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EDITORIAL

THE EU AND SHARED MANAGEMENT OF INFORMATION: OPPORTUNITIES AND RISKS THE END OF A NEW *BELLE ÉPOQUE?*

*Giacinto della Cananea**

More or less one century ago, *La Belle Époque* (1890-1914), a period in the history of Western Europe characterized by peace and economic prosperity, came to a sudden end. Peace had endured despite the conflicts at Europe's borders and elsewhere. Economic prosperity had been favoured by technological progress and freedom of movement for persons, goods, and capital. A gentlemen could travel through Europe without a passport and be subject to minimum bureaucratic burdens. There was ample commercial opening and expansion. Movement of capital was also frequent, with positive effects for countries suffering from a chronic lack of capital, especially with a view to the building of new infrastructures. The outset of the Great War brought all this to an end.

Only between the last decades of the Twentieth century and the first decade of the new century have movements of persons been liberalised once more, and for all: workers and students, tourists and patients. Economic interdependence has grown, favoured by new legal rules and driven by new technologies, as well as by an accelerated increase in trade and investment flows. For some observers, this growing interdependence, which reflects the partial political unification of Europe, is now endangered by the centrifugal forces that are weakening the European Union. There is no doubt that those who are interested in European integration should take into account the nature and magnitude of such centripetal forces.

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However, there are important differences with respect to 1915. Economically, the growing liberalisation of markets within an area that is wider than the EU has transformed the organisation of business, moving from nation-based production structures and strategies to 'regional' networks. Socially, millions of Europeans live a part (and sometimes most) of their lives in another country. Legally, there is a still wider Europe of rights, from the Atlantic to the Urals, with a bill of rights and a Court which interacts with national judges.

Information Networks

Another important, though relatively under-studied, manifestation of this growing interdependence is the development of information exchanges between public authorities. In contrast with the traditional hierarchical vision of public authorities within national borders, a horizontal and complex set of networks has emerged within which hierarchies become blurred and public authorities function in a sort of spoke-hub distribution paradigm, with access to a common data-base.

Consider, for instance, the Visa Information System within the Schengen Area, which connects the central system to national systems, thus allowing participating countries to exchange visa data. The Schengen Information System (SIS) is even more important because it supports external border control and permits national authorities to exchange data and be informed of alerts concerning certain categories of persons. Other alert systems have been created in the fields of food safety and environmental protection.

These and other information networks provide real opportunities. But they are not without risks, although these are not always evident. Opportunities and risks are two sides of the same coin. Public administrators can define and revise their policies based on new technologies and the access to data they provide. On the other hand, the challenge is not simply to avoid misuse and abuse of these data, but also to reduce the possibility of unauthorised access. We thus need to improve public authorities' ability to ensure the proper functioning of the network

and to contain risk events should they occur. Another advantage of a network is that once it is operational, all processes can be managed though a rules-based control model. But especially, if such rules are sector-specific and fragmented, issues of transparency and accountability will arise.

Precisely for these reasons, a group of European scholars – including the author of this editorial – have proposed, in the framework of a draft proposal for 'binding legislation' at EU level with the aim of reinforcing the Union's general principles that govern administrative procedure, to define new rules for information management. Unlike most such "Model Rules", which have little or no impact on the administrative procedure of Member States, these rules should contribute to the objective of a clear allocation of responsibility between EU and national authorities, viewed as an essential feature of a decentralised structure of government. They aim to establish "a legal infrastructure for information management activities which is not excessively burdensome on the one hand, and to provide the legal standards necessary in an EU based on the rule of law on the other hand".

Thus far, the European Parliament seems inclined to promote only an elaboration of the principles of good administration applicable at Union level and in individual cases, namely with regard to adjudication. Such a limited scope of application clearly cannot provide the type of legal infrastructure that is needed. It would be a pity if, as a consequence of this, only the risks associated with the shared management of information were highlighted, and not the opportunities it provides.

ARTICLES

FREEDOM OF EXPRESSION, HONOUR AND CONTROL OF POWER. DEVELOPMENTS IN THE RIGHT OF POLITICAL CRITICISM, BETWEEN THE NATIONAL AND EUROPEAN COURTS

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Abstract

The essay analyses in depth the crucial relationship between freedom of expression and political power in the public sphere, pointing out the social counter-majoritarian role played by the freedom of expression itself, in order to protect fundamental rights. Starting from a practical perspective, the author critically underlines the different approach followed by domestic and European Courts and their different judicial techniques, adopted for balancing freedom of expression with other constitutional values, such as honour and reputation, especially when a political body is involved.

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1. Dangerous freedom and the debate of ideas

Press freedom – like freedom in general, according to the teaching of Benedