" and "economic policy"? It is submitted that the Court interprets the ESM as an instrument within the "economic policy",⁷⁵ but it does not give enough indications on how the ESM relates to the Union framework. Unfortunately, *Pringle* does not give answers to these questions. However, the interpretation of the expression "stability of the euro area as a whole" results in a very innovative assertion by the Court that needs to be clarified in future case law especially now that it is contained in a specific Treaty provision.

Finally, it should be noted that the answer of the Court is, arguably, far less reasoned and motivated as to whether the revision procedure increases the competences conferred on the Union in the Treaties, namely the second condition for a simplified revision procedure. Conferring new competences can be made by express Treaty provisions that establish legal basis for the Union to take action or through implied powers. The solution of the Court appears very cautious. The judgment limits to say that the simplified amendment does not confer any new competence on the Union. The amendment does not add any new Union legal basis nor extend the role of the Union's institutions.⁷⁶ As such, the Court does not take a purposive or extensive interpretation of the conditions for a simplified revision, but keeps a prudent, even a *status quo*, interpretation on the possibility to integrate the ESM into the Union in future. The very careful approach of the Court might be explained by the political pressure put by the case at issue. A more open reading would have been to

⁷⁵ *Ibidem*, para. 60.

⁷⁶ *Ibidem*, paras 73-74.

argue that the Treaty amendment acts as a first step, in emergency situations and under “strict conditionality”, to allow further Treaty amendments without infringing Article 48 paragraph 6 TEU.

Overall, the judgment sheds important lights on use of the simplified revision procedure under Article 48 paragraph 6 TEU in future. To some extent, the Court has opted for an extensive reading of this Article that could allow for future simplified revisions of the EMU provisions so long as the Treaty revision does not touch the core of monetary policy and does not add new legal basis.

4.2.3 Articles 122, 123 and 125 TFEU: real limits to the establishment of permanent assistance mechanisms between Member States?

As recalled before, the ESM has been established outside the Union legal framework. This is because the Union framework does not contain any specific provision that allowed the establishment of *permanent* financial assistance mechanisms between Eurozone Member States. To that extent, Articles 122, 123 and 125 TFEU come into question. These will be analysed in turn.

4.2.3.1 The ESM Treaty and Article 122 paragraph 2 TFEU

Article 122 paragraph 2 TFEU provides that “where a Member State is in difficulties or is seriously threatened with severe difficulties (...), the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. (...)”. The use of this provision is limited to natural disasters or similar occurrences. A strict reading of this provision would run counter its use in other circumstances. However, the crisis has made reference to this provision in a wider sense to provide *ad hoc* financial assistance to

Member States in distress.⁷⁷ In particular, it was used to establish the EFSM.⁷⁸

Article 122 paragraph 2 allows for the use of special “Union financial assistance” to the benefit of a Member State “in difficulties or is seriously threatened with severe difficulties”. The special nature of the provision cannot act as a *carte blanche* to provide any kind of financial support, given the special conditions set out in that article. As such, it could not be stretched as much as to establish the ESM. This would clearly run counter the scope of the provision especially because of the permanent nature of the ESM.

Pringle examines whether Article 122 paragraph 2 TFEU would run counter the establishment of the ESMT. The Court adopts a strict reading on the limits of Article 122 TFEU which follows the strict views of the Heads of State and Government on the future use of Article 122 TFEU. The Commission’ position was divergent. This discrepancy can be implicitly seen from the Conclusions of the meeting of 16 and 17 December 2010 where only the Heads of State and Government are mentioned and not the European Council comprising also the President of the Commission.⁷⁹

The Court follows the strict line of the Heads of State and Government by excluding that “article 122 (2) TFEU (...) constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged in [Decision 199/2011].”⁸⁰ In other words, the judgment does not recognize that that article might be used, more generally, as the legal basis to provide *permanent* - and not temporary - financial assistance to Member States in serious difficulty in the Eurozone.

⁷⁷ See among others J.-V. Louis, *Editorial Guest Article*, *Common Market Law Review*, 984 (2010); and R. Palmstorfer, *To bail or not to bail out? The current framework if financial assistance for euro area Member States measured against the requirements of EU primary law*, cit. at 6, 779.

⁷⁸ Council Regulation 407/2010, Preamble.

⁷⁹ European Council conclusions, 16-17.12.2010, 1: “As [the ESM] is designed to safeguard the financial stability of the euro area as a whole, the European Council agreed that Article 122(2) TFEU will no longer be needed for such purposes. *Heads of State or Government* therefore agreed that it should not be used for such purposes” (emphasis added).

⁸⁰ *Pringle* judgment, para. 65.

Some authors have expressed the same concern on the use of Article 122 paragraph 2 TFEU.⁸¹ Before the judgment they argued that Article 122 TFEU has a limited scope and cannot give ground to the establishment of permanent mechanisms of the kind envisaged.⁸²

The Court's approach distances the ESM, a permanent financial assistance mechanism, from any possible encroachment with Article 122 paragraph 2 TFEU. The reference to Article 122 paragraph 2 should be made only when support is provided to a Member State in temporary financial difficulties and not to create a permanent facility to assist Member States in distress.

However, one might question whether Article 122 paragraph 2 TFEU is really useful to provide an ESM-kind new financial assistance arrangement. The system of own resources in the EU budget is not sufficient to safeguard government debts of big Member States. The EU budget does not have sufficient funds to provide the required financial assistance to big economies in the Eurozone.⁸³ Member States needed to establish an international organisation to provide robust assistance going beyond "the margin available under the own resources ceiling for payment appropriations" of the EFSM.⁸⁴ This shows that stability mechanisms for robust assistance to Member States require funds that are not currently available under the EU budget and thus would not come within the scope of application of Article 122 paragraph 2 TFEU.

Overall, *Pringle* confirms that Article 122 paragraph 2 TFEU is a very special provision. To some extent, this is a regrettable step as the Court could have avoided such a firm view on this article. In this way, the Court excludes that Article 122 paragraph 2 TFEU would come into play as a legal basis to create other forms of financial assistance under European Union law in future. It is

⁸¹ J.-V. Louis, *Editorial Guest Article*, cit. at 77, 986.

⁸² A. de Gregorio Merino, *Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance* cit. at 2, 1632.

⁸³ According to the latest data, the draft EU budget for 2014 would amount to €142.01 billion in commitment appropriations and to €135.9 billion in payment appropriations. The latter sum is clearly insufficient to cover financial assistance to big Member States such as Spain or Italy. See further http://ec.europa.eu/budget/index_en.cfm

⁸⁴ Council Regulation 407/2010, Article 2 paragraph 2.

true that the introduction of Article 136 paragraph 3 TFEU allows for the use of permanent financial assistance mechanisms between Member States outside the Union framework. However, the Court's approach on the use of Article 122 paragraph 2 TFEU appears too severe. It is submitted that the Court should not have been so clear-cut to limit the use of Article 122 paragraph 2 TFEU.

4.2.3.2 *The ESM Treaty and Article 123 TFEU*

Article 123 TFEU prohibits "[o]verdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (...) in favour of (...) Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments".

Pringle makes a reference also to Article 123 TFEU.⁸⁵ However, both the A.G.'s View and the judgment fail to provide legal certainty on the terms contained in this article. The Court simply excludes that financial assistance between Member States of the ESM is covered by that provision. The choice of the Court is cautious as it prefers to assess only forms of financial assistance between Member States. The judgment neither gives indications on the terms used in Article 123 TFEU nor specifies what limits this article entails. Thus, it still cannot be inferred from *Pringle* whether some forms of ECB credit facilities would be compatible with Article 123 TFEU.

At the time of writing, there are at least two measures that need some scrutiny under this article. First, on 2 August 2012 the ECB announced that it would undertake the Outright Monetary Transactions (OMTs) programme⁸⁶ as a purchase of government-issued bonds maturing in 1 to 3 years in the secondary market. The ECB can exercise OMTs once the Eurozone Member State asks for financial assistance. This announcement followed Draghi's public speech where he declared that "[w]ithin our mandate, the

⁸⁵ *Ibidem*, paras 125-128.

⁸⁶ The OMTs are outright transactions in secondary, sovereign bond markets, aimed "at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy." See the ECB press release on OMTs available at http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html

ECB is ready to do whatever it takes to preserve the euro”.⁸⁷ So far the OMT programme has only been announced and has not yet been exercised. It has been demonstrated that the effects of the announcement has been beneficial to stabilize the markets, but it is still questionable whether the OMT programme is compatible under Article 123 TFEU.⁸⁸ It is submitted that the OMT programme is feasible as it acts only as a purchase in the secondary market and is a crisis-tailored instrument for intervention. The German Constitutional Court will decide on the compatibility of the OMTs programme with the *Grundgesetznorm*.⁸⁹ There may be the possibility that the German Constitutional Court refers, for the first time, to the ECJ the case as it lacks the powers to assess the legality of the ECB mandate under article 123 TFEU. In such case, the ECJ may be called to rule on the OMT and the ECB mandate. The Karlsruhe decision would probably indicate some guidelines on the feasibility of the OMTs. However, it is submitted that only the ECJ has the competence and the power to provide the interpretation on the feasibility of OMTs under Article 123 TFEU.⁹⁰

Second, the ESMT envisages the possibility of borrowing capital “from banks, financial institutions or other persons or institutions for the performance of its purpose”.⁹¹ The ESMT provision does not set any limits as to the threshold to borrow

⁸⁷ Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012 available at <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>

⁸⁸ On the OMT programme see, further, T. Petch, The compatibility of Outright Monetary Transactions with EU law, 2013 *Law and Financial Markets Review*, pp. 13-21.

⁸⁹ *ECB warns against opening debate on its mandate*, Financial Times, 12.06.2013, <http://www.ft.com/cms/s/0/8e6e2600-d366-11e2-b3ff-00144feab7de.html#axzz2dNfDhgW9>

⁹⁰ This is precisely what happened in the German Constitutional Court case where, for the first time in German constitutional law, the Karlsruhe Court makes a reference to the ECJ. The decision of the German Constitutional Court in English is available at http://www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr2728_13en.html . See "German court refers ECB bond-buying programme to European justice", Financial Times, 07 February 2014, available at <http://www.ft.com/cms/s/0/3feab440-8fd5-11e3-ae3-00144feab7de.html?siteedition=intl>

⁹¹ See the ESMT, Article 21.

capital. It is submitted that the ECB comes within the term “banks” and that the ECB could be used as the lending institution for additional capital to the ESM. In other words, the ECB could become the lender of additional capitals to the ESM, especially in cases of systemic crisis or of a defaulting big euro area Member State. However, so far some Member States, most notably Germany, have opposed the power to grant this unlimited banking license to the ESM.⁹² The use of the ECB capital to the benefit of the ESM would certainly question the compatibility of such measure under Article 123 TFEU. However, it is not excluded that, in the long term, the ECB via the ESM could acquire the role the pan-Euro area financial backstop institution for the safeguard of Member States’ public finances. Neither the AG’s view nor the ECJ judgment give indications on the possible links between the ECB and the ESM. To conclude, it is clear that the creation of an unlimited or a wide ECB banking license to the ESM would require a Treaty change as Article 123 TFEU would not allow this operation. However, there is ground to argue that some credit links between the ESM and the ECB could put “real teeth” to create a strong financial backstop in the Euro area.

4.2.3.3 *The ESM Treaty and Article 125 TFEU*

More importantly, the *Pringle* case assesses, for the first time, the no bail out clause under Article 125 TFEU. Before commenting on the judgment, we will first recall the provision and the doctrinal debate on it.

Article 125 TFEU contains the ban to the assumption of commitments by Member States between each other. It states that the “Union shall not be liable for or assume the commitments (...) of any Member State, (...). A Member State shall not be liable for or assume the commitments (...) of another Member State, (...)”. This

⁹² “Angela Merkel stands firm in resisting ESM bank licence”, The Telegraph, 29 August 2012, available at <http://www.telegraph.co.uk/finance/financialcrisis/9506882/Angela-Merkel-stands-firm-in-resisting-ESM-bank-licence.html>

provision was inserted in the Treaty of Maastricht to ensure that the Member States follow a sound budgetary discipline.⁹³

So far, Article 125 TFEU has proven to be the real “evil” for any possible mutualisation of public debt. Doctrinal positions so far on it have been divergent. Shortly after the entry into force of this provision, Smits argued that the no bail out clause is an essential element of the budgetary code if the Union and, thus, Member States, are “on their own” as to their budgetary commitments. He underlined that “the rationale for the prohibition is (...) the application of full market rigour to the activities of Governments”.⁹⁴

More recently, in the context of the current financial crisis, different positions have arisen on the recent crisis measures taken in Europe. Rüffert argued that the bilateral loans to Greece in 2010 and the establishment of the EFSF were in breach of EU law because they would run counter Article 125 TFEU.⁹⁵ More correctly, Smits suggested that the markets have yet not been a reliable instruments to discipline financial assistance to Member States in difficulties and that, given the changed circumstances, a different view of the EMU rules is needed.⁹⁶

Some others have tried to give a narrower interpretation of the no bail out provision as “it aims to force Member States to comply with their budgetary discipline following the logics of the markets when incurring public debts”.⁹⁷ Louis sustained that under exceptional circumstances the no bail out can be potentially overturned “if the situation (...) degenerates into an asymmetric shock or a shock common to a number of Member States”.⁹⁸ Nonetheless, as affirmed by the more cautious position of Palmstorfer, the wording and the systematic reading of the provision “covers and bans all forms of financial assistance given by the European Union or through a Member State to another”.

⁹³ *Ibidem* para. 135 where the Court mentions the Bulletin of the European Communities, Supplement 2/91, 24 and 54, to retrace the origin of the no bail out rule.

⁹⁴ R. Smits, *The European Central Bank*, 76-77 (1997).

⁹⁵ M. Rüffert, *The European debt crisis and European Union law*, 48 *Com. Mkt L. Rev.*, 1777-1805, at 1785 (2011).

⁹⁶ R. Smits, *Correspondence*, 49 *Com. Mkt L. Rev.*, 827-832, 827 (2012).

⁹⁷ De Gregorio Merino, *Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance*, cit. at 2, 1625.

⁹⁸ J.-V. Louis, *Editorial Guest Article*, cit. at 77, 984.

Thus, the Greek loan facility, the EFSF and the ESM would run counter Article 125 TFEU.⁹⁹

Overall, the doctrinal positions appear divergent as to the possible implications of Article 125 TFEU on financial assistance mechanisms.

Pringle has offered the Court the chance to express itself for the first time on Article 125 TFEU and, in particular, to interpret the ESM in light of Article 125 TFEU. The Court considers that Article 125 TFEU does *not* preclude the adoption and ratification of the ESMT. This conclusion is made through a certain number of arguments that need a careful assessment.

First, the Court conducts a literal interpretation of Article 125 TFEU and concludes that Member States are not prohibited from granting any form of financial assistance whatever to another Member State.¹⁰⁰ This result is achieved through a combined reading of Article 125 TFEU together with Article 122 paragraph 2 TFEU and Article 123 TFEU. Correctly, the Court shows that financial assistance between Member States is allowed by some Treaty provisions even if Article 125 TFEU provides for the no bail out clause. It is an important point as the Court considers that, notwithstanding the no bail out clause, financial assistance between Member States is possible.

Second, the Court examines the objective of Article 125 TFEU. Paragraph 135 affirms that Article 125 TFEU serves to ensure that Member States maintain budgetary discipline. This equals to say that Article 125 TFEU serves as a provision to guarantee the budgetary discipline of the Member States and *not*, strictly speaking, to ban financial assistance between them. However, this is not an absolute "invitation" to provide financial assistance instruments. In fact, the Court requires that such intervention is indispensable for the safeguarding of the financial stability of the euro area as a whole and that it is subject to strict conditionality.¹⁰¹ The arguments of the Court are based on the different provisions contained in the ESMT according to which financial assistance is given only if special conditions are respected. This is not to say

⁹⁹ R. Palmstorfer, *To bail or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law*, cit. at 6, 784.

¹⁰⁰ *Pringle* judgment, para. 130.

¹⁰¹ *Ibidem*, para. 136.

that Member States cannot provide assistance between each other. Indeed, one might take two different views on this issue.

On the one hand, it can be argued that the Court has clearly set the maximum limits on the possible exceptions to Article 125 TFEU. Member States cannot be liable for debts of other Member States, but they can only provide loans or similar means on condition that the beneficiary rests fully liable with its commitments.

On the other hand, provided that assistance is given to the benefit of the “financial stability of the euro as a whole” and that strict conditionality is respected, Member State can voluntarily make use of financial assistance instruments without infringing Article 125 TFEU and to the extent that they prefer.

Correctly, De Witte and Beukers argue that the interpretation of Article 125 TFEU in *Pringle* is based both on the requirement of indispensability and conditionality of intervention.¹⁰² However, I would put more emphasis on the actual limits on Member States’ commitments which flow from Article 125 TFEU. It is submitted that the Court legitimizes Member States’ money transfers to bail out other Member States in distress without infringing EU law.¹⁰³

It is true that the recipient Member State remains fully responsible to its creditors for any financial commitments¹⁰⁴. Financial assistance amounts to the creation of a new debt to the ESM and not to the establishment of debt liabilities assumed by the assisting Member States. We are still not in a transfer Union with a mutualisation of public debts.¹⁰⁵ The ESM does not provide neither for the joint nor for the joint and several liability of the assisting Member States. It is not an international organisation which provides for “stability bonds”.¹⁰⁶ The assisted Member State remains fully responsible for its commitments.

¹⁰² B. De Witte & T. Beuckers, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, cit. at 45, 838-839.

¹⁰³ See *Pringle* judgment, para.137.

¹⁰⁴ *Ibidem*, paras 139, 145.

¹⁰⁵ See more extensively A. de Gregorio Merino, *Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance* cit. at 2, 1630-1632.

¹⁰⁶ European Commission, *Green Paper on the feasibility of introducing Stability Bonds*, 23.11.2011, COM(2011) 818 final.

Nonetheless, it can be argued that the Court legitimizes, if not even invites, Member States to bail out each other without necessarily infringing the Treaty. This is because the purpose of Article 125 TFEU is essential to assure that “the incentive of the recipient Member State to conduct sound budgetary policy is [not] diminished”¹⁰⁷ and not to prohibit financial assistance between Member States as such.

If the Court’s judgment is welcome as it held that the ESM is compatible with the no bail out clause, regrettably, it does not appear as progressive as the reading of the A.G.’s view.

First, the A.G. stated that Article 125 TFEU would not prohibit any form of financial support to a Member State.¹⁰⁸ In a more appealing way, she argued that the purpose of Article 125 TFEU is to assure that “the disciplinary effect of interest rate spreads on the capital markets according to the individual financial positions of Member States”.¹⁰⁹ Does this mean that the no bail out provision is concerned with market discipline of Member States rather than with budgetary discipline?¹¹⁰ It appears that Article 125 TFEU runs primarily counter Member State’s arrangements which would subvert the credibility of the individual financial position of Member States.

Second, the A. G.’s view argued that an extensive reading of the provision would run counter the principles of sovereignty and solidarity of the Member States. Such arguments equal to say that an extensive reading of the no bail out clause would *infringe* two principles in the EU that, admittedly, “rank as of at least equal importance to Article 125 TFEU”.¹¹¹ Unfortunately, the judgment does not mention any principle to counteract the prohibition under Article 125 TFEU. This is regrettable as the Court could have showed more activism in legitimizing a restrictive reading of Article 125 TFEU.

Conditionality and even more indispensability of financial intervention have less relevance than what one could see at first look. As to the former, conditions attached to the MoU are

¹⁰⁷ A. G. Views *Ibidem*, para. 136.

¹⁰⁸ *Ibidem*, para. 134.

¹⁰⁹ *Ibidem*, para. 132 and 148.

¹¹⁰ See on that issue V. Borger, *The ESM and the European Court’s Predicament in Pringle*, cit. at 45, 135-137.

¹¹¹ Pringle judgment, para.136.

essential to granting financial assistance in compliance with EU law, but can go further or can be different from what is required under the economic policy provisions contained in the Treaty. It is true that Article 13 ESMT requires strict conditionality of intervention. However, it is argued that conditionality is a flexible concept which depends on the nature of each intervention. As to the latter, indispensability does not seem so much essential. It is true that the ESM was created to guarantee the stability of the euro and that Article 136 paragraph 3 TFEU requires that intervention can be activated “if indispensable to safeguard the stability of the euro area as a whole”. However, the recent Cypriot bail out programme did not appear to be such a serious threat to the financial stability of the euro as a whole. Even if the Eurogroup stated that “financial assistance to Cyprus is warranted to safeguard financial stability (...) to the euro area as a whole”¹¹², it is submitted that indispensability of intervention was not essential to safeguard the currency union as such. As shown by the Cypriot bail out, the ESM funds can be used also to allow a Member State in difficulty not to exit the Eurozone.¹¹³ This questions whether indispensability of intervention is essential to trigger the ESM funds.

Overall, the Court’s approach on Article 125 TFEU is welcome as it gives some leeway to assure financial assistance between Member States beyond a strict reading of Article 125 TFEU. Despite not being as appealing as the A.G.’s view, the Court establishes that Member States can provide financial resources to another Member State without breaching the no bail out prohibition. This is possible so long as such intervention is in line with sound budgetary discipline and with the indispensability to safeguard the stability of the euro as a whole. However, it has been demonstrated that these two conditions can become rather flexible in their application. Thus, the real limit of the no bail out clause remains the nature of the liability of the financial instrument which, under the ESM, is still separate between Member States’ finances and ESM finances.

¹¹² Eurogroup Statement on Cyprus of 25 March 2013 available at <http://eurozone.europa.eu/media/404933/EG%20EG%20Statement%20on%20CY%2025%2003%202013.pdf>

¹¹³ See in favour V. Borger, *The ESM and the European Court’s Predicament in Pringle*, cit. at 45, 138.

5. *Conclusions*

The judicial endorsement of the ESMT by the ECJ was highly expected. This contribution has shown that this judgment is welcome and satisfactory in light of future developments along the financial crisis. Among others, it clarifies four issues in the current debt crisis era.

First, it is the first time that the Court pronounces itself on the rules related to the new crisis-related measure in light of the economic and monetary provisions contained in the Treaty. The Court's approach is satisfactory as it adopts a lenient judicial control over the conclusion and ratification of an international Treaty to provide financial assistance to Eurozone Member States. An opposite solution would have jeopardized the project of monetary union in Europe.

Second, the judgment sheds some lights on the use of EU institutions beyond the EU legal order. It provides some indications on the role of the Commission, the ECB and the ECJ in dealing with a stability mechanism of the ESM-kind. This is not a conferral of a "carte blanche" of delegation as some conditions are attached to such exercise. However, this does not exclude that EU institutions might be relied on to exercise intergovernmental functions in future. In particular, this might be the case for the ECB.

Third, the judgment allows the use of the simplified revision procedure pursuant to Article 48 TEU in the context of the economic policy. This is a critical point as the Court has clarified to what extent the simplified revision procedure might be used to change the Treaty. The judgment is an important precedent to future simplified revisions of the Treaty provisions on the EMU so long as the changes do not affect the core part of the monetary policy competence and introduce new legal basis. It has been argued that new provisions could be inserted to amend the Treaty under the simplified procedure with a view to legitimize the Banking Union.

Fourth and perhaps most importantly, the *Pringle* case illustrates how stability mechanisms to support Member States in financial distress can be effective tools to provide liquidity in the European markets. By endorsing the ESMT, the ECJ assures that Member States can take financial measures to support each other, notwithstanding the straightjacket of the no bail out clause. The

result is that Member States can establish financial arrangements which can be used beyond a strict reading of Article 125 TFEU. In essence, the judgment gives some flexibility to Member States to provide financial support to each other.

To conclude, *Pringle* will be remembered as the first landmark decision in which the Court has endorsed financial assistance between Member States as a “catalyst” to increase further financial, economic and perhaps political interconnection between Member States in the euro area.

ACCESS TO INTERNET AS A FUNDAMENTAL RIGHT

Tommaso Edoardo Frosini*

Abstract.

Assuming that technology represents a development of freedoms, the article analyzes how in a constitutional and liberal State the Internet and the use of technologies in general is employed as a strategic tool to foster and enforce individuals freedoms. According to the author, the Internet constitutes an important instrument for increasing democracy, because it guarantees the transparency of the political acting, ensuring the pluralism of information. In this perspective, the legal horizon of the Internet includes not only the right to privacy, but it can also be extended to the freedom of expression. The informatic freedom is qualified as a new right, resulted from the evolution of technological society, which shows a new aspect of the well-established idea of personal liberty. This particular right has become a claim of liberty in the active sense, perceived as the freedom to make use of computer in order to provide and obtain information of any kind or as the right to join the digital society and communicate to whoever. Therefore, the author amounts to the right to access to the Internet as a social right, or better, as an individual claim to a state's performance (like services such as education, health and welfare) and through comparative references shows how some countries have recognized the access to the Internet as a fundamental right of individuals, considered as a universal service that they must guarantee to their citizens by investments of public resources and social or educational policies.

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1. Technologies have represented and still represent a development of freedoms; more in details, freedoms have significantly extended their scope to new frontiers of human acting by virtue of the recent technological developments¹. Indeed, technologies do not only produce freedom: it would be better to say that technologies can be employed by good and bad individuals, as well as by either an open-minded government or a despotic one. In a constitutional and liberal state, however, public policy should always be aimed at fostering and extending individuals' freedoms, and the use of technologies must be one of the strategic tools to this end. Let's think about the Internet and its typical cross-border nature, which goes across national borders, overcomes customs boundaries and removes cultural differences between various people².

Also, with respect to the Internet, it is still a problem to distinguish the different freedoms in order to achieve a holistic model of freedom: whoever has access to the Internet, in fact, expresses himself/herself, joins communities, communicates, in the manners that he/she prefers. Different freedoms are therefore enforced by the same medium, i.e. the Internet, at the same time or at very closed times. Of course, there is another point in return: virtual barriers are raised instead of real barriers. In fact, there are some countries (illiberal, of course) that have built electronic barriers in order to avoid the access to part of their global network, by the removal of words, names, and keywords from search engines or by violating personal data of individuals. New information barriers have been raised in part of the world, where videos or blogs are the *samizdat* of the present days. These factors, however, confirm the liberal spirit of the Internet, and the fear by which non-tolerant countries approach technologies, because they feel the Internet as a threat to their absolute power. The Internet can be – as it was, for example, in the so called “Arab spring” – an important tool for increasing democracy, also because it guarantees the transparency of the political acting by a pluralism of news and information which circulate over the Internet, allowing citizens to see-know-share.

¹ See T.E. Frosini, *Nuevas tecnologías y constitucionalismo*, 124 Rev. Est. Pol. 129 (2004). Recently, P. Costanzo, *Il fattore tecnologico e le sue conseguenze*, 4 Rass. Parl. 232 (2012).

² V. Frosini, *L'orizzonte giuridico dell'Internet*, 2 Dir. inf. 271 (2000).

2. It has to be pointed out that the problems brought along by technological developments are not limited to the protection of the right to privacy anymore, even if this problem has been and continues to be analyzed from the constitutional point of view, by both scholars and courts (including data protection authorities). The “legal horizon of the Internet” includes the right to privacy, of course, but such background extends also to the freedom of expression, which is a constitutional right to be rethought in light of its new implications from a legal point of view.

In order to examine the most critical issues concerning the coming of the Internet and its legal implications, I believe that some points have to be made with respect to the “informatic freedom”. This theory was developed in 1981 and found its grounds in the concept of a new liberal age, characterized by the new achievements permitted by the technological “revolution”. Such doctrine was based on the rise of a new dimension of the personal liberty in the age when computer were used for the first time³.

The informatic freedom is therefore a new right resulted from the evolution of technological society, and shows a new aspect of the well-established idea of personal liberty and constitutes the advancement of a new frontier of human freedom to the society of the future to be placed in the construction of the contemporary constitutionalism.

The informatic freedom qualifies as a new form of the traditional right of personal liberty, as the right to exercise the control over personal information, or a right to “habeas data”. Over the time, case law has recognized and affirmed this new freedom in terms of preservation of the individual, as a claim against the holders of the computer power, by private persons and public authorities. By the new legislation on the protection of individuals with regard to the processing of personal data, fostered by a European standard, the notion of the right to informatic freedom has been recognized in positive law. The freedom to preserve their confidentiality when using computer has become also the freedom to communicate to others the information transmitted by electronic means to exercise that

³ See V. Frosini, *Law and Liberty in the Computer Age* (1995).

freedom of expression of one's personality making use of new communication systems.

Hence the right to informatic freedom acquires an additional significance nowadays as a result of the coming of the Internet, and this proves its relevance even today. In fact, in the age of the Internet, the right to informatic freedom 'has become a claim of freedom in the active sense, not a freedom "from" but freedom "of", which is the freedom to make use of computer to provide and obtain information of any kind.

And it is a right to participate in the virtual society, which has been created by the coming of computer in the digital age: it is a society characterized by movable parts and dynamic relationships, where each participant is sovereign over his/her decisions'.

It is, then, the right to join the digital society that has been created. We are approaching, without doubts, a new form of freedom, i.e. the right to communicate to whoever, including the right to circulate personal opinions, thoughts and materials, as well as the right to receive the same.

Therefore, freedom of communication qualifies as a right to circulate and receive. This is not only the individual freedom of expression anymore, rather the right to establish relationships, circulate and request information, and therefore exercise the new power of knowledge based on the information technology: in a nutshell, the right to exercise the informatic freedom. Moving from the acknowledgement of such a freedom it could be possible to establish some grounds for an *Internet Bill of Rights*.

3. Then we come to the right to access to the Internet. It is worth quoting Rifkin, first of all: «In a world more and more based on economic and social electronic networks, the right not to be excluded – the right to access – acquires an increasing importance. Concepts like "inclusion" and "access" have today replaced those (corresponding) of autonomy and possession, which characterized the notion of property in a traditional sense: in the new economy, the concept of property does not refer to a power of excluding others from enjoying personal goods

anymore, rather it qualifies as a right to not be excluded from the society's resources»⁴.

The right to access to the Internet has therefore to be considered as a social right, or better as an *individual claim to a state's performance*, like services such as education, health and welfare. It is a universal service that state's bodies must guarantee to their citizens by investments of public resources, social and educational policies. In fact, more and more the access to the Internet and the conduct of business via the Internet constitute the means by which individuals enter into relations with state's powers, i.e. exercise their citizenship's rights⁵.

Today, citizenship is a digital concept. It is interesting, in this respect, to look at the provisions contained in the Italian Code of Digital Administration (CAD) - Legislative Decree No. 82/2005, which establishes "a statute of the digital citizen" (including natural and legal persons), by requiring public offices, agencies and bodies to interact in a digital manner, thus to arrange appropriate means from the technical and organizational point of view to meet citizens' requests. It is clear that such a new way of qualifying the relationship between individuals and public administration in terms of a new digital citizenship demands a process of digital literacy, as a social right that the state must guarantee, along with the right to education and to the digital cultural development, that the Italian Constitutional Court (by decision n. 307, 2004) has found to be «corresponding to a general interest, specifically the development of culture -by the use of digital tools-, that Italy must pursue at any levels (art. 9)». In this respect, it is worth mentioning the European Parliament resolution of 10 April 2008, requiring Member States to «to recognize that the Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society; calls on the Commission and the Member States, to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of

⁴ So, J. Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is Paid-For Experience* (2000).

⁵ A. Lepage, *Libertés et droits fondamentaux à l'épreuve de l'internet* (2002).

Internet access». Also in the European Parliament recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet it is stressed that the Internet is «a key instrument at world level for exercising freedom of expression» protected under the Charter of fundamental rights of the European Union and « can be an extraordinary opportunity to enhance active citizenship».

Yet, in terms of (digital) active citizenship, it is worth quoting the Italian Law No. 4/2004 (so called “Stanca Law”), establishing provisions for favouring the access of disabled people to computer systems. This law recognizes and protects the right of any persons to access any sources of information and the related services, including those provided by computer systems. In particular, art. 1 refers to art. 3 of the Italian Constitution when setting the right to access to the Internet, by qualifying such right as instrumental for the achievement of equality among citizens. Therefore, denying access to the Internet would result in the violation of fundamental human rights such as freedom of expression, freedom of information, education, development and equality⁶. Then, the right to access to the Internet amounts to a fundamental right the exercise of which is instrumental to the enjoyment of other constitutional rights and freedoms: not only the freedom of expression, protected by art. 21 of the Italian Constitution, but also the right to an “appropriate development of the human being” and to an “effective participation to the political, economic and social life of the State” protected under art. 3 of the Constitution, as well as the freedom of conduct business contained in art. 41. Today, against the background of the information society (or the “age of the access”) being deprived of access to the Internet results in being prevented from exercising large part of the citizenship rights.

In Finland, a law that came into force on 1st July 2010 has defined as “a legal right” the access to the Internet for over five millions of citizens. The Finnish Minister of Communication said that «a high-quality broadband Internet connection at a reasonable price is an essential right». Therefore, all the 26 providers operating in Finland, that are qualified as “provider of a universal service”, shall be able to connect any facilities with a *download*

⁶ See, recently, O.D. Pulvirenti, *Derechos Humanos e Internet* (2013).

speed of 1 *megabit* per second. Also Switzerland and Spain are looking at this initiative, and may act in the next future in order to grant access to the Internet as a condition for the enjoyment of other rights.

4. Some countries have recognized the access to the Internet as a fundamental right of individuals in the relevant legal systems, even if at different levels: some in the constitutions, like Estonia, Greece and Ecuador; some by laws, like Finland and Peru; some by the case law of the respective domestic courts, like France, Costa Rica and –even before– the United States, where the Supreme Court, in a decision delivered in 1997, said that «The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship»⁷.

With regard to the decision of the French *Conseil Constitutionnel* (no. 2009-580 DC of 10 June 2009), it has to be stressed that the court referred to the access to the Internet in terms of a fundamental right. In fact, due to the large-scale diffusion of the Internet, the freedom of communication and expression necessarily requires a free access to online communication services. The *Conseil* moves from an express reference to art. 11 of the Declaration of the Rights of Man and of the Citizen of 1789: «The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law». This definition provides a clear and specific view of the freedom of information and still proves to be valid. Then, the *Conseil*, by the application of the proportionality test, found that the freedom of communication, including the right to access

⁷ See, *American Civil Liberties Union vs. Reno* [E.D. pa 1996]; again, Supreme Court 521 US 844 (1997).

to communication services, has a valuable importance and therefore any restriction of the same imposed by the competent authorities must be specifically defined⁸.

Also, some international (also non-binding) documents concern the right to access to the Internet. It is worth quoting, for example, a May 2011 report issued by the General Assembly of the United Nations where it is highlighted that «given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal access to the Internet should be a priority for all States».

5. In the 21st Century the «legal horizon of the Internet» is clear and visible. And this constitutes also the new horizon of contemporary constitutionalism, as the aforesaid important decisions of the US Supreme Court first and of the French *Conseil Constitutionnel* then, have proven (without forgetting the decisions, already mentioned, of the *Sala Constitucional* of Costa Rica). It is interesting to observe, in two countries where the constitutionalism was born, even though by following different paths at the very beginning, the interpretation given by courts to two dated provisions – the First Amendment to the US Constitution and art. 11 of the 1789 Declaration-, provisions which were written and adopted more than two centuries ago to protect and enforce the freedom of information: that's the case to say, the freedom of yesterday, today and tomorrow. In fact, it is from these provisions –defining clear horizons of the constitutionalism- that today a legal ground is sought in order to recognize and protect the new forms of expressions of electronic communications, with respect in particular to the Internet. Thanks to an appropriate interpretation and enforcement of the relevant parameters, a very *constitutional right to access to the Internet* is emerging nowadays⁹. And this is because, against the extensive diffusion of the Internet, the freedom of communication and expression requires first the freedom to access to those online communication services. It is for

⁸ L. Marino, *Le droit d'accès à internet, nouveau droit fondamental*, 30 Rec. dal. 2045 (2009).

⁹ See, T.E. Frosini, *La lotta per i diritti. Le ragioni del costituzionalismo* (2011).

states to remove barriers and obstacles that prevent citizens from enjoying this universal service that must be guaranteed to all citizens by public investments, social and educational policies, by public expenses. As pointed out, the right to access to the Internet constitutes in fact the way by which individuals approach state's powers. Denying the access to the Internet, or making it costly, excluding part of citizens from its enjoyment would make it impossible to exercise a large part of the citizenship rights.

Finally: the constitutional freedom of expression consists of what art. 19 of the Declaration of the Rights of Man and of the Citizen of indicated in the right: «to seek, receive and impart information and ideas through any media and regardless of frontiers», even when- like in the recent "WikiLeaks" case - the information circulating via the Internet may disappoint national governments, put at risk diplomatic relationship between states or reveal *arcana imperii*. One could not like it, and also reduce the scope of protection and the effects or deny the legal validity, but in any cases the act of "seeking, receiving and imparting information" demonstrates the crucial role of the right to know and the freedom of information, that also show a new model of separation of powers in light of a modern constitutional view.

In the past, it was the government to control citizens by the control over information; today, it has become harder and harder to control what a citizen reads-sees-hears, seeks-receives-imparts. The technology provides thus to individuals the ability to become a power that is in the condition to control the other powers: *le pouvoir arrête le pouvoir*.

“GOOD REGULATION”:
ORGANIZATIONAL AND PROCEDURAL TOOLS

Maria De Benedetto *

Abstract

The article argues that administrative procedures and organization can affect the quality of regulation. This premise creates the necessity to consider the matter starting from the point of view of enforcing regulation. The mentioned approach also implies the need for maintenance of rules, with systematic and periodic monitoring and evaluation of regulatory provisions, in particular in order to ensure the continuous connection between the objectives of regulation and the effects which regulation produces. Furthermore, procedural steps of a regulatory decision are analyzed, as well as the hard question of the relationship between politics and administration in procedures and in organization. Finally, good organization principles for regulators are described, with specific reference to parliament, administrations and independent authorities.

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I. “Good” regulation, procedures and organization

The aim of this article is to illustrate how procedures and organization can affect the problem of quality of regulation, and – in so doing – to show that they could be considered as regulatory tools.

If we remember that regulation has its roots in political economics¹, it is clear that the legal concept of regulation has been influenced by the economic one, which requires a strong link between rules and their consequences². From a legal point of view regulation is law structurally built to achieve its objectives, to solve effectively various kinds of problems³ and to avoid (as far as possible) regulatory failures⁴.

During the last twenty years, the biggest driver in circulating the idea that regulation should be “good” has been the OECD which has stated that “better regulation means to adopt

¹ See A. Ogus, *Regulation. Legal Form and Economic Theory*, (2004), 1.

² See C. Coglianese and R.A. Kagan (ed. by), *Regulation and Regulatory Process* (2007), xi.

³ See S.G. Breyer and R.B. Stewart, *Administrative Law and Regulatory Policy*, (1992), 5-6.

⁴ See R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation. Theory, Strategy and Practice*, (2012), 68. On this point see also European Commission, Communication “Strengthening the foundations of Smart regulation – improving evaluation”, COM(2013) 686 final, p. 3: “Thorough evaluation also identifies unintended and unexpected consequences”.

regulations that meet concrete quality standards, avoids unnecessary regulatory burdens and effectively meets clear objectives”⁵.

“Good” regulation has been described several times and in several ways, in literature as well as by national, European and international organizations. While highlighting each time specific aspects, it has been indicated as “better regulation” by the OECD⁶ and, more recently, by the EU, as “smart regulation”⁷ as well as regulation “fit for purpose”⁸.

Furthermore, institutions and scholars have looked for principles and criteria of good regulation. In this way, any regulation should be: transparent, accountable, proportionate, consistent and targeted only at cases where action is needed”⁹ and needs legislative mandate, accountability, due process, expertise and efficiency¹⁰.

Starting from a more general point of view, the problem of a “good” regulatory regime¹¹ is often indicated in terms of enforcement (and compliance)¹², to the extent that “the problem of enforcement is an acute one in regulation for reasons that are

⁵ OECD, *Overcoming Barriers to Administrative Simplification Strategies: Guidance for Policy Makers*, (2009), 44.

⁶ OECD, *Reccomendation on Improving the Quality of Government Regulation*, Paris, 9 March 1995 and *The OECD Report on Regulatory Reform; Synthesis*, (1997), 8.

⁷ European Commission, Communication “*Smart Regulation in the European Union*”, COM/2010/0543 final, p. 3: Smart Regulation means a regulation “[...] about the whole policy cycle – from the design of a piece of legislation to implementation, enforcement, evaluation and revision”, a regulation which “must remain a shared responsibility of the European institutions and of the member States”, a regulation in which “the views of those most affected by regulation have a key role to play”. On this point, see R. Baldwin, *Is better regulation smarter regulation?*, in *Public Law*, 2005, p. 485.

⁸ See European Commission, Communication “*EU Regulatory fitness*”, COM(2012) 746 final and European Commission, Communication “*Strengthening the foundations of Smart regulation – improving evaluation*”, p. 3.

⁹ Legislative and Regulatory Reform Act, 2006, art. 21, sec. (2). The principles of good regulation have been established by BRTF (Better Regulation Task Force), *Principles of Good Regulation*, 2003.

¹⁰ See Baldwin, Cave and Lodge, *Understanding Regulation. Theory, Strategy and Practice*, cit. at 4. 26-27.

¹¹ *Ibid.*, p. 38.

¹² OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, (2000). See also W. Voermans, *Motive-based enforcement*, Working Paper Leiden University, March 23, 2013.

intrinsic to the nature and the task of regulatory control”¹³. In this regard, the quality of legislation has been considered as a problem of making legislation clear and accessible but also of making it as “easy to comply with as possible”¹⁴.

However, this approach to enforcement reveals an administrative stance which prioritizes compliance: “regulatory unreasonableness makes regulatory compliance much more inefficient and costly than it needs to be”¹⁵.

If enforcement aims “to solve problems”¹⁶ and to pursue “behaviour modification”¹⁷, “good regulation” should even be measured as “performance of regulatory improvements tools, institutions and policy”¹⁸. In this sense, I would argue, it is strictly connected to procedures and organization because “the ultimate impact of any regulatory policy depends not only on how that policy has been drafted and designed, but also on how enforcement officials take actions to implement those policies at the ‘street level’”¹⁹.

In other words, there is a “symbiotic relationship between the formulation of regulatory rules and their application”²⁰.

Let us look, for example, at (administrative) procedures in regulatory processes. Administrative procedures, in fact, have been considered “another mechanism for inducing compliance”²¹.

¹³ K. Hawkins and J.M. Thomas, *Enforcing Regulation*, (1984), 7.

¹⁴ European Commission, Communication “EU Regulatory fitness”, p. 9. See also OECD, *Better Regulation in Europe: Italy 2012 – Revised Edition*, June 2013, OECD Publishing, p. 101 (Compliance, enforcement and appeals).

¹⁵ E. Bardach and R.A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, 2010, originally published in 1982 by Temple University Press, x.

¹⁶ Ivi, xxi.

¹⁷ Baldwin, Cave and Lodge, *Understanding Regulation*, cit. at 4, 227.

¹⁸ Ibid., p. 34.

¹⁹ Coglianese and Kagan (ed. by), *Regulation and Regulatory Process*, cit. at 2, xvi. The concept of “street-level bureaucracy” is due to M. Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Services*, (2010), original edition published in 1980.

²⁰ Ogus, *Regulation. Legal Form and Economic Theory*, cit. at 1, 90. See also Hawkins and Thomas, *Enforcing Regulation*, cit. at 13, 173: “Enforcement activities are facilitated and constrained by the form, stringency and coverage of the law”.

²¹ M.D. McCubbins, R.G. Noll and B.R. Weingast, *Administrative Procedures as Instruments of Political Control*, in J.L. Econ. & Org., 1987, 244.

Their importance is due to “transparency and public participation [which] can help produce better, more informed policy decisions”²². But the use of economic evaluation techniques, such as cost-benefit analysis, has increased and has been itself defined, in the context of the so-called “analytic management of regulation”, as “a method for taking into account the interests of all affected citizens and selecting regulatory measures that will enhance societal welfare”²³.

Let us look at (administrative) organizations which are in charge of regulatory tasks: “enforcement practice is heavily influenced by the role that organizations play in regulation”²⁴. In fact, there are important “institutional factors that affect the decision of regulatory officers”²⁵.

“Good” regulation, finally, seems to regard both elements of (what we are going to define) formal quality and substantial quality, as we will see later (par. II). In other words, “good” regulation depends on (or is strictly connected with): the way in which regulation is adopted; the way in which it is enforced; the way in which it is evaluated (and, if necessary, revised or reformed) in order to ensure the continuous adequacy of regulatory provisions.

We could say that – alongside classic regulatory tools²⁶ – there are relevant administrative tools (procedures and organization) which can affect regulation as being capable of achieving its proper objectives.

II. *Quality of regulation: formal and substantial aspects*

The problem of the quality of regulation (how to design a good regulatory regime) could be usefully analysed as the problem of the quality of rules (how to make a good rule)²⁷. In

²² C. Coglianese, H. Kilmartin and E. Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, in *Geo. Wash. L. Rev.*, 2009, vol. 77, 927.

²³ R.B. Stewart, *Administrative Law in the Twenty-First Century*, in *N.Y.U. L. Rev.*, vol. 78, 2003, 445

²⁴ Hawkins and Thomas, *Enforcing Regulation*, cit. at 13, 18.

²⁵ Coglianese and Kagan (ed. by), *Regulation and Regulatory Process*, cit. at 2, xiii.

²⁶ See Breyer and Stewart, *Administrative Law and Regulatory Policy*, cit. at 3, 11.

²⁷ The relationship between quality of legislation and quality of regulation has been analysed by W. Voermans, *Concern about the quality of EU legislation: what*

fact, only legal rules are specifically enforced and only a single legal rule imposes consequences on its targets, altering their behaviour. The legal rule is, in other words, the basic element in the context of wider regulation²⁸.

The quality of regulation/rules, as we have seen, has been considered both from a formal point of view and from a substantive one.

Firstly, the formal quality of the rule is the objective of drafting (also called *legistique formelle*, in French speaking countries). To achieve formal quality of rules, rules must be consistent, clear and understandable. Therefore, manuals of drafting style have been adopted all over the world by several legislative assemblies (e.g., by the U.S. House of Representatives), by governmental institutions (e.g., in Italy there is a “*Guida alla redazione degli atti normativi*”, adopted in 2001; in Spain there are “*Directrices de técnica normativa*”, adopted in 2005), but also by supranational bodies, such as at European level (since 1993, the EU institutions has issued a lot of official documents regarding the question of quality of drafting) and at international level (e.g. the ILO – International Labour Office Manual for drafting, adopted in 2006).

But this concept of formal quality is nowadays more extensive. In 2010 the U.S. Office of information and regulatory affairs adopted “Disclosure and Simplification as Regulatory Tools”, which gives directives to ensure fair communication: not only should each rule be consistent, clear and understandable, but should also be transmitted “clearly and at the time when it is needed”, information must be “salient and easy to find and to understand”; “as usable as possible” and accessible in an electronic format “that does not require specialized software”.

Secondly, the substantive quality of the rule refers to the effect of the whole regulation and, in this sense, is the object of

kind of problem, by what kind of standards?, in Erasmus L. Rev., vol. 2, 2009, 59. See also H. Xantachi, *Quality of legislation: an achievable universal concept or a utopian pursuit?*, in *Quality of legislation. Principles and instruments: Proceedings of the Ninth Congress of the International Association of Legislation (IAL)*, (2011), 75.

²⁸ See M. De Benedetto, M. Martelli and N. Rangone, *La qualità delle regole*, (2011), 12-13, where the problem in general has been developed and where wider references are provided.

“better” and “smart” regulation policies. In fact, since the beginning of the Nineteen Nineties the OECD has given impetus to the need to rationalise the regulatory system, with the goal of reducing quantitative regulations and improving their quality. Furthermore, the question of evaluating the effects of regulations has presented itself in an institutional dimension at the EU level²⁹ and has also become ever more important³⁰ in many national legal systems.

In the life-cycle of regulation rules are considered as being capable of producing effects. The horizon is wider than in the legislative process, which has the different perspective of the mere adoption of the rule/regulation. The life-cycle of regulation includes all institutional activities oriented towards monitoring and evaluating the effects of rules in order (ultimately) to make possible review or regulation reform: this is what I have elsewhere defined as “maintenance of rules”³¹.

This approach to the problem of quality of regulation has important consequences for procedures and organization, as we are going to explain specifically.

III. Procedures

When we adopt the logic of the cycle of regulation many things in administrative processes need to be reinterpreted. Procedures must be created with a “developing logic” in mind: a planning phase comes before a regulatory procedure, which is followed by evaluation in a sort of “rolling”³² sequence.

What kind of rules are to be adopted in order to achieve good quality rules? What is the way in which regulation could meet its objectives? We can approach these questions in two different ways.

The first way looks at procedures formally, with regard to the rules of the procedure. The competition between public and

²⁹ In general, on this point, see L. Mader, *Evaluating the effects: a contribution to the quality of legislation*, in *Statute L. Rev.*, 2001, 119.

³⁰ See, recently, European Commission, Communication “*EU Regulatory fitness*”.

³¹ See De Benedetto, Martelli and Rangone, *La qualità delle regole*, cit. at 28, 98.

³² See European Commission, Communication “*Regulatory Fitness and Performance (REFIT): Results and Next Steps*”, COM(2013) 685 final, p. 13, where REFIT has been defined as “a rolling programme”.

private interests is regulated by the procedure itself, because participation in procedures “involves competition amongst competing ends and values”³³. Furthermore, the U.S. Administrative Procedure Act and other general regulations of rulemaking all over the world, impose procedural obligations, such as prior notice to the targets of the rule, participation (or consultation), information and transparency.

The second way looks at procedures substantively, with regard to the content of the final decision and to the choices during the procedure. The problem is to develop an adequate procedure and to control the cost of the whole rulemaking process. How deep has a rulemaking process to be in order to assure a well-reasoned decision? If we consider the cost of gathering information in procedures³⁴, we have to define a proportionate level of analysis (as this concept is called in EU vocabulary³⁵) for each procedure. But, in order to arrive at an appropriate definition of this level, further activities would need to be carried out, in other words, to incur further costs.

It is necessary to accept a suboptimal solution³⁶. The procedural choice is, in fact, based on a “bounded rationality”³⁷, a rationality which is constrained by limited information, by cognitive limitation and by a finite amount of time to make a decision. The choice could also be conditioned by the requirements which come from the various kinds of regulatory

³³ D.J. Galligan, *Due process and fair procedures. A study of administrative procedures*, (1996), 123.

³⁴ See, in general, on this topic G.J. Stigler, *The Economics of Information*, in *J. Pol. Ec.*, 1961, 69, 3, 213.

³⁵ The concept of “proportionate level of analysis” has been used in the context of Impact Assessment, see European Commission, *“Impact Assessment Guidelines”*, SEC(2009) 92, p. 13-14, where it is considered that it “relates to the appropriate level of detail of analysis which is necessary for the different steps of IA”. See also, European Commission, Communication *“Strengthening the foundations of Smart regulation – improving evaluation”*, p. 7 where a good evaluation report is described: “the appropriate level of (proportionate) analysis is defined based on the policy importance, the complexity of the EU action and its stage in the policy cycle”.

³⁶ See A. Albert, *Traktat über kritische Vernunft*, (1969), Italian edition *Per un razionalismo critico*, (1973), 20. See also N. Luhmann, *Legitimation durch Verfahren*, Italian edition *Procedimenti giuridici e legittimazione sociale*, (1995), 213.

³⁷ See H. Simon, *Administrative Behaviour*, (1947).

oversight (judicial review, oversight bodies, and non-governmental oversight bodies).

On the basis of this double approach, in several legal systems rulemaking is commonly articulated in a “series of step”³⁸, a decision route constituted by a “highly complicated set of activities”³⁹.

U.S. Executive Order n. 12866/1993 describes the principles of regulation, while the OMB Circular A-4, Regulatory analysis (2003), indicates key elements of a regulatory analysis. In Europe there has been a strong tradition of adopting check-lists since the Nineteen Seventies. This has been accepted by the OECD, which adopted the most famous check list in 1995. Also in France, la *Guide de légistique* – reviewed in 2007 – has considered the “*trame*” of the “*étude d’impact*” to be absolutely necessary, independently of the degree of in-depth study of the analysis. In Italy, the content of impact regulatory analysis is described as a step of the Government rulemaking process. In UK, the Impact Assessment Guidance⁴⁰ has identified stages in the process of impact assessment. Finally, at the European level, the European Impact Assessment Guidelines have prescribed analytical steps in the process and evaluation has, more recently, become crucial in the REFIT Programme⁴¹.

This, of course, leads to the logical conclusion that “an assortment of analytical requirements have been imposed on the simple rulemaking model” and that “the rulemaking process has become increasingly rigid and burdensome”⁴². This is the phenomenon called “ossification” of the rulemaking process.

³⁸ C.M. Radaelli, *What do governments get out of regulatory reform? The case of regulatory impact assessment*, paper, XV Conference of the Nordic political science association, Trømsø, Norway, 6-9 agosto 2008, p. 5

³⁹ J. Wroblewski, *The rational law-maker. General theory and socialist experience*, in *L’educazione giuridica, V – Modelli di legislatore e scienza della legislazione*, tomo III – *la discussione contemporanea*, ed. by A. Giuliani and N. Picardi, (1987), 59.

⁴⁰ Department for Business, Innovation and Skills, *Impact Assessment Guidance. When to do an Impact Assessment*, August 2011.

⁴¹ In particular, see European Commission, Communication “*Strengthening the foundations of Smart Regulations – improving evaluation*”. See also footnote n. 32.

⁴² About the “ossification” of the rulemaking process, see McGarity, T.O., *Some thoughts on ‘deossifying’ the rulemaking process*, in Duke L. J., 1992, vol. 41, p. 1385.

a. Regulatory “steps”

Let us begin with an examination of the possible nine steps which must be found in the process and which must be transparent, accessible and documented.

- 1) **Input of regulation.** At this step the problem is defined, in particular by highlighting the criticisms of the regulation in force, often facing the pressure of the users and their representative organizations⁴³. Here the need for intervention is defined⁴⁴.
- 2) **Grounds of regulation.** Here the gathering of evidence is provided⁴⁵ as well as the development of a baseline in order to measure the benefits and the costs of a rule⁴⁶.
- 3) **Purposes.** At this step, policy objectives must be identified⁴⁷. They have to be clear and directly related to solving the problems⁴⁸. Furthermore, they have to be divided into general, specific and operational objectives. Finally, it is necessary to make the objectives of the proposed regulation SMART objectives (Specific; Measurable; Achievable; Realistic; Time-dependent)⁴⁹.
- 4) **Consultations.** In order “to be effective” consultations must “start as early as possible”⁵⁰ and must respect minimum standards⁵¹. Moreover, a specific consultation stage allows the regulatory options to be refined, also

⁴³ Department of Business, Innovation and Skills, *Code of practice on Guidance on regulation*, October 2009, p. 6

⁴⁴ European Commission, *Impact assessment Guidelines*, (2009), p. 21

⁴⁵ Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 10

⁴⁶ Office of Management and Budget, *Circular A (Regulatory Analysis)*, September 17, 2003, p. 15

⁴⁷ Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 10

⁴⁸ European Commission, *Impact assessment Guidelines*, p. 25

⁴⁹ *Ibid.*, p. 28

⁵⁰ European Commission, *Communication “Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission”*, COM(2002) 704 final, p. 18. On this point, Executive Order 13,563, *Improving Regulation and Regulatory Review*, January 18, 2011, sec.2.

⁵¹ *Ibid.*, p 19. Here minimum standards for consultations have been indicated: clear content of the consultation process, consultation target groups, publication, time limits for participation, acknowledgement and feedback.

with a publication for public consultation and comments⁵². The Minister or other regulator – exercising largely discretionary powers - can consult “all relevant interests in society”⁵³ as well as the representative organizations of interests which are substantially affected by the proposed regulation⁵⁴, or statutory bodies, where the proposed regulation relates to its own functions.

- 5) **Alternatives.** At this step regulators “shall identify and assess available alternatives to direct regulation”⁵⁵, “including the alternative of not regulating”. In other words, it is necessary to define which options are most likely to achieve the objectives “in the light of constraints such as compliance costs or considerations of proportionality”⁵⁶.
- 6) **Evaluation.** The comparison and the evaluation of the options allow the regulator to “focus on costs and benefits of preferred option”⁵⁷.
- 7) **Justification.** As Executive Order n. 12866/1993 stipulates, cost-benefit analysis and other measuring techniques provide a framework for evaluating the alternative regulatory choices⁵⁸ and for showing the reasons for choosing one alternative over another.
- 8) **Enforcement.** Also called the implementation step, at this stage it is obligatory for implementation to be “‘on track’ and the extent to which the policy is achieving its objectives”⁵⁹.
- 9) **Review stage.** After the implementation of the regulation, the regulation should be reviewed to

⁵² Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 9

⁵³ European Commission, Communication “Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission”, p. 5.

⁵⁴ Art. 13, *Legislative and regulatory reform Act*, 2006.

⁵⁵ Executive Order n. 12866/1993, *Regulatory Planning and Review*, sec. 1, b, n. 3.

⁵⁶ European Commission, *Impact assessment Guidelines*, p. 28

⁵⁷ Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 22.

⁵⁸ Office of Management and Budget, *Circular A (Regulatory Analysis)*, p. 9.

⁵⁹ European Commission, *Impact assessment Guidelines*, p. 48.

confirm the actual costs and benefits and to verify whether it is achieving its desired effects⁶⁰. When regulation contains a review clause evaluation is made compulsory⁶¹.

Thanks to the review stage we can talk about a real regulatory “chain”, characterized by a systematic and periodic evaluation of regulation, according to the regulatory provisions. The described nine steps of the regulatory decision route are not always compulsory but they should be traceable if we want to ensure quality of regulation. If the steps are not traceable, regulators can omit consultations or not evaluate the options, without fear of consequences even when some form of oversight (by a Regulatory Oversight Body or by judicial review) has been established.

Transparency in the process relating to these steps “means that agency decisions are clearly articulated, the rationale for these decisions are fully explained and the evidence on which the decisions are based is publicly accessible”⁶². So, by following the steps it is possible to achieve two different goals: legitimacy of regulatory decisions and good quality regulation.

Three questions remain to be analysed: political decisions and technical (or bureaucratic) decisions; participation; giving reasons.

b. Political decisions and technical decisions.

The general problem of the normative criteria for the allocation of tasks to bureaucrats or politicians⁶³ aims to find a solution also in procedures. Therefore, almost all of the steps described above should be performed by technical bodies, by bureaucrats, by professionals operating in institutions

⁶⁰ Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 22.

⁶¹ European Commission, *Impact assessment Guidelines*, p. 50.

⁶² Coglianese, Kilmartin and Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, cit. at 22, 926.

⁶³ See on this point, A. Alesina, and G. Tabellini, *Bureaucrats or politicians? Part I: a single policy task*, in *Am. Ec. Rev.*, 2007, 97, p. 169 and *Bureaucrats or politicians? Part II: multiple policy tasks*, in *J. publ. ec.*, 2008, 92, p. 426.

characterized by expertise and impartiality, in legislative assemblies, in ministries or in independent regulators. The administrative stage (in which impact assessment is produced and decisions are taken) is “an aid to decision-making, not a substitute, for political judgement”⁶⁴. The reason is that politics and administration function in quite different ways, for example, let us consider the system of incentives. The administrative decision, on one side, should be extended to every step of the process, until the formulation of alternatives to regulation and until choosing the preferred “proposal”. The political stage of decision, on the other side, should be limited to the input of regulation (for example, by a regulatory agenda, directives and so on) and to the final decision, even if it is different from the preferred “proposal”. If we must face facts, very often the decision is adopted in advance, without a transparent process and with a “post-hoc rationalization”⁶⁵.

c. Participation and transparency.

We have seen that participation and transparency in rulemaking are considered rules of quality. There is a remarkable difference between consultation in a regulatory process and lobbying. In fact, lobbying (regulated only in some legal systems, such as US, Canada, Australia and EU) is a process starting from the representatives of interest groups and directed at regulators in order to gain favourable rules⁶⁶, while consultations are conditioned by the input of regulators themselves and are directed towards achieving the point of view of the targets of the regulatory process⁶⁷.

⁶⁴ European Commission, Communication on “*Impact assessment*”, COM (2002) 276 final

⁶⁵ Coglianese, Kilmartin and Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, p. 933.

⁶⁶ European Parliament, Directorate-General for Research, Working Paper, *Lobbying in the European Union: current rules and practices*, 2003, p. iii, where the objective of lobbying is described as “to maintain a favourable regulatory environment for their organizations, members or clients”.

⁶⁷ See European Commission, Communication “*Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*”.

Not all legal systems regulate participation and transparency in rulemaking. The most important regulation is without any doubt the US Administrative Procedure Act, adopted in 1946, also based on notice and comment procedures. But in some legal systems – like in Italy – there are no general provisions in order to guarantee participation in rulemaking even though specific provisions in regulatory sectors (such as communications or financial markets) have started being adopted.

But, also thanks to the pressure of European regulations – informed by the right to be heard and to promote consultations – participation in rulemaking processes is destined to become more robust, because it “allows agencies to obtain information that helps them (1) improve the quality of new regulations, (2) increase the probability of compliance, and (3) create a more complete record for judicial review”⁶⁸.

d. Giving reasons.

It was noted that “the standard of fair treatment is [...] not only that there be good reasons, but also that the reasons be given”⁶⁹. In fact, giving reasons is the formalization of the justification process and is also the object of the various kinds of review by oversight bodies and by judges.

The requirement to give reasons is prescribed in several legal system, such as in Europe, or in the UK, and in Spain (*exposición de motivos*), but is absent – in the legislative process – in Italy and France even if it has here recently been made obligatory for legislative initiatives to be accompanied by specific *analisi d’impatto della regolazione* and *études d’impact*.

So, we can reasonably expect that in a short time general provisions adopted by every kind of regulator will be not only justified but also provided with a related explanation.

⁶⁸ Coglianesi, Kilmartin and Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, cit. at 22, 946.

⁶⁹ Galligan, *Due process and fair procedures. A study of administrative procedures*, cit. at 33, 433.

IV. Organization

In order to improve the quality of regulation it is necessary to build efficient institutions, which are coherent with the procedural framework⁷⁰. Furthermore, to make good rules we need not only a change in traditional institutions but also the creation of new kinds of institutions to be in charge of such matters. Regulation is “*la forme moderne de l’action administrative*”⁷¹, i.e., it imposes new ways for traditional functions to be performed and to carry out new functions.

This has been confirmed by pressure from the OECD to promote simultaneous regulatory reforms and institutional reforms.

On the other hand, the organizational problems of public bodies have been studied less, at least in Italy⁷², even if they are priority problems⁷³ and even if they are possible obstacles to implementing reforms.

The relevance of this question concerns institutional design: design – as a general process – consists in “inventing physical things which display new physical order, organization, form, in response to function”⁷⁴. As a consequence, starting with functions good quality regulation imposes new skills, a greater workload and an adjustment of the organizational framework in ministerial and independent bodies one of whose aims is to reconfigure and probably even to reduce the public sphere⁷⁵.

⁷⁰ D. Rodrigo, L. Allio and P. Andres-Amo, *Multi-level regulatory governance. Policy institutions and tools for regulatory quality and policy coherence*, OECD Working Papers on Public Governance No. 13, 2009, p. 25: “Regulatory institutions are fundamental to ensure regulatory implementation and the appropriate use of regulatory instruments”.

⁷¹ Y. Gaudemet, *Introduction in La concurrence des modes et des niveaux de régulation*, in *Revue française d’administration publique*, 2004, n. 109, 13.

⁷² The question of administrative organization was extensively analyzed by M.S. Giannini, *Le organizzazioni elementi degli ordinamenti giuridici*, in *Scritti in onore di Pietro Virga*, Tomo I, (1994), 929.

⁷³ M.S. Giannini, *La priorità dei problemi di organizzazione*, in *Il motore immobile. Crisi e riforma della pubblica amministrazione*, (1980), 45, now in *Scritti*, vol. VII, 1977-1983, (2005), 503.

⁷⁴ C. Alexander, *Notes on the Synthesis of Form*, (1964), 1. See also M.S. Giannini, *In principio sono le funzioni*, in *Amministrazione civile*, 1959, 11, now in *Scritti*, Vol. IV, 1955-1962, cit. at 73, 719.

⁷⁵ About the “minimal State”, see R. Nozick, *Anarchy, State and Utopia*, (1974).

But, how must we consider the relationship between regulation and organization? How must a good regulator evaluate organization?

A good regulator is, in fact, involved in making a consistent procedural and organizational framework with the need for good regulation and, in so doing, aims at giving regulation concrete opportunities to become effective.

If we take a look at organization from the point of view of the quality of regulation we can observe three ways in which it could be relevant.

Firstly, organization is one of the *variables* in Impact assessment. Organization, indeed, can represent a criticism in order to implement a regulation and the impact of each regulatory option on administrative institutions has to be individually evaluated.

Secondly, organization is one of the possible *objects* of regulation itself, for example, when institutional reforms are carried out. In these cases, organization is analysed from an empirical and managerial point of view.

Thirdly, organization is probably one of the most relevant *conditions* for the success of regulation, because it also consists of enforcement and monitoring rules, as we have previously affirmed. The organizational dimension of law has been also considered the key-variable in order to understand effectiveness (efficacy) of legislation. In other words, efficacy problems have to be evaluated as organizational problems⁷⁶.

In recent years, several countries have been interested by institutional reforms, very often related to better regulation policies⁷⁷. A look at the possible kinds of organizational interventions reveals six different typologies.

The first kind is the reduction (or suppression) of public bodies. This is the case for Italian “*enti pubblici*” and the French “*suppression de services ou organismes*”, in the framework of the “*Révision general des politiques publiques*”, started in 2007.

⁷⁶ See, on this point, Wroblewski, *The rational law-maker. General theory and socialist experience*, cit. at 39, 65.

⁷⁷ C. Radaelli, F. De Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes*, (2011).

The second kind is the reduction in the size of public bodies. This is the case for the “reinventing government” programs and for the “cutting red tape” programs.

The third kind is the fusion (or merging) of public bodies. This is the case for the UK single regulator of financial markets, born in 2000 (Financial Services and Markets Act).

The fourth kind is the transformation of public bodies. This is the case where there is a change in the juridical nature of bodies which were in origin public and which were later privatised (such as in the privatization of public enterprises).

The fifth kind is the establishment of independent institutions. This is the case, for example, with the antitrust authorities in many European countries.

Finally, there is the reform of public bodies. This is the case for real reform, in which the functions are reorganized, like in the Italian reform of Government (1999) and in the Belgian reform (*Plan Copernic*), implemented in 2000.

A good regulator should choose between these different kinds of intervention in order to make consistent (as much as possible) regulation and organization. The choice depends in part on possible regulatory constraints (i.e. EU regulations which require independence of regulator, financial constraints, and so on) and in part on regulatory contents (i.e. liberalization accompanied by a privatization process).

More importantly, a good regulator should also take into account the zero-option also when designing institutions in charge of regulatory enforcement. This means that regulators should always keep in mind the possibility not to carry out any organizational reform. In fact, often (at least in Italy) a public body reform could be a pretext for a creative compliance strategy to pursue objectives other than good regulation (for example, to change completely the managerial positions in a Ministry or to serve symbolic politics). Furthermore, every change in organization carries costs and creates side-effects which should be considered before starting the process: “changes are costly and take time to implement – so they need to be justified and greater attention need to be paid to looking back before moving

forward”⁷⁸. Even “stakeholders prefer regulatory stability over frequent legislative revision”⁷⁹, so it may sometimes be sufficient to look for informal agreement and solutions⁸⁰.

Another two questions require our attention.

Firstly, we have to take into account the general relevance of informatization over organizational matters. Informatization, indeed, implies a different allocation of the tasks, of the relationship between administrations and citizens or users and a change in workloads.

Secondly, we have to take into account the increasing relevance of the financial point of view, which seems to be the principal criterion of institutional reform “in an age of permanent fiscal crisis”⁸¹.

What is needed to qualify the professional role of experts regarding the quality of regulation? There is large agreement about the idea that a good regulator should have a high level of technical expertise and a certain degree of independence.

In a number of studies and research projects we have seen that regulatory functions (and specifically those functions related to the use of regulation analysis techniques) have been inserted into the organization of institutions all over the world, and have also been organized in several ways⁸². On the other hand, this “diffusion” of regulatory functions and the operating capacity are “without convergence”⁸³. It is, in fact, possible to find different models, different contexts, different flexibility and different oversight systems.

⁷⁸ See European Commission, Communication “*Strengthening the foundations of Smart Regulations – improving evaluation*”, p. 5.

⁷⁹ See European Commission, Communication “*Regulatory Fitness and Performance (REFIT): Results and Next Steps*”, p. 9.

⁸⁰ See, on this point, J. Black, *Talking about Regulation*, in “Public Law”, 1998, p. 77.

⁸¹ On the specific issue of administrative costs, D. Osborne, and P. Hutchinson, *The Price of Government: Getting the Results We Need in an Age of Permanent Fiscal Crisis*, (2004).

⁸² See A. Kasemets, *Impact Assessment of Legislation for Parliament and Civil Society: a Comparative Study*, in ECPRD Seminar on Legal and Regulatory Impact Assessment of Legislation, 2001, Riigikogu, Tallinn.

⁸³ C.M. Radaelli, *Diffusion without convergence: how political context shapes the adoption of regulatory impact assessment*, in J. Eur. Publ. Pol., 2005, p. 924.

a. Principles of Good Organization

In this non-uniform overview, it is useful to search for uniform principles of “good” organization, principles capable of giving directives over the allocation of tasks in the matter of good quality regulation.

The first principle concerns the relationship between politics and administration. As we have explained in the matter of procedures, good quality regulation is placed at the boundary between politics and administration⁸⁴. When regulator designs an institutional framework⁸⁵ it is necessary to distinguish between two different regulatory bodies: one is responsible for political tasks and placed at the top of the institution; the other is responsible for technical tasks and closely linked to the executive director of the agency or the permanent/general secretary of the Ministry and related to the line structures⁸⁶.

The second principle regards transparency and responsibility, which are strictly connected. Transparency is the key to achieving democratic goals and also to producing “better, more informed policy decisions”⁸⁷. Moreover, all political and administrative decision-makers (even if with different methods of

⁸⁴ On the relationship between political decision and technical decision see the already mentioned Alesina, and Tabellini, footnote n. 63.

⁸⁵ See, in general, R. E. Goodin (ed. by), *The Theory of Institutional Design*, (1996), in particular p. 32-33.

⁸⁶ On this point see J. Chevallier, *L'évaluation législative: un enjeu politique*, in *Contrôle parlementaire et évaluation*, ed. by A. Delcamp, J.L. Bergel and A. Dupas, (1995), 20. See, on this point, Department for Business, Innovation and Skills, *Impact Assessment Guidance*, in particular p. 15, where there is a description of the approval necessary to publish an Impact Assessment. This is an interesting example which expresses a good distinction between politics and administration in IA process: “The minister responsible for the policy (or the Chief Executive of non departmental public bodies or other agencies) is required to sign off published Impact Assessment [...]”, and specifically he has to declare that he has read and he is satisfied about the consultation stage, the final proposal and the review stage, while “Chief Economist should sign off Impact Assessment for the robustness and accuracy of the costs, benefits and impact analysis at the different stages of policy development”.

⁸⁷ Coglianese, Kilmartin and Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, cit. at 22, 927.

oversight) should be held to absolute standards of individual responsibility⁸⁸.

The third principle is multicompetence in regulation. Regulation presupposes multicompetent expertise, such as economic, legal, statistical, political and, ultimately, technical skills. Furthermore, regulation needs a specific competence in managing multicompetent expertise.

Finally, we should look for an oversight principle in regulation⁸⁹. Regulatory decisions must be reviewed by an oversight body in order to guarantee their adequacy to attain regulatory objectives. The “plethora of oversight mechanisms”⁹⁰, such as parliamentary, governmental or judicial ones, imposes the need for models in line with technical reviews of regulatory decisions.

If problems of efficacy are mainly problems of organization (as we have seen)⁹¹, what is necessary to make a regulator a “good” regulator, from an organizational point of view?

Given that the regulator is part of the traditional administration (such as a ministry), it would be necessary for the office in charge of regulatory tasks to have a sufficiently high level in the organization, in order to coordinate line structures (where expertise is found) and to manage external relations with a sufficient degree of autonomy. Furthermore it would be well-resourced⁹².

Since the regulator is supposed to be independent (for example, when imposed by a European regulation), the various measures of independence (appointments, incompatibilities,

⁸⁸ See H. Jonas, *The imperative of responsibility: in Search of an Ethics for the Technological Age*, (1984), in particular the “responsibility principle”. See also F.A. Von Hayek, *The Constitution of Liberty*, (1960); Italian edition, (1999), 123.

⁸⁹ See OECD, *Regulatory institutional framework and oversight*, in “Government at a glance” 2011, p. 158.

⁹⁰ M. Seidenfeld, *A table of requirements for federal administrative rulemaking*, in *Fla. St. U. L. Rev.*, 2000, p. 533.

⁹¹ See Wroblewski, *The rational law-maker. General theory and socialist experience*, cit. at 39, 65.

⁹² At this regard, see Evia (Evaluated Integrated Impact Assessment), *Improving the practice of Impact Assessment*, in particular p. 10-11, where institutions for Impact Assessment are described.

powers, autonomy, etc.) should create a coherent and non-contradictory system⁹³.

If we are to set up an oversight body, then expertise and adequate resources must be accompanied by a placement “at the centre of Government”⁹⁴.

Some different considerations should be mentioned about the different kinds of institution: Parliaments (or legislative assemblies); Administrations; Independent Authorities.

b. Parliaments (or legislative assemblies).

Sometimes Parliaments adopt rules which are proposed by members of the assembly but more frequently rules are proposed by Governments. If we consider that the economic analysis of regulation must be used as early as possible in the regulatory process, then in reality we can only develop an oversight of the proposed legislation at the parliamentary stage. How have Parliaments organized offices, teams or professionals in charge of regulatory support? Impact assessments, for example, are usually performed outside parliament, by governments as well as research centres and universities or other private entities⁹⁵. Nevertheless, parliaments have appointed structures to support the legislative process and to review the proposed legislation, from the general point of view of the quality of regulation. Such structures include: the US Congressional Budget Office; the German *Büro*, which supports the *Bundestag* in matters of technological innovation; the *Office parlementaire d'évaluation des choix scientifiques et technologiques*, which advises French Parliament about the consequences of scientific and technological choices. In Italy there are two different organisms, the *Commissione parlamentare per la semplificazione* (which has advisory powers in the process of

⁹³ See Alexander, *Notes on the Synthesis of Form*, cit. at 74, 15, where – talking about “design” in general – he says that “every design problem begins with an effort to achieve fitness between two entities: the form in question and its context”; see also, p. 17: “the rightness of the form depends [...] on the degree to which it fits the rest of the ensemble”.

⁹⁴ OECD, *Oversight bodies for regulatory reform*, 2007.

⁹⁵ The European Centre for Parliamentary Research and Documentation in 2001 carried out (and later updated) a comparative study on Impact assessment in 22 countries, see Kasemets, *Impact Assessment of Legislation for Parliament and Civil Society: a Comparative Study*.

cutting legislation) and the *Comitato per la legislazione* which (in the Italian Chamber of Deputies) has advisory powers on the formal quality of legislative proposals. Regional assemblies too have structures responsible for the quality of legislation, such as in Italian regions (inside the Conference of the Presidents of Regional Legislative Assemblies) and in the German Länder (inside the Conference of the Länder Presidents).

c. Administrations.

In the Ministries (and in regional and local administrations), the functions regarding quality of regulation are, normally, organized into three different levels, which are (generally) present at the same time.

The first way in which to organize regulatory functions is inside each regulator, in order to decentralize (as much as possible) the functions⁹⁶. Different kinds of professionals operate here: the US agency regulatory policy officer; the UK impact assessment officer; the Australian regulatory impact officer; the French *fonctionnaires responsables de la qualité de la réglementation*; the Italian *responsabili dell'analisi degli impatti della regolazione*. The most frequent problems are, at this level, the proper allocation of tasks and the clear definition of the functions in the regulatory process, in order to correctly distinguish technical evaluation from political evaluation.

The second way to organize regulatory functions is near the centre of Government, in order to centralize the functions. The central unit can take several forms. For example, there is – in the US – the Office of Information and Regulatory Affairs, inside the Office of Management and Budget of the Presidential Executive Office; the UK Better Regulation Executive based in the Department of Business, Innovation and Skills (BIS), which has general responsibility over governmental activities; in France there is a *Direction des études législatives* and an interministerial group at the *Secrétariat général du gouvernement*; in Italy, there is a Central Unit for Simplification and for Quality of regulation and

⁹⁶ We can find *ad hoc* offices near the permanent/general secretary; offices specifically dedicated to the mission of good quality regulation; other organisms in the ministry, characterized by a certain degree of autonomy; specific units in those offices which are responsible for the normative process.

an office in charge of analysis and evaluation of regulatory impact inside the Department for Legal and Legislative Affairs (at the Presidency of the Council of Ministers); in Spain, there is a national Agency (*Agencia de evaluación y calidad*) in charge of evaluation, inside the Ministry of public administration.

Three different kinds of tasks are performed: *coordination* of regulatory activities of the Government, in order to pursue what the OECD has called the “whole of Government approach”; *support and advice* to ministerial regulators (such as the State of New York Governor’s Office of Regulatory reform); *regulatory oversight*, such as for the US Office of Information and Regulatory Affairs.

The third way in which to organize regulatory functions is to create a network of regulators, in order to connect functions. This kind of organization allows regulators to create an integrated system, between centralized structures and decentralized ones, aimed at “network building and administrative cooperation”⁹⁷.

d. Independent authorities.

Independent authorities are generally not obliged to observe the same procedural constraints imposed on the executive agencies or Ministries, because they have a direct relation with the Parliament/Congress (as is the case of Italy, for example). The cost-benefit analysis constraints in the US have been established only for the executive agencies, which are subject to review by the Office of Information and Regulatory Affairs. In the US it has been suggested, indeed, that even independent agencies might be subject to some of the procedural constraints of executive agencies. Executive Order 13,578 (Regulation and Independent Regulatory Agencies, July 11, 2011) has stated that “independent regulatory agencies should consider how best to promote retrospective analysis of rules” (Sec. 2). Nevertheless, it is clear that there are some risks (to their independence) if presidential control over independent agencies would become too pervasive.

⁹⁷ C.M. Radaelli, *The diffusion of regulatory impact analysis. Best practice or lesson-drawing*, in Eur. J. Pol. Res., 2004, p. 739. This is the case, for example, of the Standard Cost Model Steering Group, established in 2003.

IV. Conclusions

Legislative inflation (due to interest groups, symbolic politics and to the speed of technological innovation) is an obstacle to the certainty and the consistency of regulatory frameworks. It is becoming ever more difficult to maintain rules and to continuously make rules consistent with their consequences⁹⁸. The need for (legal) certainty is, indeed, indispensable to exercising freedom⁹⁹ and regulators work towards the goal of guaranteeing the so-called *securité juridique*¹⁰⁰, which consists both in the quality of rules and in their predictability.

The problem is not limited to the single procedural obligation or to a specific regulatory process. It involves the normative power itself, which must be controlled¹⁰¹: this is the reason why wide programs for controlling regulations are carried out in many OECD legal systems.

What rules of quality must be adopted in order to ensure good regulation?

The first (and more general) rule of quality is – as we have seen – to distinguish between politics and administration both in regulatory procedures and in organization¹⁰². It is not a simple question: the two aspects of institutional decisions (political and administrative) have frequently been linked and influence each other.

Furthermore, a powerful tool to achieve better quality regulation is transparency, which must be understood as the main rule in the life-cycle of regulation. Transparency is required by the diverse stakeholders in the regulatory process and implies not

⁹⁸ See Coglianese and Kagan (ed. by), *Regulation and Regulatory Process*, cit. at 2, xi.

⁹⁹ On the need of certainty, see Z. Bauman, *Liquid life*, (2005); Italian edition *Vita liquida*, (2008), 29.

¹⁰⁰ Conseil d'Etat, *Rapport public 2006 – Sécurité juridique et complexité du droit*, La documentation française, 2006.

¹⁰¹ Concerning the “control” of normative power, see B. Leoni, *Freedom and the law*, (1961); Italian edition, *La libertà e la legge*, (2000), 108 ss. and; see also, N. MacCormick, *Questioning sovereignty. Law, State and Nation in the European Commonwealth*, (1999); Italian edition *La sovranità in discussione. Diritto, stato, nazione nel <commonwealth> europeo*, (2003), 95, and, finally, B. Du Marais, *L'Etat a l'épreuve du principe de concurrence: analyse et prospective juridique*, in *Revue politiques et management public*, 2002, p. 121.

¹⁰² Chevallier, *L'évaluation législative: un enjeu politique*, cit. at 86, 20-21.

only information but also communication activities because “to be effective regulations need to be well designed, communicated and enforced”¹⁰³. Furthermore, it is necessary for such communication to be “as fair and accurate as possible”¹⁰⁴.

On the other hand regulators should consider the problem of the side effects of regulations, now accompanied by the more pernicious creative compliance¹⁰⁵, which aims to use rules as instruments to pursue prohibited results. In this framework evaluation “identifies unintended and unexpected consequences”¹⁰⁶ and can help discover opportunistic use of available legal schemes.

How is it possible to take into account these several elements, in order to adopt and to maintain rules properly? Some conditions must be satisfied.

Firstly, regulations must be built and adopted to be maintained. Rules should not only be clear, coherent and accessible (formal quality of rules), but should also be built on an informative basis, which is available to the stakeholders and to the citizens to allow monitoring and evaluation of the impacts, because there “should be a continuous loop: a good evaluation should be influenced by the quality of the preparation which went into an intervention”¹⁰⁷.

Secondly, good quality regulation should be strengthened as a political task, in the sense that it should become an important part of legislative work at every level of Government. This is the case for the Interinstitutional Agreement on better law-making¹⁰⁸ at the EU level. This is also the case for the constitutional reform issued in 2008 in France, which made it obligatory to dedicate

¹⁰³ HM Government, *The Government's Forward Regulatory Programme*, 2010. See also European Commission, Communication “Strengthening the foundations of Smart regulation – improving evaluation”, p. 9.

¹⁰⁴ Office of Information and Regulatory Affairs, “Disclosure and simplification as Regulatory Tools”, 2010

¹⁰⁵ See Baldwin, Cave and Lodge, *Understanding Regulation. Theory, Strategy and Practice*, cit. at 4, 70.

¹⁰⁶ European Commission, Communication “Strengthening the foundations of Smart regulation – improving evaluation”, p. 3.

¹⁰⁷ *Ibid.*, p. 5.

¹⁰⁸ European Parliament-Council-Commission, *Interinstitutional Agreement on better law-making*, 2003/C 321/01: see in particular the section dedicated to “Improving the quality of legislation”.

specific moments of Parliamentary activities to public policy evaluation. This is the case for Italian Regions or German Länder which have promoted good quality regulation in the activities of their assemblies.

Thirdly, good quality regulation should be an administrative (or technical) task. Good quality regulation should be organized as a real administrative function, regulated by law and performed by professionals operating in dedicated offices, inside every kind of regulator (legislative assemblies, administrations, independent agencies).

Finally, in maintaining rules, it is necessary to consult the targets of regulations, in order to improve the informative basis of the regulatory process and in order to achieve compliance and prevent litigation.

THE INCIDENTAL LEGALITY REVIEW OF REGULATIONS IN ITALY

Marco Macchia *

Abstract

This article discusses the legality review of secondary rules in Italy. In the era of the vast administrative state there are numerous situations in which some activities are covered by rules emanating from government, departments of state or other governmental agencies. They are like a delegate is invited to stand in the shoes of the legislature. Governmental rules have two-fold nature. Regulations, on the one hand, are sources of law similar to primary legislation. On the other hand, secondary rules are administrative instruments that supplement the executive power, that is, they are an inherent feature of public authority. The two-fold nature affects the legality review. Secondary rules may not be reviewed by the Constitutional Court. Although regulations are legislative instruments, their administrative set-up plays a key role in the application of procedural rules. Indeed, the judicial review of secondary rules is up to administrative courts, which can intervene mainly after a regulation is challenged. Because of this flexibility, administrative judicial proceedings are suitable for challenging regulations on account of the hybrid nature of regulations, which are halfway between legislative instruments and tools inherent in the exercise of public authority. The aim of this article is to demonstrate how administrative law courts seized with the review of regulations. The judicial review by administrative courts appears to be quite similar to that of the Constitutional Court, as it is modeled after an objective approach to jurisdiction. Judges must disapply regulations that infringe laws and they can adjust themselves to and admit of innovative approaches.

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1. *Foreword: The Judicial Review of Secondary Sources.*

Parliament does not have the monopoly on law-making power. Government, ministerial bodies, Regions, local administrative bodies, and independent authorities are empowered to adopt acts of legislative nature. This means that sources of law do not derive exclusively from representative bodies; norm creation is indeed conferred to various public subjects and is developed through complex processes, in which hierarchical and competence criteria constantly overlap and replace one another. This is an instance of the so-called “legislative polycentrism”¹. Legislatures delegate power because they cannot possibly fulfill the expectations of the modern citizen through primary legislation². Governmental rules are secondary sources: they are different from primary legislation (i.e. laws and equivalent acts) both in nature and legal status³.

¹ On the creation of acts of legislative nature by independent administrative authorities see Council of State, regulatory instruments division, decision no. 11603/04, dated to 25 February 2005.

² P. Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope*, (2012), 2.

³ On the controversial nature of regulations and on the difference from general administrative instruments see G. della Cananea, *Gli atti amministrativi generali*, (2000). Considering such different legal status, it is often the Government that

This article is concerned with secondary rules. It does not focus on parliamentary legislation, but on rules emanating from government, that is on the array of rules produced by the departments of state or other governmental agencies. This, necessarily, involves considering how the use of rules «as tools of government» can be gauged⁴. The law-making power of public administrative bodies is currently in a chaotic situation, because of the presence of an irrational and contradictory set of applicable rules. There are numerous situations in which a delegate is invited to stand in the shoes of the legislature. But there is no systematic statutory framework.

This law-making power relies on a general model, composed of governmental regulations combined with special instruments – varying from the regulations issued by local authorities to those of independent authorities. Secondary rules have legal force and are produced in exercise of a power to legislate that is conferred by an act of Parliament.

The government's secondary source legislative power is regulated by Article 17, Law no. 400/1988 that disciplines the type of power and its decisional procedure, above and beyond anything provided for by Constitutional regulations. A government regulation may be proposed by one or more Ministers, but it must be deliberated by the government's collegial

has to decide - depending on the sector involved - whether to start the procedure for passing a law or to adopt a regulation; this decision ultimately determines the type of jurisdictional protection. On the origins of the Government's regulatory functions see F. Cammeo, *Della manifestazione della volontà dello Stato nel campo del diritto amministrativo. Legge ed ordinanza (decreti e regolamenti)*, in *Primo trattato completo di diritto amministrativo*, edited by V.E. Orlando, (1907), III, 71 and ff. On the secondary sources of law see G. Tarli Barbieri, *Il potere regolamentare del Governo (1996-2006)*, in *Osservatorio sulle fonti 2006*, (2007), 205 and ff.; U. De Siervo, *Il potere regolamentare alla luce dell'attuazione dell'art. 17 della legge n. 400 del 1988*, in *Dir. pubbl.*, 1996, 82. On local (de-centralised) sources of law, see M. Di Folco, *La garanzia costituzionale del potere normativo locale. Statuti e regolamenti locali nel sistema delle fonti fra tradizione e innovazione costituzionale*, (2007). The secondary rules of independent authorities are examined by S. Foà, *I regolamenti delle autorità amministrative indipendenti*, (2002); F. Politi, *Regolamenti delle autorità amministrative indipendenti*, in *Enc. giur.*, XXX, 2001.

⁴ On the idea of rules as a governmental tool, and particularly on the creation of different forms of regulatory regimes employing different forms of rule, R. Baldwin, *Rules and Government*, (1995).

body after receiving the State Council's obligatory but not binding opinion. Once this procedure is complete, the President of the Republic issues the regulation as a Presidential Decree Law (*Decreto del Presidente della Repubblica*), submits it to the Court of Accounts for preventive control and filing, and publishes it in the Official Gazette.

Despite a series of legal provisions enshrined in laws, systematic and open consultation of the public on governmental regulatory initiatives is not provided by law. In practice open public consultation, through "notice and comment" procedures, remain seldom used and coexist with traditional forms of closed-door consultation and negotiation. However greater awareness of the necessity to enhance consultation practices as an integral part of decision-making is emerging. The government would devote more attention to public consultation in the preparation of normative acts, and is preparing a new regulation which is expected to cover consultation in *ex ante* and *ex post* evaluation⁵.

⁵ Oecd, *Better Regulation in Europe: Italy 2012. Transparency through consultation and communication*, revised edition, June 2013, 59. Otherwise United States procedures for developing regulations derive from the U.S. Constitution and the 1946 Administrative Procedure Act (APA). The APA constrains executive rulemaking, not only because the agency can only act within the limits set by statutes, but also because it must follow specified procedures. In particular, it must provide notice to the public of the proposed action and take into consideration public comment before issuing a final rule. The APA describes two types of rulemaking – formal and informal. Formal rulemaking is typically used by agencies responsible for economic regulation of industries, and is only required when a statute other than the APA specifically states that rulemaking is to be done "on the record". Informal rulemaking, or notice and comment rulemaking, is the most common process used in the U.S. by agencies for writing, or "promulgating" regulations. On public involvement, see S.G. Breyer, R.B. Stewart, C.R. Sunstein, A. Vermeule, *Administrative Law and Regulatory Policy: Problems, Text, and Cases*, (2006), 479 and ff. As noted P. Cane, *Administrative Law*, (2004), 139, «the main advantages of a more formal procedure of rule-making are said to be that it gives the citizen a greater chance to participate in decision-making and that it improves the quality of the rules made. However, unless participation leads to greater satisfaction with and acceptance of the rules themselves, it is of doubtful value. If the participants object to the rules made, despite extensive involvement, and feel that participation has only "worked" if the result they favour is reached, then participation by itself is of limited value. The more formal procedures used in the United States do not seem to have reduced dissatisfaction with administrative rule-making. It may be that Americans are much less happy than

Otherwise public consultation practice by regulatory agencies is quite advanced. All of them apply notice and comment and publish the inputs received as well as their general feedback on the consultation findings. Systematic involvement of stakeholders in the adoption of general type acts is required by law.

Administrative bodies' law-making power is free from formal constraints, since the models may be set forth in general terms not only by laws, but also by secondary rules. These latter may also surreptitiously take a different form⁶. In other terms, primary laws usually set out substantive standards applicable to "legislative acts" issued by public administrative bodies. At the same time, *ad-hoc* measures adopted by the Parliament waive these standards, ultimately enabling those bodies to adopt "legislative acts that do not have the force of regulations"⁷. Over the past thirty years, there has been a veritable proliferation of non-typical regulations, which is partly due to the lack of constraints placed by our Constitutional Charter on this subject-matter. This makes it necessary to rely on interpretative approaches, moving from a solid substantial ground, in order to focus on the actual contents of the considered regulatory instruments⁸.

the British about having their lives regulated by government at all, and that this, rather than the actual content of the regulation, is the main source of the discontent. No amount of formalized procedure can overcome this problem».

⁶ There is no single system of secondary sources, but rather a system of independent secondary sources of the State, Regions and local bodies. A more thorough analysis of these briefly examined, but fundamental questions, can be found in L. Carllassare, *Il ruolo del Parlamento e la nuova disciplina del potere regolamentare*, in *Quad. cost.*, 1990, 24 and ff.; G.U. Rescigno, *Note per la costruzione di un nuovo sistema delle fonti*, in *Dir. pubbl.*, 2002, 789 and ff.; N. Lupo, *Dalla legge al regolamento*, (2003); C. Tubertini, *Riforma costituzionale e potestà regolamentare dello Stato*, in *Riv. trim. dir. pubbl.*, 2002, 935 and ff.

⁷ On this kind of source see A. Moscarini, *Sui decreti del Governo «di natura non regolamentare» che producono effetti normativi*, in *Giur. cost.*, 2008, 5075 and ff.; G. Sciuillo, *Potere regolamentare, potere «pararegolamentare» e pubblica amministrazione: gli orientamenti dopo la l. 400/1988*, in *Le Regioni*, 1993, 1277 and ff. Decrees without force of regulations that deal with organizational issues are analyzed by L. Torchia, *Il nuovo ordinamento dei ministeri: le disposizioni generali (articoli 1-7)*, in *La riforma del Governo*, edited by A. Pajno, L. Torchia, (2000), 130.

⁸ For example, *delegislation* is translated into the adoptions regulations (Article 17, Law no. 400/1988), which substitute a law in the absence of an absolute constitutional statutory limit, giving it an apparent abrogative effect on primary laws. In reality the mechanism is as follows: the law authorises the government

Such a chaotic situation is also a consequence of the two-fold nature of the regulations: on the one hand, they are sources of law similar to statutory laws; on the other hand, they are administrative instruments that supplement the executive power – being an inherent feature of public authority. This two-fold nature, first and foremost, impacts on their legal status. Since the law-making power of administrative bodies is not specifically regulated, it is unclear whether their status should be applied to all sources of law by analogy (inasmuch as they constitute a form of legislation), or whether they should be subject to the rules regarding the forms of exercise of public authority (as they share various features with such exercise, including the fact that they are issued by a public body through identical procedures)⁹.

On the other hand, the regulations' two-fold nature affects judicial review. Although they are legislative instruments, their administrative origin plays a key role in the application of procedural rules. Regulations' judicial review is indeed up to administrative courts, which normally intervene after a regulation is challenged. The rules concerning the right of individuals to

to exercise regulatory power to determine general provisions regulating the subject matter and to abrogate the current law once the regulation enters into effect. This should provide greater flexibility and faster adaptability to the real situation. The relationships with the Italian Constitution and the principle of legality are examined by S. Cassese, *Le basi costituzionali*, in *Trattato di diritto amministrativo*, in *Diritto amministrativo generale*, S. Cassese (ed.), I, (2003), 215 and ff.; G. Amato, *Rapporti fra norme primarie e secondarie (aspetti problematici)*, (1962), 130; G.U. Rescigno, *Sul principio di legalità*, in *Dir. pubbl.*, 1995, 259 and ff.; L. Paladin, *Le fonti del diritto italiano*, (1996), 190.

⁹ Is not obvious to show where does legislation stop, and where does administrative action begin. «Surely legislation has certain fundamental characteristics – principally the laying down of rules which are of general application and which can be enforced by courts – that make it readily identifiable. Anything falling short of this paradigm lacks the necessary characteristics of legislation, and is therefore merely administrative in nature. Reality, however, is more complicated; many measures now emanate from government which cannot easily be classified according to a simple legislative/administrative dichotomy», M. Elliot, J. Beatson, M. Matthews, *Administrative Law*, Third edition, (2005), 638. Since no specific legal rule applies to the process of issuing regulations, procedural rules are often debated by legal scholars. See, for instance, Council of State, Division VI, decision no. 1215 dated 2 March 2010 as regards the possibility not to subject proceedings based on regulations to the general rule dispensing from the need to provide the reasons for a decision.

challenge regulations remain unprejudiced. Even the annulment of a regulation (a remedy that typically involves the administrative courts) is adapted in order to rely on a specific legal rule¹⁰.

Thus, there is no clear-cut distinction – unlike, for instance, in the German legal system – between the power of administrative bodies to adopt implementing measures and their law-making powers¹¹. Whilst the former is regulated by the Act on administrative procedure, such Act is utterly irrelevant to law-making powers. Invalidity is also regulated differently, depending on whether an administrative measure or an administrative regulation is found to be illegitimate: in the former case, the measure can be set aside, whilst in the latter illegitimacy focuses on nullity and voidness of the secondary rule and setting aside cannot even be conceived. Hence, administrative regulations that are in conflict with primary legislation are null and void.

As regards the review of law-making powers in order to establish consistency with higher-level sources of law, no clear-cut legislative framework is available. In fact, this issue has never been tackled by Parliament, not even on the occasion of the recent re-codification of the legislation concerning the administrative

¹⁰ On the general principles of judicial review, M. Elliot, *The Constitutional Foundations of Judicial Review*, (2001). On procedural rules see G. Morbidelli, *La disapplicazione dei regolamenti nella giurisdizione amministrativa*, in *Dir. amm.*, 1997, 578; F. Cintioli, *Potere regolamentare e sindacato giurisdizionale*, (2007), 98 and ff.; M. Massa, *Regolamenti amministrativi e processo. I due volti dei regolamenti e i loro riflessi nei giudizi costituzionali e amministrativi*, (2011).

¹¹ The rationale for this distinction can be explained with the different functions fulfilled. Regulations are instances of the legislative powers vested in the executive; accordingly, the relevant law-making process is differently structured from the so-called standard proceeding as set forth in the Act on administrative proceedings. For these proceedings special importance is attached to public participation, decision-making procedures implemented by municipal bodies, or to the fact that the opinion of expert committees is sought. If procedural rights are breached, the flaw(s) which cause(s) nullity and voidness must be evident and essential in nature – this is the case whenever a requirement set forth by the law-maker in respect of the given proceeding in order to ensure that the specific instrument takes shape appropriately is breached to a substantial degree in terms of its function. A necessary referral should be made to the decision of the Bundesverfassungsgericht, dated 12 October 2010, in *NVwZ* 2011, 289, §128, as quoted by E. Schmidt-Aßmann, *L'illegittimità degli atti amministrativi per vizi di forma del procedimento e la tutela del cittadino*, in *Dir amm*, 2011, 481.

judicial proceedings. There are no statutory rules for the administrative regulations review through *ad-hoc* measures. Nevertheless, derogations from the general model and specific provisions have been developing over the years, at least through case law and practice, especially with reference to the procedural approach to regulations. The exceptions to standard rules are meant to allow to shape safeguards, which are tailored to the specific type of instrument that is being challenged.

In general, the review of the sources of law different from primary legislation is committed in full to judicial authorities. There is only one statute that explicitly authorizes incidental review. It dates back to 1865, it applies to all administrative instruments, including those different from regulations, and it explicitly refers only to ordinary (i.e. non-administrative) courts. For the remainder, safeguards against illegitimate regulations have been developed through case law. The applicable rules in challenging regulations derive from judicial decisions, which have expanded or reduced the scope of judicial review on a case-by-case basis¹².

The purpose of this article is to examine the judicial review of secondary rules. It begins by drawing a general distinction between *direct* review of secondary rules and *indirect* (or *incidental*) review. The decision to focus on incidental review stems not merely from a concern to impose limits on this essay but from a special interest in the problems of legitimating incidental judicial controls over administrative rule-making processes.

2. *The Judicial Review of Secondary Rules.*

2.1. *The Lack of Constitutional Review.*

Secondary rules cannot be reviewed by the Constitutional Court. Under Article 134 of the Constitution, the Court has jurisdiction - and may be incidentally seized by citizens - exclusively over the instances of primary legislation (i.e. Acts

¹² See, in this respect, E. Cannada Bartoli, *L'inapplicabilità degli atti amministrativi*, (1950); A. Romano, *La pregiudizialità nel processo amministrativo*, (1958); G. Morbidelli, *La disapplicazione dei regolamenti nella giurisdizione amministrativa*, cit. at 10, 665; F. Cintioli, *Giurisdizione amministrativa e disapplicazione dell'atto amministrativo*, in *Dir. proc. amm.*, 2003, 95. See generally C. Forsyth (ed.), *Judicial Review and the Constitution*, (2000).

passed by Parliament, regional laws, decree-laws, and legislative decrees); the Court cannot review the legitimacy of regulations¹³. This is the reason why the Constitutional Court can be defined as the “judge of laws” rather than the “judge of constitutional compliance”. The Court has applied this rule by drawing a unique clear-cut distinction between laws and regulations, based on formal criteria such as sources, decision-making process, and the formal features of the regulation. The Court has never relied on substantial criteria, which might have resulted into different outcomes about the acts to be reviewed by the Constitutional Court; this has factually limited the scope of the Court’s jurisdiction to laws, except for particular cases¹⁴.

Conversely, ordinary judges have jurisdiction over regulations. In this context, a general distinction between *direct* review and *indirect (incidental)* review must be drawn.

2.2. *Direct Review by Administrative Courts.*

The legislative nature of regulations enables all courts to deal with interpretative issues; conversely, the direct review of regulations is exclusively reserved for administrative courts, since regulations emanate from administrative entities¹⁵. Secondary legislation is subject to judicial review under the Article 113 of the

¹³ During the meetings of the Constituent Assembly, Costantino Mortati and Egidio Tosato were in charge of drafting the text of Article 134; they clarified that the members of the Constituent Assembly meant to rule out that the Constitutional Court could review the legitimacy of regulations. The incidental review of regulations by the Constitutional Court is supported by C. Mortati, *Atti con forza di legge e sindacato di costituzionalità*, (1964).

¹⁴ A particular case concerns the direct review conducted by the Constitutional Court: if a regulation – like any administrative instrument or measure – encroaches upon the State’s or a Region’s scope of competences as set forth in the Constitution and/or other constitutional acts, it is open to direct review by the Constitutional Court, when the State or a Region were to claim a conflict of competences. In the latter case, the Court’s decision on the conflict in question is not to be complied with by ordinary judges.

¹⁵ In the legal systems of Western countries, the competence to annul regulations is frequently devolved to administrative courts: see M. Fromont, *Droit administratif des Etats européens*, (2006), 274. In France, regulatory instruments may be challenged on grounds of *excès de pouvoir*. On incidental review models see B. Marchetti, *L’eccezione di illegittimità del provvedimento amministrativo. Un’indagine comparata*, (1996).

Constitution, just as all the other acts adopted by public administrative bodies. If a regulation is found to be illegitimate, the court annuls it – i.e., sets the regulation aside, and declares its effects null and void from inception (*ex tunc*).

A regulation may be challenged *per se*, if it is immediately detrimental, that is, if the negative impact on certain interests is to be traced directly back to a provision contained in that regulation¹⁶. If this is not the case, the regulation must be challenged together with the implementing measure thereof¹⁷. In general, the direct challenge of regulations is the exception, whilst the joint challenge of a regulation and the relevant implementing measure(s) is the rule.

Thus, in order to challenge a regulation before an administrative court within the applicable deadline, regardless of any related implementing measures, two conditions have to be fulfilled: a) it produces detrimental effects on third parties' legal interests; b) the detrimental effects in question are produced despite the implementing measures adopted by an administrative

¹⁶ In literature, a distinction is drawn between “volition-action” regulations, that is, regulations that can be challenged directly, and “preliminary volition” regulations. Whilst the former have an impact on the personal sphere of the individuals concerned, the latter need an implementing instrument. This widely-received definition was coined by A. Romano, *Osservazioni sulla impugnativa dei regolamenti della pubblica amministrazione*, in Riv. trim. dir. pubbl., 1955, 882; reference has often been made to it in case law as well: see Regional Administrative Court, TAR Lombardia, Milan, 17 June 2009, decision no. 4056; TAR Puglia, Lecce, 6 May 2008, decision no. 1290.

In the Italian legal system it is still necessary to prove that harm was caused to the individual petitioner/claimant. This is not in line with the approach developed in EU law, which regulated the admissibility of individual claims for annulment via the Lisbon Treaty, by mitigating the stringent provisions that were previously in force. Under the current text of Article 263 of the TFEU, any legal or natural person lodging a judicial claim for annulment of “regulatory provisions [...] that do not entail any execution measures” has only to show that he is “directly” affected, without any consideration being given to individual harm.

¹⁷ Since the right to directly challenge a regulation is closely related to the principle of the individual's interest to take legal action, an individual is to lodge a two-fold claim in order to have both the implementing measure and the relevant regulation reviewed judicially; indeed, the implementing measure specifies the detriment caused to the individual and, thereby, accounts for the individual's interest in taking legal action. On this issue see Council of State, Division VI, decision no. 663 dated 12 February 2001.

body¹⁸. This circumstance has to be factually established considering both the contents and the nature of the regulatory provision in question, and the effects produced.

When an illegitimate regulation directly challenged is annulled by the administrative court, its effects, as said, are declared null and void from inception (*ex tunc*) and *erga omnes*. Since any measure or act inherent to the regulation is inseparable from the latter, the annulment of the regulation “is binding on the administrative body with regard to all the entities to which the measures or acts in question are addressed and accordingly pre-empted and makes unsubstantiated any claim possibly made by the said administrative body on the same matters through a separate judicial proceeding”; “on the other hand, annulment of the regulation entails that the latter instrument is cancelled from the realm of the law, so that no other court may ever be seized to rule on the legitimacy of the said regulation”¹⁹.

If a regulation is annulled, the effects already produced are null and void too: this occurs with regard to the whole gamut of the specifically addressed rights and interests, as well as to the rights and interests already come into existence – providing they have not yet been defined²⁰. Unlike what is generally the case, these consequences are not limited to the parties in the relevant litigation. By derogating from the general rule, whereby the judgment is only enforceable between the litigating parties, judicial annulment of a provision contained in a regulation applies to all potential addressees of the said provision – that is, it should be classed as a judicial decision of general reach, and not a case-specific one²¹. Even when the requirements of publicity are not met, such as those concerning Constitutional Court’s decisions, the ultimate effects are similar to those produced by a judgment setting aside a specific piece of legislation. Public authorities are under the obligation to inform the citizens on the annulment of

¹⁸ TAR Lazio, Rome, Division II *ter*, 25 February 2008, decision no. 1685.

¹⁹ Council of State, Division IV, 19 February 2007, decision no. 883; *Id.*, Division IV, 12 May 2006, decision no. 2671. An interim order issued by the court to stay application of a regulation is also enforceable in general, still on account of its “ontological inseparability”: see Council of State, Division VI, 6 September 2010, decision no. 6473.

²⁰ Council of State, Division VI, 12 March 1994, decision no. 332.

²¹ Council of State, Division IV, 23 April 2004, decision no. 2380.

legislative instruments, even if nothing is specifically provided to that end²².

Considering the general and non-specific nature of such decisions, annulment of “general regulations, which are a source of law and, accordingly, are legislative in nature”, is different from the annulment of “individual acts of administrative and judicial authorities, which should be regarded as executive and judicial in nature”²³. The decisions in question are enforceable *ultra partes* [i.e. beyond the parties concerned], because the legal obligation originating from the source of law at issue is related to the exercise of authority – that impacts also on the entities unrelated to the considered judicial proceeding.

2.3. *Incidental Review of Regulations.*

Judicial review of regulations is often contained in a special discipline, which marks a clear distinction from general procedural provisions. Because of the peculiarities of these acts, which are “legislative by nature”, though “administrative by set-up”²⁴, it is generally accepted that the legitimacy of secondary legislation can be reviewed on an incidental basis, even *ex-officio*. In such case, the litigation is not necessarily devolved to administrative courts, as also ordinary judges may be seized of an incidental claim. The reason of this rule is that not the regulation’s legitimacy is at stake, but a different *petitum*, which involves the regulation’s legitimacy assessment as preliminary question.

Lower courts are empowered to review, on an incidental basis, the legitimacy of a regulation in both civil and criminal proceedings under section 5 of Act no. 2248, “on setting aside

²² There is no provision that specifies publicity arrangements. By analogy, section 14 of Presidential decree no. 1119 dated 24 November 1971 (on the lodging of extraordinary complaints with the Head of State) is considered to be applicable. Accordingly, if general administrative instruments of a legislative import are annulled, the administrative body has to publish such annulment “according to the same publication arrangements as applied to the instruments that were annulled”. The issue of extending these provisions to the decisions that grant claims on conflicts of jurisdiction is addressed in Council of State, Division VI, 30 November 1993, decision no. 954.

²³ C. Esposito, *La validità delle leggi*, (1964), 119.

²⁴ This definition was devised by E. Cheli, *Potere regolamentare e struttura costituzionale*, (1967), 436.

litigations”, dated to 20 March 1865 (Annex E thereof). Should the judge, in adjudicating the main litigation, find that the regulation is illegitimate – regardless of whether the said regulation was challenged or not – it shall refrain from applying it and decide as if such a regulation was non-existent²⁵. This shows how incidental ruling is exclusively functional to adjudicating the case under scrutiny; accordingly, the decision is not regarded as final, and may only be enforced against the parties; indeed, the regulation is not set aside *per se*. Such a ruling does not produce any specific legal effects – in particular, it does not start up a new time limit period to challenge the given regulation, nor does it allow to lodge a claim for annulment of the said regulation²⁶.

²⁵ In civil proceedings the judge refrains from applying an illegitimate regulation, if assessing legitimacy of such regulation is part of the issues that the judge has to settle before adjudicating the case and declaring whether a given claim is to be granted or not. Conversely, in criminal proceedings consideration is given to an administrative instrument to insofar as the latter is part of the statutory definition of the criminal offence at issue. The lenient approach to such cases only allows to refrain from the application of the given regulation *in bonam partem*, that is, for the defendant's benefit, in order to avoid imposing criminal punishments. However, part of the case-law (see Court of Cassation, Criminal Law Division III, 17 February 2004, decision no. 1443; Division III, 24 February 2001, decision no. 1537) also admits to refrain from the application of a flawed regulation *in malam partem* – whereby the statutory definition of the offence is amended and the illegitimate instrument is equated to a non-existent instrument. See, in this regard, C. Franchini, *Il controllo del giudice penale sulla pubblica amministrazione*, (1998), 75.

²⁶ As clarified by the Joint Divisions of the Court of Cassation in decision no. 22217 dated 28 September 2006, “in the context of setting aside administrative litigations, refraining from the application of illegitimate administrative measures was justified by the prohibition for judicial authorities to revoke, amend, or annul administrative measures – such power being conferred exclusively on the competent administrative authorities that received the claim lodged by the party concerned. Together with the consequent introduction of administrative jurisdiction, aiming to protect the citizens’ legitimate interests, the power in question only exists with regard to litigations between individuals – if the administrative measure at issue does not underlie the judicial claim made and is only relevant in terms of logical sequence, so that it gives rise to a preliminary question of a technical nature, which can be assessed on an incidental basis”. Other decisions by the Court of Cassation followed this approach (no. 2588 dated 22 February 2002; no. 18263 dated 10 September 2004; no. 1373 dated 25 January 2006). However, there are also decisions upholding the incidental review performed by non-administrative courts, which accordingly refrained from applying illegitimate administrative instruments in

Specifically, administrative courts are empowered to refrain from applying any administrative act to the extent that they take review of the administrative instrument as an underlying assumption rather than as the material object of the decision, which, conversely, consists in the legal relationship between the parties²⁷. However, a non-administrative court may only refrain from applying an illegitimate regulation, if the administrative instrument does not impact directly on the legal relationship submitted to the court's scrutiny and is only a precondition thereof, without making up the judicial claim. This means that the non-administrative court reviews the legitimacy of the instrument in question on an indirect, incidental basis rather than directly²⁸.

The incidental evaluation before administrative courts follows the same rules, although no legislative provision allows these courts to carry out such a review²⁹. Even the recent

connection with actions instituted against public administrative bodies, if the judicial claim made concerns a right and the latter remains so, because the regulatory instrument at issue is not such as to turn the right in question merely into a legitimate interest, which is the case if the regulatory instrument must be compliant with specific legal requirements and, accordingly, does not represent an instance of authoritative, discretionary powers. This was the decision made in cases brought by users of public facilities that challenged the amount charged to them (see decision no. 4584 dated 2 March 2006 by the Court of Cassation).

²⁷ See M.S. Giannini, *Discorso generale sulla giustizia amministrativa*, part. II, in Riv. dir. proc., 1964, 14. The power to refrain from applying regulatory instruments as part of administrative proceedings is addressed by R. Dipace, *La disapplicazione nel processo amministrativo*, (2011), 149 and ff.

²⁸ See Joint Divisions of the Court of Cassation, decision no. 22217 dated 28 September 2006. Alternatively, the criterion consists in the protection of individuals' rights; indeed, a court that has to decide on an administrative measure that impacts on individuals' rights is certainly empowered to perform an the incidental review of the instrument underlying the measure that is being challenged, without acting *ultra vires* (see Joint Divisions of the Court of Cassation, decision no. 20125 dated 18 October 2005).

²⁹ On the application of section 5 of the Act setting aside litigations to administrative proceedings, see E. Cannada Bartoli, *L'inapplicabilità degli atti amministrativi*, cit. at 12, 192.

Conversely, the following judicial decisions ruled out the possibility to refrain from applying a regulatory instrument in administrative proceedings: Council of State, Division IV, 11 June 1909; Id., Division V, 14 February 1941, decision no. 93; Id., Division V, 10 July 1948 decision no. 500; Id., Division V, 28 June 1952 decision no. 1032; Council of the Region of Sicily 30 September 1965 decision no. 130; Council of State, sitting in plenary, 8 January 1966, decision no. 1; Council of the Region of Sicily 21 February 1968 decision no. 49; Id., Division

consolidation of the rules applying to judicial administrative proceedings, based on the legislative decree no. 104, dated 2 July 2010, fails to address the power to refrain from applying illegitimate regulations. The decree does not refer to the incidental review of legality, nor to the possibility, for a court, to declare that the instruments adopted by a public authority are null and void for the purpose of adjudicating a case – without exceeding the scope of the specific claim³⁰.

The possibility for administrative courts to review the legality of regulations on an incidental basis is taken into consideration in judicial decisions dating back to 1992. Before that period, judges were not empowered to intervene, if a regulation was not challenged within the sixty-day deadline from its adoption – as the expiration of such deadline barred any further challenging of the instrument³¹. Starting from the early 1990's, however, administrative courts were allowed to refrain from applying a regulation incompatible with higher-level legislation, irrespective of whether the regulation in question had been expressly challenged or not. This was due to a change in the stance taken by the Council of State on this subject-matter, such as to attach the appropriate importance to the legislative force of regulations.

IV, 20 April 1971 decision no. 463; Id., Division IV, 2 October 1989 decision no. 664; TAR Sicily, Catania, 6 June 1986, decision no. 625; Council of State, Division V, 12 September 1992 decision no. 782; TAR Veneto 16 February 1995 decision no. 300; TAR Abruzzo, Pescara, 20 July 1995 decision no. 263; Council of State, Division V, 24 May 1996 decision no. 597; Court of Cassation, Employment Division, 14 February 1997, decision no. 1345.

³⁰ Comments on the recent legislation can be found in A. Pajno, *La giustizia amministrativa all'appuntamento con la codificazione*, in *Dir. proc. amm.*, 2010, 119; L. Torchia, *I principi generali (Il nuovo Codice del processo amministrativo, Decreto legislativo 2 luglio 2010, n. 104)*, in *Giorn. dir. amm.*, 2010, 1117. With the new Consolidated Statute, administrative proceedings are no longer limited to protecting legitimate interests – pursuant to the principle that multiple actions may be appropriate to grant the petitioner's claim; to this regard, see Council of State, sitting as a plenary, 23 March 2011, decision no. 3. As regards the actions that may be brought in court, see L. Torchia, *Le nuove pronunce nel Codice del processo amministrativo*, in *Giorn. dir. amm.*, 2010, 1319.

³¹ Over the years, the stringent requirement of complying with the deadline in question led administrative courts to limit their reliance on this tool as for regulatory provisions; by doing so, they played down the executive functions of such provisions whilst emphasizing their legislative nature.

The stringent requirement of complying with the deadline for challenging regulations – that is, with the so-called “precondition” – led administrative courts to limit their reliance on this tool; by doing so, they played down the executive functions of such provisions whilst emphasizing their legislative nature.

The regulation must not be the main subject of the litigation; rather, it should be an obstacle to the appropriate establishment of the parties’ legal standing. The administrative court finding an illegitimate regulation may refrain from applying it, without annulling it. Pursuant to the principle of hierarchy within the sources of law, an administrative court may directly assess the possible conflict between an administrative measure and primary norms, irrespective of whether the regulation has been challenged³².

In any case, being sources of law, regulations are subject to the hierarchical principle as well as to the procedural principle known as *iura novit curia* [i.e. the court knows the law]. Accordingly, in case of conflicts between different sources of law, the administrative court must be in the position to refrain from applying a regulatory instrument that is in conflict with a higher-level source, even if such instrument has not been expressly challenged. In this way, it can determine, by its own motion, the legal rule applicable to the case under scrutiny, without any constraint whatsoever³³. This is also allowed by the circumstance

³² Council of State, Division VI, 3 October 2007, decision no. 5098; Council of State, Division VI, 12 April 2000, decision no. 2138. Conversely, challenging of the provision by the petitioner in the first-instance proceeding is necessary according to Council of State, Division V, 1 September 2009, decision no. 8387.

³³ The possibility to refrain from applying a legal rule could, therefore, be introduced into administrative proceedings thanks to the peculiar legal features of regulations. For the same reason, such a possibility was not admitted by courts with regard to case-specific administrative provisions, because it would have jeopardized the continuity of administrative activities, the rule whereby an administrative measure is assumed to be legitimate, and the soundness of legal relationships - even if the breach at issue concerned an EU instrument. The most significant decision in this regard is the one by the Council of State, Division V, dated 10 January 2003 (no. 35), whereby refraining from applying the regulatory provision in such cases would undermine “the soundness of legal relationships based on public law along with the principles of stability, reliability, and continuity of administrative activities and the presumption of legitimacy principle”; Council of State, Division IV, 21 February 2005, decision

that the respect of the established deadline to challenge the regulation – which is formally an administrative instrument – is irrelevant in such cases.

Having established that a regulation is illegitimate in relation to higher-level legislative provisions, whether issued by the State or by the EU, the decision adopted by the court is not considered final, is only enforceable in respect of the litigation at issue and only between the concerned parties. Actually, cancelling the legal effects produced by the regulation in question might be prejudicial to third parties' interests.

In this way, the judicial review by administrative courts appears to be quite similar to that of the Constitutional Court, as it is modeled after an objective approach to jurisdiction. This is all the more true in peculiar cases such as those concerning delegated regulations – i.e. those cases where Parliament delegates the executive power to lay down the rules applying to a specific case, without adequately setting out the reference benchmarks. In spite of their being instruments of secondary legislation, delegated regulations set provisions that are independent from specific legislative constraints. Accordingly, their functions are distant from the typical ones of executive instruments; this means that they should be classed as regulations exclusively from a formal standpoint.

3. The Review Process by Public Administrative Bodies.

Let us now consider the *role played by public authorities* in applying a secondary source of law breaching a higher-level rule. An administrative body required to apply a regulation considered to be illegitimate pursues different lines of conduct, depending on whether it *fathered* the regulatory instrument at issue or not.

An administrative body called for the implementation of its own regulatory instrument may not refrain from applying it automatically, because it is obliged to rely on self-protection tools – in particular, the remedy of *ex-officio* annulment – in order to introduce any modification. Indeed, only after instituting the relevant proceeding and having checked the interests vested in the

no. 579. See also M.P. Chiti, *L'invalidità degli atti amministrativi per violazione di disposizioni comunitarie e il relativo regime processuale*, in *Dir. amm.*, 2003, 687.

addressees and counterparts, may an administrative body, by its own motion, set aside a regulatory instrument in conflict with higher-level norms (including the effects that it produced since inception). Pursuant to the *contrarius actus* principle, the formal and procedural rules that apply to an annulment proceeding are the same as those that apply to the adoption of the instrument that should be set aside³⁴.

An administrative body may find that a regulation is null and void *ex officio* also when it is supposed to implement such a regulation; however, that administrative body is obliged to abide by the self-protection regime in order to legally set aside a flawed regulation. As already pointed out, it may not simply refrain from applying it. Nor may an Italian administrative body – contrary to the German or Spanish cases – act on the assumption of a sort of unlawfulness exception. Indeed, in Germany and Spain illegitimate regulations are considered *per se* null and void, whilst in our legal system they must be set aside³⁵. Accordingly, textual conflicts between a regulation and higher-level legislation may be claimed by public administrative bodies at any time (in line with the approach to nullity and voidness), since administrative regulations inconsistent with the law are generally null and void *ex lege*.

It is unclear whether the role played by involved the administration can be analogous to the one a court – that is, whether it may “sort out” the sources of law just as a court and find that a regulation conflicting with a higher-level legislation is

³⁴ Council of State, Division V, decision no. 7218, dated to 12 November 2003; TAR Abruzzo, L’Aquila, decision no. 603, dated to 2 October 2007. The application of this principle is not without exceptions, because it does not concern procedural requirements that are irrelevant to the review procedure.

³⁵ On the legal status of regulations in Spain see E. García de Enterría, T.-R. Fernández, *Curso de derecho administrativo*, I, (2006), 227 and ff. A decision, which finds that an illegitimate regulation is null and void, is enforceable *erga omnes* and retroactively, whilst the same publicity rules apply, as in the case of a measure that is set aside. On Germany see F. Hufen, *Verwaltungsprozessrecht*, (2003), 391; E. Schmidt-Aßmann, *L’illegittimità degli atti amministrativi per vizi di forma del procedimento e la tutela del cittadino*, cit. at 11, 481. In particular, public authorities are not empowered in the German system to autonomously refrain from applying illegitimate instruments. This is the reason why they rely on an *ad-hoc* procedure – called *Normenkontrollverfahren* – in which the main cause of action consists in assessing the legitimacy of the regulation issued by the Länder or the local authorities.

null and void. An interesting development occurs in France, where an administrative body is required to repeal any regulation found null and void from its inception, in front of a claim lodged by a subject legally interested in avoiding the regulation's application³⁶.

An administrative body is required to set aside a regulatory act (relying on the *ex-officio* annulment procedure, under section 21-*nonies* of Act no. 241/1990) even if it has already been declared illegitimate by an incidental decision of either an ordinary judge or an administrative court – because, as already pointed out, this form of incidental decision would not produce the annulment of the regulatory instrument in question. In any case, the administrative body is not really obliged to do so, since no clear-cut legal requirement is applicable in this regard: rather, it will have to assess the available options on a discretionary basis, by balancing public and private interests. If the administration opts for the setting aside, relying on the self-protection regime it will consider requirements such as cost-containment, efficacy, and effectiveness of administrative activities: in this way, it will avoid the adoption of further administrative measures liable to be challenged by third parties because of their contrast with a general rule.

Conversely, if an administrative court has directly (not incidentally) set aside a regulation with a final decision, an administrative body is obliged to refrain from applying such regulation to any pending cases, under penalty of incurring liability³⁷.

On the other hand, if the regulation originates from an administrative body different from the one responsible for its implementation, the latter seems required to apply the regulation in question – but nothing is expressly provided in this regard. This

³⁶ *Conseil d'État*, 3 February 1989, *Compagnie Alitalia*.

³⁷ See TAR Emilia-Romagna Region, Bologna, 8 June 1984, decision no. 334; Court of Cassation, Division III, 25 November 2003, decision no. 17914, a decision which concerned a regulation set aside by a decision that had not yet become final, whereupon the Court ruled out any liability as vested in an administrative body that had applied such regulation. The latter decision fails to take into due account the uncertainty arising from applying or refraining to apply a regulation whose illegitimate nature has not yet been established finally.

is due to the fact that our legal system does not consider administrative bodies as entities empowered to review the legitimacy of the regulations that they are expected to apply (except for EU law)³⁸. Nevertheless, if an incidental decision finds that the given regulation is illegitimate, the administrative body might refrain – in a collaborative perspective – from applying it, and thereby abstain from issuing a measure that would be invalid from the start. The literature on this matter is rather scarce, since this is not a topic addressed neither in jurisprudence, nor in case law; consequently, there is no argument that supports a different approach.

Against this backdrop, one should consider two major *derogations* from the stance described above. First, when the higher-level legislation is part of the EU law, since refraining from application is an obligation imposed on public authorities – as repeatedly affirmed by the EU Court of Justice³⁹. Second, when the conflict with the higher-level legislation entails an *ultra vires* decision of the administrative body in issuing that regulatory act, then the regulation is declared null and void rather than being set aside; in this case, having the regulation been found null and void, it would not be capable to produce valid effects, with the consequence that any administrative body, as much as any private subject, might autonomously refrain from applying it.

It is questionable whether applying an illegitimate regulation gives rise to *liability* as vested in administrative body. Here one should return to the already drawn distinction between

³⁸ The innovative features of the European administrative framework and the composite mechanisms relied upon by the EU to achieve the relevant objectives are addressed by C. Franchini, *Autonomia e indipendenza nell'amministrazione europea*, in *Dir. amm.*, 2008, 87 and ff.

³⁹ The obligation to refrain from applying domestic legislation that does not conform with the EU law has been imposed on administrative bodies since the well-known decision in the *Fratelli Costanzo* case (case C-103/88), dated to 22 June 1989, paragraph 30. The conflict between domestic and EU sources of law can be reconciled through two legal approaches that rely on a hierarchy criterion. On the one hand, national administrative authorities are required to refrain from applying domestic rules that do not conform with EU law; on the other hand, EU legality generally takes priority over domestic legality. In this way, the principle is reaffirmed whereby the legality rule entails that administrative authorities' activities are subject, first, to EU law and, second, to domestic law, providing the latter is in conformity with the former.

the case where an administrative body adopts an illegitimate regulation and the one where it merely implements such an illegitimate regulatory instrument. If an incidental decision has found the regulation to be illegitimate, the administrative body that adopted it may be liable under tort law - when the relevant preconditions are met. However, this liability only arises because it has *adopted* the illegitimate regulation, not because it has *applied* it⁴⁰. Conversely, if a different administrative body is involved, it is hard to imagine that tort liability may arise, considering that there is no legal obligation to refrain from applying a regulation found to be illegitimate but not set aside - not even if the parties concerned notify this circumstance to the administrative body that applies such regulation. Since no obligation exists, no unjust harm may be caused in breach of legal rules - and thus the precondition for tort liability would lack. This holds true regardless of the nature of the instrument at issue, and whenever a court has already found it to be illegitimate; conversely, the mere circumstance that a regulation was challenged before a court assuming its illegitimacy is utterly irrelevant.

Like administrative bodies, private bodies may not refrain from abiding by an regulation found to be illegitimate by a court - unless they are parties to the proceeding.

4. The Sources Relied upon As Benchmarks.

In the context of a regulation's incidental assessment, the judicial review may focus on compliance with any item of primary legislation, including decrees that have the force of laws and legislative decrees, or, conversely, with EU law, applicable international law or immediately enforceable international law provisions.

⁴⁰ In recent plenary sittings too, the Council of State re-affirmed that challenging an illegitimate regulation is an appropriate remedy to establish a legal claim, even if seeking its annulment is legally barred. This means that the conventional approach, whereby annulment was indispensable if a regulatory instrument had been found to be illegitimate, has been overcome and a flexible system of safeguards, which allows establishing the illegitimate nature of a regulatory instrument with a view to claiming damages (Council of State, Plenary sitting, decision no. 3 dated 23 March 2011), has been developed.

In doing so, the court has to consider the multiple sources which set the boundaries of administrative activities - such as the provisions contained in Treaties, sometimes subject to diverging interpretations, the judgments of the Court of Justice, which go in several directions and are sometime interpreted in a way that gives rise to slightly diverging rules, and so on⁴¹. If jointly applied, these sources may fail to point to the same legal rule. In such a case, to assess compliance of a regulatory instrument with a legislative benchmark, i.e. reviewing compliance with the legality principle, is a daunting task, given that no unified guidance can be identified.

From this perspective, one could argue that legality may take the form of “reviewing the criterion for selecting the right law”⁴². The focus is not so much on establishing compliance with laws that impose limitations on public authority, but on reviewing the assessment made by the public administrative body in order to determine the applicable rule. The mechanistic view of the legality principle, whereby public administrative bodies only execute the intent of the law, is no longer true. If one endorses this extension of the scope of the legality principle, the benchmark applied by administrative courts needs to be different. The Courts search for the law in case law, based on the *stare decisis* principle, rather than in law, and “scholars’ activities contribute to giving form to the law”, so that “the law grows and slowly evolves”⁴³.

The review applies to all instruments of regulatory nature adopted by the Government, individual Ministers, or other administrative bodies, at State or local level - including municipalities - as much as by independent authorities. The scope of the review also includes by-laws or other sources of secondary

⁴¹ That the judgments by the EU Court of Justice are sources of law was ruled by the Constitutional Court since its decisions no. 113, dated to 23 April 1985, and no. 389, dated to 11 July 1989. As consistently found by administrative courts, the judgments of the EU Court of Justice are directly enforceable in Member States’ legal systems like regulations, directives and Commission's decisions; accordingly, they are binding on domestic courts, which are required to refrain from applying any domestic provisions that are in conflict with them. See, in this connection, Cons. giust. amm. Sicilia, decision no. 470 dated 25 May 2009; Council of State, Division V, decision no. 4440 dated 13 July 2006.

⁴² S. Cassese, *Alla ricerca del Sacro Graal. A proposito della rivista Diritto pubblico*, in Riv. trim. dir. pubbl., 1995, 796.

⁴³ All the quotations are from S. Cassese, *Le basi costituzionali*, cit. at 8, 222.

legislation. “Regulation” actually means an instrument that sets forth rules – which should be as general and theoretical as possible – adopted by any public administrative body⁴⁴. Conversely, Parliamentary rules of procedure fall outside the scope of this definition, since they are peculiar sources of law that take priority over primary legislation.

The incidental review is strictly limited to administrative instruments of regulatory nature; in no case may such a review be performed in respect of laws or instruments that have the force of law, which may only be checked by the Constitutional Court on the basis of constitutional principles – pursuant to Article 134 of the Constitution. On the other hand, incidental review is an alternative to direct assessment, because, if no direct evaluation is permitted, the court is empowered under procedural rules to rely on incidental review as a remedy. Indeed, the Constitutional Court clarified that it is unquestionable that any court that is expected to apply regulatory provisions that are found to be illegitimate, because they are in conflict with the Constitution may, indeed must refrain from applying them – for instance, whenever such provisions are found to be illegitimate on account of their being in conflict with primary legislation – in pursuance of section 5 of Act no. 2248 (annex E), dated to 20 March 1865⁴⁵.

The *modus operandi* is also different. Whilst the Constitutional Court relies on parliamentary records to review all the instruments having the force of law, administrative courts are not required to rely on the regulatory impact assessment – where this is available – to establish whether regulations are legitimate. This entails that there is a wide gap between impact assessment and the reasons underlying legal instruments. Relying on impact assessment would translate into conferring a two-fold role on the tools that are meant to ensure the quality of law-making, which

⁴⁴ A peculiar case is that of legislative simplification regulations, which are substantively enforceable as laws, although they are not formally considered instruments that have the force of laws. If the Article 134 of the Constitution is to be construed extensively, these instruments might fall under the scope of the Constitutional Court’s review, namely because of their peculiar features.

⁴⁵ Decision no. 72 by the Constitutional Court dated 27 June 1968, as commented by V. Onida, *Sulla «disapplicazione» dei regolamenti incostituzionali (a proposito della libertà religiosa dei detenuti)*, in *Giur. cost.*, 1968, 1031.

would cease being tools to merely check the draft instruments, and become tools to also check the instrument *per se*⁴⁶.

The incidental review of legality may be carried out both by ordinary and administrative courts, in accordance with the current mechanism for the distribution of jurisdiction, which is based partly on the right or interest at stake, and partly on the subject of the claim. Accordingly, administrative courts have jurisdiction over all the disputes that involve public administrative bodies exercising public authority⁴⁷.

There is not a defined list of regulations subject or undergone to judicial review – their number cannot be determined. Only courts verify – on a case by case basis – whether a regulation is compliant with the higher-level legislation that applies to the case under scrutiny. No derogation from or exception to the rule of the incidental review of legality is envisaged, either based on legislative instruments or on case law;

⁴⁶ B.G. Mattarella, *Analisi di impatto della regolazione e motivazione del provvedimento amministrativo*, paper from the Observatory on Regulatory Impact Assessment, www.osservatorioair.it, September 2010 (also published in *Astrid Rassegna*, no. 123/2010). Indeed, as shown by administrative provisions, providing the reasons for a legal instrument pursues several objectives. This is meant not only to enable judicial review, but also to ensure transparency and public scrutiny. Regulatory Impact Assessment (RIA) can lend itself very well to fulfilling this objective; as well as being helpful to courts, it could be relied upon by Parliamentary opposition and, in general, the public opinion. Thus, it should be included in the preamble to all legislative instruments as part of the underlying reasons, but it should also be published without being regarded as an internal step in governmental law-making. The concept that regulatory options should rely on regulatory impact assessment is examined in Council of State, Division VI, decision no. 5026, dated to 16 October 2008.

⁴⁷ In general, jurisdiction falls to ordinary or administrative courts as follows: if the claim made concerns a right, ordinary courts have jurisdiction; if the claim made concerns legitimate interests, administrative courts have jurisdiction – without prejudice to specific issues over which administrative court has exclusive jurisdiction.

On the issue of civil law courts refraining from the application of regulatory instruments see A. Romano, *La disapplicazione del provvedimento amministrativo da parte del giudice civile*, in *Dir. proc. amm.*, 1983, 22; S. Cassarino, *Problemi della disapplicazione degli atti amministrativi nel giudizio civile*, in *Riv. trim. dir. proc. civ.*, 1985, 864; G. De Giorgi Cezzi, *Perseo e Medusa: il giudice ordinario al cospetto del potere amministrativo*, in *Dir. proc. amm.*, 1998, 1023. On the issue of criminal law courts refraining from the application of regulatory instruments, see R. Villata, *Disapplicazione dei provvedimenti amministrativi e processo penale*, (1980); C. Franchini, *Il controllo del giudice penale sulla pubblica amministrazione*, cit. at 25, 77.

consequently, that rule is applicable to any and all regulatory instruments.

As already clarified, the incidental review of legality is in full committed to the courts, which bear overall responsibility for it. There is no relationship between the framework of regional authorities and the incidental review of legality.

5. *Sanctions Relating to the Incidental Review of Legality.*

If during an incidental review a higher-level legislative instrument is breached, the remedy consists in refraining from applying the regulatory measure; this means that a court may decide on the validity of a regulation exclusively to settle the dispute between the parties involved, without affecting the act *per se*. As already pointed out, refraining from the application of a regulatory instrument is a power vested in judicial authorities whereby an illegitimate - though enforceable - administrative instrument is “devitalised”; and this power concerns exclusively the effects related with the object of the judicial claim⁴⁸.

The declared invalidity implies the refrain from applying a regulatory instrument, which will not produce any effect in the individual case; this situation is different from the case in which the competent subject *fails to apply it* - where the refusal to apply the instrument could be irrespective of whatever assessment or evaluation⁴⁹. After declaring the invalidity, the court decides on the case as if the regulation did not exist, *tamquam non esset*. This might also entail enforcement of a previous regulatory measure - which would be almost resuscitated - if one desists from applying the provisions that repealed the previous regulatory measures.

Two fundamental reasons allow to rely on this measure, which can be considered exceptional in the context of the administrative process. Both reasons permit the non-application of the standard rule, which provides a deadline of 60-day in order to

⁴⁸ A. De Roberto, *Non applicazione e disapplicazione dei regolamenti nella recente giurisprudenza amministrativa*, in *Impugnazione e disapplicazione dei regolamenti. Atti del convegno organizzato dall'Ufficio studi e documentazione del Consiglio di Stato e dall'Associazione studiosi del processo amministrativo*, (1998), 21.

⁴⁹ According to E. Cannada Bartoli, *L'inapplicabilità degli atti amministrativi*, cit. at 12, the power not to apply an instrument results from the invalidity of that instrument, just as the power to declare it null and void.

challenge a regulatory instrument - since that rule, in the considered grounds, would not allow achieving the purposes for which it is intended⁵⁰.

The first ground concerns the hierarchical structure of the sources of law, and the legislative nature of regulatory instruments. Refraining from the application of a regulation is allowed because a private subject's legitimate expectations cannot rest on an act not compliant with higher-level sources of law but fit to produce repeatable effects. Consequently, a regulation only produces effects when it is valid. There is no need for enhancing the stability of the exercise of public authority along with its effects, because the secondary norm will be liable to new applications, as it will be challengeable by an indefinite number of affected subjects. Thus, the "principle" of equivalence - whereby an illegitimate measure is evaluated as a legitimate one in terms of the produced effects - does not apply to regulations, as it happens with administrative measures, since a secondary rule conflicting with primary norms does not produce effects of loss, extinguishment or modifications to the rights vested in private individuals, and thus cannot be legitimately relied upon by these latter⁵¹.

The second ground concerns the predicate instrument criterion. The judicial system admits this extraordinary remedy as far as the flaw that affects the regulation challenged results from another act that has not been challenged yet⁵². A judicial authority may decide on a case *incidenter tantum*, if there is an act on which that case can be predicated - that is to say, if the claimed violation is related to a specific regulation and can be traced back to another different instrument, on which the former is predicated, i.e. to a predicate instrument. From this perspective, refraining from applying a regulatory instrument on an incidental basis is

⁵⁰ The relationship between refraining from application of administrative measures and claims for damages is addressed in F. Francario, *L'inapplicabilità del provvedimento amministrativo e azione risarcitoria*, in *Dir. amm.*, 2002, 23.

⁵¹ This shows that "the rules on jurisdiction and decision-making powers (that is, the way in which a judicial proceeding is structured), cannot be consistent with the claim made in such a proceeding as much as with the relevant purposes" - see F.G. Scoca, *Sulle implicazioni di carattere sostanziale dell'interesse legittimo*, in *Scritti in onore di Massimo Severo Giannini*, (1988), III, 674.

⁵² C.E. Gallo, *Questioni pregiudiziali*, in *Enc. giur.*, 1991, XIX.

grounded in the existence of a predicate instrument. Overall, such predicate instruments are general in scope.

This is basically the “illegality exception” mechanism, whereby illegality results from a flaw affecting the predicate instrument and may generally be claimed without any time constraints, that is, it is *perpétuelle*⁵³. The possibility to claim illegality of regulations incidentally allows the judicial authority to take full cognizance of the specific legal relationship; on the other hand, this results into a judicial decision, whose effects go beyond the parties to the specific dispute⁵⁴.

Whenever instruments of a different hierarchical level are found to be in conflict, refraining from application allows one to give priority to the higher-level instrument in pursuance of the hierarchical structure of sources of law – that is, it works as a mechanism to declare the lower-level provisions invalid as much as being a de-centralized mechanism to settle the conflicts between sources of law, since every judge involved in the relevant case is empowered to do so. This approach to judicial review is the ultimate outcome of the lack of a centralized system for settling such conflicts, possibly grounded in the initiative of a single court empowered to declare a given instrument invalid on account of its being in breach of constitutional provisions. That is to say, refraining from application is meant to fill the gap resulting from the lack of an incidental review of constitutionality as for the justiciability of regulations.

The operational features of the decision to refrain from applying a regulatory instrument are straightforward. The judicial

⁵³ In the French legal system there is the *exception d’illegalité*, which is considered to be receivable only with regard to regulatory measures containing general provisions (R. Chapus, *Droit du contentieux administratif*, (2006), 667). It is unclear whether granting this illegality exception is a decision that is final in nature, so as to prevent challenging anew the illegitimate nature of the regulation as established by the court, or it has only relative value and, therefore, allows new determinations in respect of the relevant regulation.

⁵⁴ Council of State, Division V, 26 February 1992, decision no. 154, as commented by S. Baccharini, *Disapplicazione dei regolamenti nel processo amministrativo: c’è qualcosa di nuovo oggi nel sole, anzi d’antico*, in *Foro amm.*, 1993, 466. By refraining from applying a regulatory instrument, administrative courts exercise their power to trace back the instruments on which the challenged instrument is predicated, whereby they are enabled to probe into the features of the dispute between individual citizen and public administrative body.

authority establishes, on a preliminary basis and by its own motion, that the lower level source of law is illegitimate, because it is not in conformity with the higher level one; the case is consequently decided, as if the invalid piece of legislation did not exist and could not be enforced in the dispute at issue. Although this power is exercised *ex officio*, the principle of actionability on request is not breached, because the judicial authority steps in on the basis of the *iura novit curia* principle and the rule that the higher-level source is to be prioritized. If the court did not refrain from applying the regulatory instrument, there would be no other way to ensure that the higher-level source of law takes priority.

Where the judicial review finds that a regulation is in breach of either the Constitution or primary legislation, that regulation is not applicable; however, it remains in force because the judicial decision rendered incidentally only applies to the dispute at issue and is not to be regarded as a final judgment⁵⁵. Nevertheless, it is necessary to ensure that legal relationships are straightforward; therefore, our legal system seems to prefer – albeit non-specifically – to timely set aside illegitimate instruments for the sake of the legality principle as it is set forth in Article 97 of our Constitution as much as in pursuance of the rule of law principle, so that private entities and individuals are not required to defend themselves against multiple instances of application of an illegitimate regulation.

As for the effects produced on the legal situation that applies to the entities addressed by the administrative instruments at issue, it should be clarified that refraining from applying a regulation based on an incidental review may entail annulment of the administrative measure implementing such regulation, because the invalidity of the illegitimate legislative instrument (that is, the regulation) attracts invalidity of the measures grounded in it. The annulment in question may be ordered by an administrative court at the instance of the party concerned; alternatively, it may be ordered by the public authority that had adopted the unlawful regulation *ex officio*.

⁵⁵ A. Lugo, *La dichiarazione incidentale d'inefficacia dell'atto amministrativo*, in Riv. trim. dir. proc. civ., 1957, 646 and ff., believes that refraining from application is not suitable for meeting the public interest in setting aside an instrument that is illegitimate.

The flawed use of regulatory powers – due to the adoption of a regulation in breach of higher-level legislation – may give rise to the administrative body's tortious liability. However, there is no legislative framework; indeed, there is no single legal provision to rely upon in order to regulate this subject matter; moreover, there is not even case law to be used in this regard. One can unquestionably argue that the type of tortious liability ("*aquiliana*"), mentioned in Article 2043 of the Civil Code, may be invoked – whereby an administrative body's liability may be said to arise if regulatory powers are exercised illegitimately so as to cause unjustified harm to citizens. Starting from these assumptions, one can appreciate that the negligence element would appear to be the most difficult one to outline. Negligence, in this case, may not be construed as negligent conduct by the civil servant that drafted the illegitimate legislative instrument; rather, one should envisage a specific instance of negligence. Drawing upon the model of the lawmaker's liability for breach of EU law, negligence here might be related to the unquestionable existence of a severe violation, or to the violation of rules of law intended to protect rights vested in individuals⁵⁶. Criminal liability is obviously out of the question, because the facts at issue do not amount to any criminal offence.

In refraining from applying a regulation, the court acts as if the illegitimate regulation did not exist. One may argue that the legislative instruments previously in force have to be applied – providing they are in conformity.

The mechanism which consists in the court's refraining from application of an illegitimate regulation does not deprive the petitioner of any procedural safeguard; in fact, it may allow the petitioner to lodge a judicial claim for the annulment of the measure that implements the regulation which was found to be illegitimate on the basis of its incidental review. It is actually

⁵⁶ An overview of the liability vested in lawmakers can be found in A. Barone, R. Pardolesi, *Il fatto illecito del legislatore*, in *Foro it.*, 1992, IV, 148. Regarding the individual issues, see R. Bifulco, *La responsabilità dello Stato per atti legislativi*, (1999), 127 and ff.; E. Scoditti, *La responsabilità dello Stato per violazione del diritto comunitario*, in *Danno resp.*, 2003, 5 and ff.; V. Roppo, *Appunti in tema di illecito «comunitario» e illecito «costituzionale» del legislatore*, in *Danno resp.*, 1998, 970 and ff. Reliance on *aquiliana* tortious liability is addressed in C. Castronovo, *La nuova responsabilità civile*, (2006), 235 and ff.

unquestionable that an implementing measure – despite not being challenged within the relevant deadline – may not be regarded as legitimate *per se*, since it is issued on the factual and the legal assumption of the existence of an instrument that does no longer produce legally enforceable effects, because it has been found to be illegitimate⁵⁷. At all events, no mechanisms are available in our legal system to allow to turn an incidental finding that a regulation is illegitimate into the annulment of such regulation.

Under certain circumstances, the illegitimate nature of a regulation found by a court on an incidental basis might be also claimed by the entities addressed by such regulation, if they are aware of that finding, as a reason to elude enforcement of an administrative measure. However, it is up to the administrative body in charge to assess the relevant reasons and possibly terminate the enforcement of the measure on the basis of such reasons.

6. *The Value of an Incidental Finding of Illegality.*

An incidental finding of illegality does not take on *res judicata* value. Since its boundaries with the fact of refraining from application of an illegitimate regulation are blurred, the finding in question has a relative value – that is, it only applies to the parties to the given proceeding – rather than being absolute in nature. The finding of illegality leaves the regulation in place and does not impact directly on third parties' rights as far as they are concerned by the application of the illegitimate regulation on any other grounds.

⁵⁷ According to A. Amorth, *Impugnabilità e disapplicazione dei regolamenti e degli atti generali*, in *Problemi del processo amministrativo*, (1964), 574, as regards the entities that are not involved in the specific action, it would not be utterly groundless to argue that, since they had failed to challenge the implementing measures that violated legal interests vested in them, or to challenge the direct application of the regulation that violated such legal interests, they had consented to them and thereby exempted the administrative body from any obligation to do away with the effects produced by the measures or application in question. Hence, as regards such entities, setting aside the regulation does not restore the previous situation, which only occurs once the administrative body is no longer in a position to apply the annulled regulation in pursuance of the relevant judicial decision.

Conversely, the Council of State has consistently ruled that judicial *annulment* of a regulation by an administrative court is enforceable *erga omnes*. This means that, contrary to the general rule, the judicial decision is not enforceable only with regard to the litigants, as its effects include all the addressees of the regulation considering the factual components of the judicial decision – that is, its operative part, the underlying reasons, and the claim made before the court⁵⁸.

The only piece of legislation that empowers judicial authorities to refrain from applying illegitimate regulations (i.e. section 5 of Act no. 2248, dated to 20 March 1865, Annex E) does not refer in any way to the *res judicata* concept. Both jurisprudence and case law agree that the effects produced by an incidental finding only apply to the parties to the given proceeding.

The fact that such decisions should be regarded as *res judicata* is unrelated to the type of decision; however, it may be necessary to extend the scope of effectiveness of such judicial decisions to the entities concerned, since regulations are involved. These decisions, whether rendered by standard or administrative courts on any issue, and whether they are rendered on a preliminary basis or not, only produce their effects within the framework of the specific dispute.

This is due to various reasons. First, since justiciability is meant to afford protection to individual parties – so that refraining from application is merely a tool to afford full protection to the rights vested in such individual parties – there is no reason for extending the scope of the decision to entities that

⁵⁸ Council of State, Division IV, 23 April 2004, decision no. 2380; Council of State, Division VI, 26 June 1996, decision no. 854; TAR Lazio, Division I, 12 May 2000, decision no. 3918, where it is clarified that judicial annulment of a regulatory instrument is enforceable *erga omnes* and applies from inception (*ex tunc*), since it impacts on the regulation as a whole, that is, as it is also related to the entities that are not directly concerned by the judicial decision and with regard to their respective rights. Consequently, if a regulatory instrument, whose contents can be considered general and indivisible, is challenged and the court subsequently annuls it together with either the predicate instrument(s) or the implementing measure(s), the annulment in question will quash the instrument as a whole – so that it will have to be regarded as non-existent both by the petitioner(s) and by any other entity.

are not concerned by it⁵⁹. On the other hand, the petitioner's interest is protected by recognizing the right vested in him/her, or, otherwise, by annulling the instrument violating that interest and establishing that it is illegitimate. This is the part of the judicial decision setting out the appropriate interpretation of the law; thus, apparently there is no need to annul (where this is possible) a regulatory instrument that does not immediately violate any interest. Second, one can unquestionably argue that the lawmaker has failed to take in due account this incidental remedy, given that the only applicable piece of legislation dates back to 1865, that is, when no administrative law court had been set up on the basis of the legislative framework in force then.

Third, a direct remedy is available in our legal system, whereby an administrative court may be seized to claim annulment of an illegal regulation; accordingly, the incidental review remedy is to be regarded as a residual one, to which minor importance is attached. Its specific features are related to non-applicability, and this remedy is mostly actionable, if it is necessary to protect the legal situation of the individual entities concerned. Fourth, the finding by a court, on an incidental basis, that a regulation is illegitimate is ancillary to the operative part of the judicial decision, since it is only contained in the reasons for the decision and it is not even adequately publicized - since no specific legislative provision is applicable in this regard. Fifth, the relative nature of such a finding can also be accounted for by the risk that the administrative body's defenses might be undermined in the course of a proceeding before non-administrative courts.

An incidental finding of illegality does not involve, *per se*, any publicity requirements. The decisions rendered in this regard by ordinary and/or administrative courts do not share any of the features that apply to the decisions taken by the Constitutional Court in terms either of their formal structure or of their effects. This considerably affects the rule of law principle and the

⁵⁹ As regards, for instance, administrative law proceedings, since justiciability is meant to protect interests vested in individual entities, such interests represent both a fundamental precondition for seizing the court and a constraint placed on the scope of justiciability. That is to say, if an administrative court may only intervene insofar as the interests have been violated, it should also intervene only as long as this is necessary in order to protect the interests vested in specific entities, after establishing the violation of such interests.

assurance of legally treating identical cases by legally identical standards. No specific arrangement is envisaged in respect of incidental findings (e.g. publication in newspapers or on online media) to ensure that their effects are generally binding.

7. Mandatory or Optional Nature of Review and Sanctions.

The requirement that a regulation should be found in judicial conformity with a higher level rule is related, in general, to the *public order* concept; however, the requirement has no specific implication. There is no specific legislation whereby *public order* is linked to incidental findings of illegality; yet, it is unquestionable that “setting aside an illegitimate statutory provision is a requirement that goes beyond individual interests, since it concerns society as a whole for the sake of the rule of law”⁶⁰.

Albeit resulting from the challenge made by an individual entity, which claims the violation of individual interests, the review of regulations mainly focuses on establishing and overcoming conflicts between sources of law differently ranked. This is the reason why we believe that the findings made in the judicial decision are general in scope and lend themselves to being regarded as binding in nature.

Thus, any court, whatever its competences, is empowered to claim non-conformity of a regulation with a higher-level legislative instrument of its own motion (*ex officio*) – namely because the review of legality is closely related to the need for protecting the rule of law. Since the incidental review of legality is only allowed with regard to regulations, which are always administrative instruments in terms of their formal features, no court might be empowered to challenge legislative instruments for their “legality” – or, rather, for their being conform to constitutional principles.

⁶⁰ See R. Meregazzi, *L’annullamento giurisdizionale dei regolamenti*, in *Scritti in memoria di Antonino Giuffrè*, III, (1968), 610, who also adds that only with regard to the annulment of regulations could one support the view that the jurisdictional powers allocated to the Council of State are mainly intended to ensure the legitimacy of public administrative activities.

8. Peculiarities of Domestic Law in Case of Breaches of European Law.

If European law is breached, the legal approach to regulations is rather different. First, if the regulatory instrument is in conflict with European law, the lower courts may refrain from applying it by their own motion and at any time – just as it happens to any item of domestic primary legislation⁶¹. This is a direct consequence of the primacy of European law.

Moreover, administrative bodies are also empowered to refrain from applying regulations that are in breach of European law, inasmuch as they are branches of a Member State that has undertaken to fully implement European law. Indeed, public administrative bodies and judicial authorities are bound to act in respect of EU law and, therefore, refrain from applying any item of legislation that is not compliant with it – and one can hardly imagine that things should be in any way different with regulations – as long as they come into play in the administrative case to be decided upon; in order to do so, they do not have to await the repeal of Parliament or the preliminary ruling issued by the Constitutional Court⁶².

⁶¹ As clarified by Council of State, Division VI, 23 May 2006, decision no. 3072, domestic courts are in any case required to refrain from applying a domestic instrument, including a regulation, that is in conflict with EU law. This stance is supported by Council of State, Division VI, 25 September 2009, decision no. 5765; Council of State, Division VI, 23 July 2008, decision no. 3642. The importance of legal rules in the European legal system is discussed by G. della Cananea, C. Franchini, *I principi dell'amministrazione europea*, Second edition, (2013), 86.

⁶² European Court of Justice, Case C-103/88, *Fratelli Costanzo* – judgment of 22 June 1988, as commented by R. Caranta, *Sull'obbligo dell'amministrazione di disapplicare gli atti di diritto interno in contrasto con disposizioni comunitarie*, in *Foro amm.*, 1990, 1372. That administrative bodies must also refrain from applying domestic instruments that are in conflict with EU law is uncontested: see Council of State, Division VI, 23 May 2006, decision no. 3072, whereby the primacy of EU law requires not only judicial authorities, but also Member States as a whole, that is, the whole administrative framework of such Member States, to fully implement European laws and refrain from applying domestic laws in case of conflicts. This stance is supported in Council of State, Division IV, 20 November 2008, decision no. 5742; *Id.*, Division V, 8 September 2008, decision no. 4242; *Id.*, Division V, 14 April 2008, decision no. 1600.

The impossibility to rely on analogy in order to extend this power also to administrative measures that are in breach of EU law is expounded in Council

From this perspective, an administrative body is not required to follow the review procedure as set forth in the Act on administrative proceedings in order to refrain from applying a regulation that is incompatible with EU law; in this case, the emphasis is put on the primacy and effectiveness, principles that underlie the protection of rights grounded in European law. However, if one considers the legal relationship between a private entity/individual and the administrative body, the fact that the latter refrains from applying the regulation – without removing the rules contained from the realm of law⁶³ – would not seem to afford a sound alternative remedy such as to replace the setting aside of the regulation in question. Furthermore, the public body will have to check in any case that the intervening time span is not excessively long, something which can ultimately justify the addressee's reliance on the legitimate nature of the measure in question⁶⁴.

9. Concluding Remarks.

The regulation is an “in betweener”: halfway between a source of law and an implement of the executive power. This fact creates obstacles to a logical, consistent analysis. If one considers the legal status of secondary sources of legislation, apart from their respective contents, the administrative components would

of State, Division VI, 17 October 2005, decision no. 5826; Id., Division IV, 22 September 2005, decision no. 5005.

Lower courts have been considered to be empowered to refrain from applying domestic provisions that are incompatible with EU law, so as to bring EU law into full effect, since the decision rendered by the Constitutional Court on 8 June 1984 (decision no. 170) – whereby the European and domestic legal systems are autonomous and separate systems; however they are mutually coordinated in accordance with the allocation of competences set out in the Treaty. Thus, incompatible domestic provisions are neither repealed nor derogated from nor null and void: their application is refrained from because such provisions belong to a different, autonomous legal system.

⁶³ E. Cannada Bartoli, *L'inapplicabilità degli atti amministrativi*, cit. at 12, 35; F. Cintioli, *Giurisdizione amministrativa e disapplicazione dell'atto amministrativo*, cit. at 12, 95.

⁶⁴ E. Broussy, E. Donnat, C. Lambert, *Stabilité des situations juridiques et droit communautaire*, in Act. Jur. Dr. admin., 2006, 2275; H. Wenander, *Withdrawal of national administrative decisions under european administrative law*, in Eur. Law Rep., 2007, 54.

appear to prevail over the legislative ones. Moreover, secondary rules are not capable of repealing laws, unless ad-hoc laws confer this power to them; they may be withdrawn by administrative bodies; they may not be challenged before the Constitutional Court⁶⁵. Hence, the predominance of administrative law components accounts for the choice made to reserve the challenging of regulations for administrative courts.

However, this paper shows that the general framework of judicial review does not fail to take into account the subject to be reviewed, since administrative judicial proceedings are multifaceted. They are meant to decide both on the challenge made and – sometimes – on the right to tangible consideration. Because of this flexibility, administrative judicial proceedings are suitable for challenging regulations on account of the hybrid nature of regulations, which are halfway between legislative instruments and tools inherent in the exercise of public authority. Indeed, administrative law courts seized with the review of regulations can adjust themselves to and admit of innovative approaches – such as refraining from applying regulations of their own motion (*ex officio*), which “does away with the obsolete equivalence between administrative measures and administrative regulations”⁶⁶. By relying on a standard that applies typically to sources of law – i.e., the *iura novit curia* principle – administrative judicial proceedings lend themselves to becoming tools in order to settle conflicts between regulatory provisions.

⁶⁵ These differences are highlighted by F. Benvenuti, *Disegno dell'amministrazione italiana*, (1996), 246, where it is specified that a regulation is factually legislative in nature, although it is an administrative instrument, both substantively and formally.

⁶⁶ G. Pitruzzella, *Atti normativi del Governo e tutela dei diritti*, in *Tecniche di normazione e tutela giurisdizionale dei diritti fondamentali*, edited by A. Ruggieri, L. D'Andrea, A. Saitta, G. Sorrenti, (2007), 161 and ff.

C. BAKKER, M. SOSSAI (EDS.), MULTILEVEL REGULATION OF
MILITARY AND SECURITY CONTRACTORS. THE INTERPLAY
BETWEEN INTERNATIONAL, EUROPEAN AND DOMESTIC
NORMS, OXFORD: HART, 2012, 625 PAGES.

Edoardo Chiti*

This book discusses the increasing involvement of private companies in the exercise of military and security public functions in the changing international space. It considers two different aspects of this phenomenon: the inclination of States to contract private companies to perform genuine military and security functions within the context of armed conflicts; and the employment of these same companies by non-statal bodies, such as business corporations or international organizations, in crisis situations in which local institutions are unable to guarantee security. As a legal research on such developments, it addresses three main sets of legal questions. First, how do international, European and domestic regulatory measures in this field come reciprocally into contact, and what are the results of their interplay? Second, what legal issues does this composite regulation arise? Third, moving from empirical analysis to normative reflection, in what ways could the EU contribute to the development of a global regulation of private military and security companies, in particular by ensuring that their action complies with human rights and international humanitarian law?

The structure of the book is simple enough. The volume opens with a «general overview» of the multilevel regulation of private military and security companies, where a synthesis of the existing international and EU initiatives is presented (Part I). It then moves to the analysis of a variety of national regulatory frameworks. This investigation, which represents the core of the research, begins with the exam of the regulatory frameworks of ten EU Member States, including France and the UK, which have a significant practice in contracting military and security companies (Part II).

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It goes on by examining the legislation and case-law of a number of «crucial players» outside the EU, such as the US, the Russian Federation, Israel, Australia, Canada, Colombia and South Africa (Part III). The last part of the volume is devoted to two questions arising from the national reports, that is the exercise of criminal jurisdiction over private contractors, and the abuse by private military and security companies of tax havens (Part IV).

As it often happens in edited collections, involving a great number of disciplinary approaches, it is not possible to identify a unitary and coherent argument developed throughout the book. This does not mean that the volume does not present a series of thesis or hypothesis for further research.

The general overview provided in Part I highlights the incompatibilities between the rationales and substantive provisions of the two main international instruments currently available, the soft law of the Montreux Document and the binding law of the Draft Convention elaborated in the context of the United Nations Human Rights Council. The point is made by Nigel White that these incompatibilities might lead to a situation in which States connected to private military and security companies' industry entrench the Montreux process, while those opposing the «privatization of war» support the Draft Convention. Moreover, the lack of a specific regulatory framework at the EU level is pointed to as a shortcoming of the existing multilevel regulation, in consideration both of the direct role of the EU in military and security operations and of the EU capacity to act as a source of inspiration for other international regulatory systems and to influence third countries' action. The chapters written, respectively, by Guido den Dekker, Marco Gestri, Mirko Sossai and Christine Bakker suggest that EU regulatory action might usefully complement the international and domestic initiatives. They also identify the tools and channels available to the EU political institutions to develop such regulatory action. Finally, the comparative overview of the EU and extra-EU national regulation carried out by Ottavio Quirico highlights that the emerging common regulatory framework, though promising in some respects, is insufficient with regard to military practice, in the frequent situations in which the law of the contracting State or the State where the company is based does not apply extraterritorially and the law of the host State is absent.

Parts II and III do not put forward overall theses, but offer a detailed and realistic account of principles and rules applicable in a wide range of national orders. The reader may perhaps derive two main conclusions from the various chapters. First, all EU Member States seem to have laws and regulations concerning private security services, ranging from registration and licensing to minimum standards for personnel selection, monitoring and regulation of the use of firearms. The development of these regulatory regimes, though, varies from country to country, mainly in relation to two factors, the degree of development of the private military and security industry within the country, and the existence of a public debate on the ever-expanding number of problems raised by such industry. Unsurprisingly, it is in the UK and in France that the most elaborated regulatory frameworks have been established (see, respectively, the chapter by Alexandra Bohm, Kerry Senior and Adam White and the chapter by Vanessa Capdevielle and Hamza Cherief). Second, the regulatory frameworks of the «crucial players» outside the EU illustrate the variety of options for governmental control of private security services. In the US, for example, the increasing reliance on private contractors in the last ten years has been paralleled by the gradual establishment of a regulatory regime based upon accountability, good management and clear standards, which the Commission on Wartime Contracting and the Government Accountability Office would like to be further developed (see the accurate account provided by Kristine Huskey and Scott Sullivan). Israel's approach to the use and oversight of security contractors, instead, is shaped by the more general process of «civilianization» and privatization of functions traditionally performed by the Israeli Defence Force, which has since Israel's independence acted as the most useful agent in implementing the government's agenda: the emerging regulatory regime of private security services is thus an aspect of an overall transformation of the governmental machinery (see Yaël Ronen's chapter). And the Russian Federation does not have explicit rules regulating the employment of private security companies abroad, although these companies are becoming significant players in the protection of private and public security.

As for Part IV, its interest lies mainly in the identification of a complex legal issue, that of the jurisdictional competence in

cases of crimes committed on foreign soil by civilian contractors in military operations. In principle, those cases should be subject to the criminal law and jurisdiction of the country in which civilian contractors are deployed. Yet, the essays collected in this part, and in particular that written by Ieva Miluna, show that the principle of territoriality is sometimes set aside, either because a contracting State grants immunity from the jurisdiction of the host State or because it expands the competence of their military courts to civilian contractors. In this second case, the competent jurisdiction and relevant criminal law are identified according to the «active personality jurisdictional principle», affirmed in the US and the UK. Cases of overlapping jurisdictions and jurisdictional conflicts, however, are likely to happen.

This is a rich and stimulating book. As Francesco Francioni rightly points out in his Foreword, it offers «a realistic scenario of applicable norms and principles as well as patterns of progressive development of the law in relation to a very dynamic evolution of the market for security and military force» (p. vi). It makes it clear that the emerging patterns are both underdeveloped, particularly at the international and EU level, and unsatisfactory, as they leave open many uneasy issues, ranging from the preservation of the principles of the law of armed conflicts to the possible conflicts between national laws. By doing so, the book also offers abundant material to reflect normatively on the possible improvements of the existing law.

Nevertheless, some critical remarks can be made. One problem is that the analysis does not take into account a number of relevant variables. The various papers, for example, do not distinguish between employment of private companies by States and by (private and public) non-statal bodies. They bring together recourse to private companies within armed conflicts and within «crisis situations». They underestimate the differences between the many services provided by military and security companies, which range from prisoner detention to mere logistical support. These are, though, important variables, whose consideration would have allowed the Editors to articulate the inquiry in a more precise way, and to identify the legal and institutional issues specific to each of the various hypotheses of recourse to military and security contractors.

Another problem is the insufficient investigation of the organizational and procedural interconnections among national, EU and international laws. In spite of the sub-title of the book, which points to the «interplay between international, European and domestic norms», little attention is paid to the multiple forms in which national laws come to contact among themselves and with EU and international law, as well as to the legal challenges inherent to such variety of interconnections.

A further problem is that of the analytical instruments that are used in the various chapters. The employment of military and security contractors is analyzed using the traditional lenses of public national and international law. Yet, the international law paradigm, essentially focussing on inter-States relations, seems inadequate to give account of the features of the regulation of military and security contractors. For example, it does not fully capture the peculiarities of the Montreux process, which exploits standards and soft law mechanisms addressed to the industry itself, and it is probably unable to govern effectively the transnational activities of security contractors. One may wonder, in this regard, whether «global administrative law», as developed by Sabino Cassese, Benedict Kingsbury and Richard Stewart, would have not provided a more appropriate set of tools to analyze the relations - at the same time transnational and intergovernmental - involved in the action of security contractors, to make sense of the existing bits and pieces of national, EU and international law, and to orientate future legal developments.

Finally, the volume seems to reflect a too narrow scientific project. The various authors, together with the Editors, limit themselves to describe and discuss the current regulation of military and security contractors. They do not put this development in a historical perspective. Nor do they suggest improvements to the existing legal framework. This is, we believe, a missed opportunity. The historical perspective would have allowed to highlight that the current turn to private operators is not only a politically and legally sensitive issue, but also a direct challenge to the paradigm of the western State as an entity historically emerging from a process of centralization of coercive powers. And a systematic reflection on possible improvements could have oriented the action of the involved political actors, including the EU.

DEBATES

I. THE ROLE OF LAW IN THE LEGAL STATUS AND POWERS OF CITIES

DROIT DE LA VILLE. AN INTRODUCTION

*Jean-Bernard Auby**

1. The way the book was made owes much to what it came from: a lecture given for some years in a Master on Urban Studies, whose nearly all attendants are not lawyers.

When I first gave this course, I thought that the only way of permitting that kind of audience a smooth enough access to the corresponding rather technical legal issues was to adopt a concrete approach. This implied to leave aside the usual conceptual divides upon which we are used to build our analyses and which are mainly formal: public law/private law, local government law/substantive administrative law, planning law/neighbouring special fields like the law on public assets or the one on public contracts.

To be honest, this duty to adapt to a particular audience was also an opportunity. I belong to scholars who think that modern law - public law at least - finds itself in a period of profound transformation, due to some contemporary evolutions, such as globalization, the growing pluralistic character of our public apparatuses and the more and more complex distribution of roles between public and private entities. And I believe that, because of these evolutions, many of our concepts have become less capable to grasp the legal reality.

If this is true, we have to find new classifications. And, to this end, I think the best possible approach consists of starting from concrete realities, whose significance is not -or is the least- open to discussion.

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The City belongs to these realities. While I am not sure I know for certain what “planning law” is, I know what a city is: I have visited many, I live in one, which I can see around me when I am not traveling.

2. Usually, in the French doctrine - and, I believe, in many others -, the various pieces that constitute the legal functioning of cities are apprehended in a fragmented way, they are left to various categories of law - law on property, law on public contracts, law on local government, law on local public services, and so on -, although one piece has tended to become dominant: planning law, or land use law.

And yet, it proves quite fruitful to assemble all these pieces and bridge the gap between them by considering the ways they respectively contribute to the overall functioning of cities.

It must be stressed that this can be made without having all the bits brought together under the flag of planning law. It is true that, in some doctrines at least, planning law has shown an “imperialistic” stance and tried to appear as the only possible synthesis of “the law of cities”. But it was a failure, only leading to excessive complexity.

The law of cities can be simply apprehended as the law applicable to the various essential dimensions of cities functioning: public and private spaces, infrastructure, land occupation, local economic development, local public services, local government, and so on. And it is possible to go through these various issues without too much wondering whether you are in the field of constitutional law, administrative law, planning law or whatever: you will even possibly come across private law issues, and still you will not have lost your way!

3. The interesting is that this synthetic and concrete approach helps discern, within the overall topic of cities legal functioning, a range of cross-cutting functional logics and some common principles.

Among the functional logics it makes appear, I would first mention the trend towards a constant contribution of private actors to the pursuit of general interest aims. The private sector plays a growing role in the production of local public goods, especially in the social and cultural fields, while local democracy

makes itself ever more participative and thus more reciprocal, consisting more and more in a permanent dialogue between citizens and local powers, facilitated by the NTIC.

Another prominent feature of cities legal functioning is the importance acquired by issues concerning public spaces. Urban growth generates a tension on public spaces, which increasingly longed for by economic, cultural, political competing users. Planning law, the law on public assets and the one on public order must work together in order to regulate this competition.

What a transversal approach of the law of cities also show is that a wide range of difficult issues it contains stem from the fact that, in general, local government structures do not fit with the real dimensions of contemporary urban entities. To a large extent, these structures were designed in periods when our societies were essentially rural and, even if they have been transformed in the modern area, they never or nearly never were adapted to the effective shape of contemporary urbanization. This insufficient institutional match raises issues which are quite apparent in the field of local governance as well as in the one of infrastructure management and provision of local public services.

4. The “concrete and synthetic” approach of the law of cities also denotes that there are some principles which could constitute an important part of its contemporary layout. At least, four groups of these principles tend to emerge.

Firstly, there are principles which seem to govern the law on public spaces. Fundamentally, our legal systems have admitted a general principle of free use, but this essential rule must nowadays compose with other ones, concerning a certain degree of (ideological, religious) neutrality in the occupation of public spaces and concerning the economic development of them.

Secondly, there are principles related to the production and the organization of the services provided by cities. Here, law finds itself in tension between a logics of competition and an old tradition of solidarity - in Europe at least, the first hospitals were set up by local governments -, between the need for public intervention in order to make sure that the essential services are provided and a distribution of functions which leaves a wider and wider room for private actors action.

Thirdly, there are principles which are in connection with the institutional complexity of local governance. The fact that local institutions are in general ill adapted to the real size of urban issues, combined with the fact that laws on local government organization tend to be very much unstable - our countries tend to reform their local government quite frequently -, imposes more and more some kind of "multilevel governance" and of network functioning, in which governing constantly requires the cooperation of several centers of administrative decision and action.

5. The fourth type of principles which emerge are the ones which can be connected to the common idea of a "right to the city".

This concept has two origins. The first one comes from the observation that, among services provided by cities, some can be considered as essential, in the sense of essential means of human beings: housing, mobility, security, the basic domestic facilities - water, power, gas -. The second one derives from the realization that, because a large majority of us live in towns - 80 % in Europe -, our fundamental rights must be to some extent related to the urban reality.

The outcome is a concept of "right to the city" - promoted in particular by UN Habitat -, on the basis of which it is possible to upgrade to the status of fundamental rights the right to the basic urban amenities: thus, possibly, a right to housing, a right to mobility, a right to security, a right to access to water distribution, and so on.

6. Finally, the "law of cities" approach places us on the way of an important historical phenomenon, already highlighted by many studies in sociology and political science: the political renaissance of cities.

The idea which can these studies plead is that, in the current era of deconstruction and reassembling of public action structures, one may detect symptoms of a reemergence of cities in the position of major levels of government.

In the international ambit, these symptoms are, in particular: a growing number of city-states (Dubai, Singapore ...), a development of various networks of cities, a more and more

marked interest shown by international institutions for urban affairs. In domestic systems, they concentrate mainly in the frequent signs, here and there, of a new recognition, both political and economic, of metropolises.

We, lawyers, must realize that this political and economic reemergence of cities has its implications in law. Cities have become 'central markets' in the business of satisfying collective needs. A growing number of legal abilities participating in the conduct of public affairs are situated at their level. The intensifying - generally speaking - tendency of our public apparatuses to accommodate a higher degree of pluralism, combined with the growing interconnection of public issues, lead them to constitute more and more partial legal orders.

These converging evolutions must at least convince us that the "law of cities" is one of the groups of realities on which we should concentrate our research and our reflection if we want to keep up with the transformations which affect public law in the current era.

BEYOND THE MUNICIPALITY: THE CITY, ITS RIGHTS AND ITS RITES*

Roberto Cavallo Perin**

1. The book by Jean-Bernard is very fine. In common with every fine book that is destined to become a classic, it sparks off innovatory thinking, which I have attempted to summarise in seven theories and in reflection on method.

First theory. Everyone has stressed the need for a legal space for the city. The city may be regarded as an autonomous subject of legal discipline. The city¹ and the *comune* (municipality) may be seen as two different legal realities, and we should echo Santi Romano² in saying that the city is “*Oltre il comune*” (“Beyond the municipality”).

This may explain why in treatises on municipalities nobody has taken a serious look at the city. A new viewpoint is now emerging³, which should not make us criticise the past. The

* Paper delivered to the seminar on The City in Administrative Law - Turin, 24 April 2013, presenting the book by J.B. Auby, *Droit de la Ville. Du fonctionnement juridique des villes au droit à la Ville*, Paris, 2013 (see seminar video at: <http://www.unito.it/media/?content=6156>).

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¹ M. Ascheri, *Le Città-Stato*, (2006); L. Benevolo, *La città nella storia d'Europa*, (2001); Sir P. Hall, *Cities in civilization*, (1998); Id., *Cities in civilization*, (1998); R. Ruffilli, *Istituzioni, Società, Stato. Il ruolo delle istituzioni amministrative nella formazione dello Stato in Italia*, (1989); J. Rikwert, *The Idea of a Town: The Anthropology of Urban Form in Rome, Italy and the Ancient World*, (1988); A. Briggs, *Victorian cities*, (1963); L. Mumford, *The City in History*, (1961); L. Mumford, *The culture of the cities*, (London), 1938.

² S(anti) Romano, *Oltre lo Stato*, in Id., *Scritti minori*, (1950) vol. I, 419 s.; see also Santi Romano, *Lo Stato moderno e la sua crisi, Discorso per l'inaugurazione dell'anno accademico nella R. Università di Pisa letto il 4 novembre 1909*, (1909).

³ S. Cattaneo, *Città*, in *Enc. dir.*, VII, 125; J. Kotkin, *The city. A global history*, (2006); G. Pavani, L. Pegoraro, *Municipi d'Occidente, Il governo locale in Europa e nelle Americhe*, (2006); P. Le Galès, *European Cities: Social Conflict and Governance*, (2002); S. Vicari Haddock, *La città contemporanea*, (2004); Max Weber, *Die Stadt, erstabdruck im Archiv für Sozialwissenschaft und Sozialpolitik*, (1921), 621-772, tr. en. *The city*, (1958) tr. it. *La città*, (2003); A. Bagnasco, P. Le Galès (eds) *Cities in*

geopolitical reason is topical: at the start of the third millennium, the world urban population, those who live in towns, has overtaken the world rural population, those who live in the country⁴.

An old professor once said to me: “the city has everything except country”. What he meant was that the city is a large container that contains everything, apart from a few things such as agriculture that belonged to the rural world⁵.

Everything in the city is flowing: everything inside must flow out from the city and from outside it must flow in. The city, then, is not sufficient unto itself.

Second theory. Today it can be said more precisely that the city is the container of everything because the city is a hub. According to many writers it is “a network of networks”; in my opinion, it is more precisely *a hub of a plurality of networks*, which may be interconnected by the hub or may be independent or even unrelated. The city is always a network locus - a hub that links one centre to another⁶. An individual network normally links a smaller centre to a larger one, but it may also just connect centres that are equivalent to each other, or middle-sized.

However, it is only the “network of networks” that connects all the centres, from the smallest to the largest. This is possible solely because certain hubs serve as hubs for several

Contemporary Europe, (2000) (original ed.: A. Bagnasco, P. Le Galès, *Villes en Europe*, 1997); R. Ezra Park, E. W. Burgess, R. D. McKenzie (eds.), *The City*, (1925); L. Gambi, F. Merloni (eds.), *Amministrazione pubbliche e territorio in Italia*, (1995); A. Harding, P. Le Galès, *Villes et États*, in V. Wright, S. Cassese (eds.), *La recomposition de l'État en Europe*, (1996); P. Le Galès, *Du gouvernement des villes à la gouvernance urbaine*, in *Revue française de science politique*, 1995, 1, 57 s.

⁴ Commissione di lavoro CSS about “*Governo delle città*”, *Società e territori da ricomporre. Libro bianco sul governo delle città italiane. Sintesi del rapporto conclusivo*, Consiglio italiano per le Scienze sociali, aprile 2011, 6; G. Dematteis (eds.), *Le grandi città italiane. Società e territori da ricomporre*, (2011).

⁵ A. Faure, *Le village et la politique Essai sur les maires ruraux en action*, (1992).

⁶ G. Pinson, M. Rousseau, *Les systèmes métropolitains intégrés: état des lieux et problématiques*, *Territoires 2040 (DATAR)*, 3 (2011) 29-58; M. Castells *The Rise of the Network Society, The Information Age: Economy, Society and Culture*, Vol. I. (1996), tr. it., *La nascita della società in rete*, (2008); Id., *La città delle reti*, (2004); G. Catalano, *Reti di luoghi. Reti di città*, (2005); M. Castells, *The Informational City*, (1989); P. Perulli, *La città: la società europea nello spazio globale*, (2007); Id., *Piani strategici: governare le città europee*, (2004); C. Salone, *Logiche reticolari e politiche territoriali*, in *Urbanistica Informazioni*, 1999, n° 166, 32-40.

networks: these are the cities. The smaller centres may be rural or urban, but the city remains a point of connection for several networks.

In this sense the city is everything; more specifically, it is what it can have, but it is also what it can give through relationships with *others*.

Third theory. As the old professor also told me: “the city is very convenient; the soil is hard, one has to bend and do back-breaking work to cultivate it”. While it is normal in the countryside for every family to bake its own bread, even though it may be in a communal oven, in the city it is the combined presence of many trades that enables individuals to follow just one. This has made it possible to specialise in one profession, in an art (including the military art) or in a trade, not for oneself but necessarily for *other people*. Specialisation does not happen in a country environment.

The city must be convenient to live in, for the very reason that it enables individuals to specialise. The city therefore means plurality and differentiation, in other words very many corporations or professions, or arts or trades⁷, are all there side by side within the city, whether mediaeval, modern or contemporary.

The mediaeval guilds have been succeeded in the cities of today by the professions, in the sense of “the liberal professions” that have their own special discipline, in other words a regulated market of producers who are normally organised as a network in the cities and between cities, on a local scale and on a potentially global scale⁸, almost always linked with the rest of the world.

⁷ A. Faure, *Les élus locaux à l'épreuve de la décentralisation. De nouveaux chantiers pour la médiation politique locale*, in *Revue française de science politique*, 44e année, n. 3, 1994, 462-479 (spec. 474 on the idea of an entrepreneurial city).

⁸ S. Sassen, *Cities in a World Economy*, (2012), updated 4th ed. (1st ed. 1994); P. Perulli (eds.), *Nord. Una città regione globale*, (2012); C. Ratti, S. Sassen, *Le mega città iperconnesse*, May 3rd, 2009; Id., *Denationalization: Territory, Authority and Rights in a Global Digital Age*, (2005); Id., *The Global city. Introducing a concept*, in *The Brown Journal of World Affairs*, 2005, vol. XI, Issue 2; Id. (edt.), *Global Networks, Linked Cities*, (2002); A.J. Scott (eds.), *Global city-regions*, (2002); B. Jouve, C. Lefèvre, *Métropoles ingouvernables*, (2002); J. Gottmann, *Megalopolis. The Urbanized Northeastern seaboard of the United States*, (1961); Id., *Megalopolis, or the urbanization of the Northeastern Seaboard*, in *Economic Geography*, 33 (3): 189-200, 1957.

Each professional, however, is at the same time a hub for consumers, above all a contact point not just for city clients but also for other clients wherever they are located, who connect with them through technology or through other professionals to obtain ever more specialised services on a wide scale on the consumer market.

Clients from the city and clients from outside the city are drawn to the city, which is seen as a network of networks, or more precisely to the *hub of a plurality of networks* that is the city. Again it was the old professor who said to me that peasants going to the market in the city once a month took the opportunity there to visit the doctor for treatment, the lawyer or notary to obtain advice, and so on, because it is the city - the network node - that makes it possible to go from one network to another, even though the two networks are normally segregated.

Fourth theory. The city is not the *resident* population; the resident community, on the contrary, constitutes the *comune* (municipality); this also explains why the city is not the same as the institution of the *comune* (municipality) and its bodies and offices (the *consiglio comunale* or town council, the *giunta* or executive council, the mayor). But we shall return to this point later.

Since it is the *hub of a plurality of networks*, the city has people who come and go every day, each with their own agenda, inflows and outflows of goods, flows of services, more specifically flows of producers, as well as flows of consumers and not least a flow of capital.

The city has its own peculiar problems, because levels of criticality unknown in other places are created there⁹. Apart from the problems caused by the connection with others (transport, telecommunications, energy, etc.), there are critical environmental and health and hygiene factors, as well as the criticalities of urban planning and housing, compatibility with internal traffic conditions, generally due to what are said to be “networked” services that, where they remain unaddressed, give rise to critical

⁹ G. Dematteis (eds.), *Le grandi città italiane. Società e territori da ricomporre*, (2011); Y. Kazepov, *Cities of Europe. Changing Contexts, Local Arrangements, and the Challenge to Urban Cohesion*, (2005); G. Martinotti (ed.), *La dimensione metropolitana. Sviluppo e governo della nuova città*, (1999).

problems of public order. Jean-Bernard is right, then: in cities there are legal norms that are peculiar to each one.

The city, then, is made up of all those people who use it, live in it, and therefore simply constitute it as a community that is the *hub of a plurality of networks*. People who may belong to different municipalities – located throughout the world (in places far or near) – but who at least briefly, as a result of travelling, are concentrated in the city according to recurrent patterns of behaviour.

The different flows are characterised by differing rates and parameters, since the very idea of a flow indicates the behaviour not of a single individual but of a group of individuals who display a far from random periodicity of behaviours¹⁰. What in other sciences is said to be a “flow” is, in law, named a community – a community of professionals, users, workers, transporters, etc. – that on occasions is inaccurately described as *dynamic*, as opposed to a community of residents.

By now it is clear that every community necessarily adopts one or more behaviours for the optimum satisfaction of its own needs and organises itself to that end, and is therefore a *Ordinamento giuridico* (legal system) as defined by Santi Romano¹¹. Communities or “networks” of professionals, users and workers: each one is a *Ordinamento giuridico* (legal system), and they have long since become organised as true professional orders, as unions to defend workers or as associations of businessmen, and more recently as purchasing groups or associations to uphold users’ interests.

In this sense the city, as a *hub of a plurality of networks*, fits the definition of a system that regulates those who live in it together, not as individuals but as *ordinamenti giuridici* (legal systems) in themselves – a *ordinamento degli ordinamenti* (system of systems).

A system not regulated by law, a system that has the special characteristic of allowing systems to coexist in the city without problems of public law and order. The city as a territory is undoubtedly a place in which many *ordinamenti giuridici* (legal

¹⁰ A. L. Barabási, *Bursts: The Hidden Pattern Behind Everything We Do*, (2010).

¹¹ Santi Romano, *L'ordinamento giuridico*, II ed., (1946), reprinted by Giuffrè, 2013; Tr.: *L'ordre juridique*, (1975), II ed. 2002; *Die Rechtsordnung*, (1975); *El Ordenamiento Jurídico*, (1963); *O Ordenamento Jurídico*, (2008).

systems) coexist; this cannot be a matter of chance, but it happens because the *Ordinamento della città* (The city legal system) regulates everything there.

Fifth theory. Professor Pericu has reasoned as a jurist based on his experience as the mayor of the citizens' community that is Genoa.

He has told us that he has tackled the tougher decisions with the Rector of the University of Genoa, with the President of the Union of industrialists, with the Secretaries of the leading trades unions or the representatives of the professional bodies, with other mayors or with the Presidents of provinces or regions, and last but not least with the Archbishop of Genoa or the leaders of other religious organisations: briefly, with the spokesmen of the systems that coexist in the city.

The law does not cover their meetings and procedures, nor is there any regulation stating which people should meet, or the formalities or majorities by which decisions should be taken. These are meetings, however, in which the formal institutions, through their own office-holders (mayor, president, secretary, etc.), decide on issues of great importance to the life of the city, following the necessary relevant deliberations.

The procedures and bodies are not laid down by any written provision, law or regulation, but nonetheless the development of a city over twenty years may be planned or a port redesigned, observing an order of precedence in meetings with the various representatives that becomes almost a ceremonial formally determining the procedure.

Whether it is called external coordination, a *conferenza di servizi* (as per article 14 *et seqq.*, Law 241 of 7 August 1990) or another workable definition, the example of a council of representatives of autonomous institutions has been at the origin of many European experiences under the names of *Privy Councils*, *Councils of State* or, lastly, *Councils of Ministers*. These too were certainly not initially provided for in *Constitutiones* (Constitutions), but they were no less important to kings and to the members of the councils: all of them conferred reciprocal legitimacy on each other, according to a construct that several parties have regarded first as an institutional rule and then a constitutional norm.

The city of Genoa therefore, as a *ordinamento* (legal system), has selected its own bodies, which can be distinguished from the municipal bodies and offices (the *consiglio comunale* or town council, the *giunta* or executive council, the mayor) and which, according to a lay or secular culture of the exercise of public authority, almost always choose as their meeting place the salons of *Palazzo Tursi* offered by the Mayor of Genoa, following methods and formalities that are ritualistic in nature - lay or secular rites, certainly, but no less effective for that.

Sixth theory. The “right to the city”. Subjectively, therefore, the *right to the city*¹² is the individual’s right to participate in a complex society, to participate in the “market” for goods and services; by contrast, the *right to the country* is the right to be forgotten or to live in ways that have been defined as “happy degrowth”¹³. I do not know whether the right to the city is part of the right to life, or of the right of movement and residence or other rights, but this descriptor may remind us that in the city the rights of man immediately imply complexity. In the city, if the rights to housing, or health and hygiene, or movement are not satisfied, public order problems inevitably arise¹⁴. In the city the “rights of man” are co-essential to the definition of security or public order,

¹² D. Harvey, *The Right to the City*, in J. Show, I. Štiks (eds.), *Citizenship Rights*, (2013); H. Lefebvre, *Le Droit à la ville*, (2nd ed. 1968).

¹³ M. Bonaiuti, *La Grande Transizione. Dal declino alla società della decrescita*, preface by S. Latouche, (2013); S. Latouche, *Can the Left Escape Economism?, Capitalism Nature Socialism*, vol. 23, issue 1, 2013. 74-78; B. Muraca, *Towards a fair degrowth-society: Justice and the right to a ‘good life’ beyond growth*, *Futures*, vol. 44, issue 6, 2012, 535-545; G. Kallis, C. Kerschner, J. Martinez-Alier, *The economics of degrowth*, in *Ecological Economics* (in press available online 21 September 2012); M. Pallante, *Meno e meglio. Decrescere per progredire*, (2011); Id., *La decrescita felice. La qualità della vita non dipende dal PIL*, (2005); G. Kallis, *In defence of degrowth*. *Ecological Economics*, vol. 70, issue 5, 15 March 2011, 873-880; S. Savioli, *Alla città nemica, Diario di una donna di campagna*, (2008).

¹⁴ B. Secchi, *La città dei ricchi e la città dei poveri*, (2013); D. Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution*, (2012), tr. it. *Città ribelli. I movimenti urbani dalla Comune di Parigi a Occupy Wall Street*, (2013); G. Pinson, H. Reigner, *Différenciation et standardisation dans la(es) politique(s) urbaine(s)*, in A. C. Douillet, A. Faure, C. Halpern, J. P. Leresche, *L’action publique locale dans tous ses états: différenciation et standardisation*, (2012), 163-178; N. Houard, *Politique de la Ville, Perspectives françaises et ouvertures internationales*, (2012); H. T. Andersen, R. van Kempen (eds.), *Governing European Cities: Social Fragmentation, Social Exclusion and Urban Governance*, (2001).

as in 1789. It is not by chance that, in the *Declaration of the Rights of Man and of the Citizen*¹⁵, the “right to security” supplements the definition of the rights to liberty (art. 2 and art. 12).

Seventh theory. The city as a stress test of the effectiveness of the rights of man¹⁶. Many instances of non-discrimination are collated in Auby’s book. It is well known that France is very conscious of this issue, particularly in its cities and above all in Paris. Non-discrimination among different peoples of different cultures, different religions, but also, more simply, of different mental and physical conditions.

A classic example is the elimination of architectural barriers for the disabled, something that is hard to obtain from the urban transport operators; others have mentioned the importance of social services, in particular care for the elderly or day-care centres for children, the lack of which considerably restricts the capacity of individuals.

If, as a father or mother, I am unable to find efficient day-care centres, I do not have the time to specialise and increase my professionalism, with a systemic effect that reduces the difference between town and country. Auby’s book offers numerous examples that enable us to reflect on many questions.

Lastly, reflection as to method. I was tidying up my bookshelves and I came across a sociologist’s book entitled “The end of cities”. I looked at Auby’s book and said to myself: this time the sociologists have got it wrong. In terms of method, his is

¹⁵ We adopt the most common translation - according to the Encyclopaedia Britannica among others - of the *Declaration des Droits de l’Homme et du Citoyen* in place of the quite less known phrase *Declaration of Human and Civic Rights*.

¹⁶ S. Sassen, *La città aperta e i suoi nemici*, in *La Repubblica*, 4 aprile 2011; Commissione di lavoro CSS sul “Governo delle città”, *Società e territori da ricomporre. Libro bianco sul governo delle Città italiane*, Consiglio italiano per le scienze sociali, aprile 2011, cit.; P. Costanzo, *Note introduttive alla Carta europea dei diritti dell’uomo nella città (quali competenze per gli statuti locali in materia di diritti?)*, in *Giur. it.*, 2011, 6; A. Chabrot, *La Charte européenne des droits de l’homme dans la ville: un exemple d’acte «pré-juridique*, in *Revue de Droit Public et de la Science Politique*, 2007, 355 ss.; G. M. Flick, *La Carta Europea dei Diritti Umani nella Città nel sistema universale dei diritti umani*, in *Atti della Terza Conferenza per la Carta Europea dei Diritti Umani nella Città*, 2002, www.comune.venezia.it; *Tuzla Declaration: adopted on the Seventh Conference on the European Charter of Human Rights in the City held in Tuzla, Bosnia and Herzegovina*, 2010, in www.cities-localgovernments.org; *L’Engagement de Barcelone*, 1998, in www.droitshumains.org.

a fine book because it does not conceal the jurist's difficulties, but at the same time it is as a jurist that he confronts them, aware of the limitations of our science. It is a fine way of beginning. It may be argued that more studies are needed, but I feel that in a time of crisis this is methodologically useful, because the analysis of problems cannot be deferred *ad infinitum* and we have to begin by marshalling the facts, since - again, according to the classic legal maxim - *ex facto jus oritur*, the law arises out of the fact.

II. LAW, LANGUAGE AND CULTURE

THE CHOICE OF TEACHING “ONLY IN ENGLISH” IN AN ITALIAN PUBLIC UNIVERSITY IS A SIGN OF INTELLECTUAL SUBJECTION AND IS CONTRARY TO THE PROPORTIONALITY PRINCIPLE

(An Answer to G. della Cananea*)

*Diana-Urania Galetta***

The decision taken by the Polytechnic of Milan last year (via a resolution of the Senate upholding the three-year plan 2012-2014) according to which, starting from the academic year 2014/2015, "*the official language of the advanced two years' degree programs and of PhD programs is English, only*" was not a good step in the direction of internationalization of Italian universities. Such a decision was rather another clear sign of that intellectual subjection to the English native speakers' world, which affects at present time a large part of the Italian ruling class, also within the universities. But, most of all, the above mentioned administrative decision was wrong from a legal point of view and contrary to the principle of proportionality.

From this point of view it is pretty unfair to accuse of awkwardness the Administrative Court of Milan, because of its decision of May 2013¹, which annuls the administrative act adopted by the Academic Senate of the Polytechnic of Milan in 2012². As a matter of fact, the decision of the Administrative Court of Milan is nothing less than a correct application of the

* See Editorial, *Law, Language and Culture*, in IJPL, vol. 5, Issue 1/2013 (<http://www.ijpl.eu/>)

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¹TAR Lombardia, decision n. 1348/2013 of 23/05/2013.

²So does G. della Cananea in his Editorial in IJPL, Issue 1/2013, p. 2.

proportionality principle which, at present, is one of the most used general principles by Italian Administrative Courts when revising administrative acts³.

This principle implies that the concrete measure chosen by the Administration to put in execution law provisions needs not only to be appropriate for the attainment of the goal which it seeks, but it also needs to match the criterion of necessity, therefore not having to go beyond what is necessary to achieve the goal⁴.

From this point of view it must be taken into account that the law provision, which was the concrete point of reference for the decision of the Academic Senate of the Polytechnic of Milan, mentions "*the teachings in a foreign language*" as just one of the possible means to attain the goal of internationalization of the Italian university system and leaves broad discretion to the universities, in the choice of how to concretely achieve this goal⁵. Discretionary power of Public Administrations is not, however, "*freies Ermessen*"⁶ but rather a space of decision subject to review by the administrative courts, in particular through the review of proportionality.

³I cannot give an account in detail of the decision, which may, however, be found at: http://www.giustizia-amministrativa.it/DocumentiGA/Milano/Sezione%203/2012/201201998/Provvedimenti/201301348_01.XML

⁴See D.U. Galetta, *Il principio di proporzionalità*, in M. Renna, F. Saitta (Eds.), *Studi sui principi del diritto amministrativo* (2012) p. 389 ss.

⁵See law of 30 December 2010, n. 240 (law *Gelmini*) for the revision of the Statutes of Italian's Universities, art. 2, par. 2. It is one of the many cases in which the law *Gelmini*, respecting the statutory autonomy of universities, indicates only a very general set of criteria, with the aim of achieving a specific goal: the internationalization of the Italian university system. See on this point D.U. Galetta, *Autonomia universitaria e processi di internazionalizzazione degli Atenei dopo la legge n. 240 del 2010: una "anglicizzazione" necessaria? Riflessioni critiche dalla prospettiva del diritto (amministrativo)*, in *Giustizia amministrativa* (www.giustamm.it), Febbraio/Marzo 2013.

⁶I refer to that concept, historically dated, used in particular by the German speaking public law doctrine until about 1945, to indicate the area of substantial freedom that the public administration was to enjoy, both in front of the legislature and in front of the judicial power. See in particular the two well known contributions of F. Tezner, *Über das freie Ermessen der Verwaltungsbehörden als Grund der Unzuständigkeit der Verwaltungsgerichte*, (1892) e W. Jellinek, *Gesetz, Gesetzesanwendung und Zweckmäßigkeitserwägung*, (1913). See on this point S. Cognetti, *Profili sostanziali della legalità amministrativa*, (1993), 70 ss.

To be consistent with the principle of proportionality the concrete choice on how to achieve the goal of internationalization should have properly taken into account all other interests at stake, in order to allow the achievement of the goal of internationalization with the least possible sacrifice of other conflicting interests.

In particular, as the administrative Court’s decision stresses, the decision of the Academic Senate should have taken into account the interest of the Professors to be able to exercise their constitutionally enshrined right of freedom of teaching art and science (Articles 33 and 34 of the Italian Constitution), as well as the right of the students to an education in the language that our system identifies as the expression of the cultural and linguistic heritage of our state. Those rights cannot be subjected to a linguistic *diktat* such as the use of “solely English language” in teaching activities at university level: even if it is certainly true that in the Italian Constitution there is not a specific norm according to which Italian is “the” official language of our country, nevertheless a systematic interpretation unequivocally leads to this result⁷!

The principle of proportionality used by the Italian Administrative Court to revise the decision of the Polytechnic of Milan is the ripe fruit of a long time development of this principle within the case law of the EU Court of Justice. It is a clear sign itself of the fact, that Italian judges are not living in a close-minded world: most of them are open-minded to a trans-national debate, and do take part in the so called trans-national community of lawyers and judges⁸.

⁷I cannot agree with G. della Cananea’s point of view, according to which the strict constitutional analysis shows and emphasizes that in our Constitution there is not such thing as an explicit and univocal choice of language (Editorial, p. 3).

⁸Clear evidence of this are the meetings organized on a regular basis, for now almost twenty years, by the AGATIF (Association of German, French and Italian administrative judges). S. <http://www.agatif.org/>. See also the ACA (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union), whose activity started already in 1963, thanks to the personal engagement of the President (at the time) of the Italian “Consiglio di Stato”, Bozzi. See in <http://www.aca-europe.eu/index.php/en/historique-en>

The Administrative Court's decision at issue is not "*excluding any possibility to teach law in English in our country*"⁹: it is only stressing the need, according to a correct use of the principle of proportionality, not to take such an administrative decision without taking into account all rights concretely at stake and without putting them into adequate balance. From this point of view, I must strongly disagree with Giacinto della Cananea's point of view: even if the use of "solely English language in teaching activities" at Italian Public Universities (financed with Italian public money) could be beneficial to create a common frame of reference for researchers and teachers (which is not at all sure and still needs to be proved), this is still not enough to overcome the objections regarding non-compliance with the principle of proportionality. That's why the Administrative Court decision is correct and is not at all an "institutional" one¹⁰.

To conclude, it is my opinion that the choice of neglecting our own language and our own legal culture would be a strong sign of cultural decline of our country. The process of internationalization of our universities - while necessary and desirable - can be considered compatible with our system only to the extent that it will not have the effect of placing the Italian language in a marginal position, compared to other languages: English cannot be an exception to this golden rule.

⁹This is rather the personal opinion of G. della Cananea (Editorial, p. 2).

¹⁰So G. della Cananea (Editorial, p. 4).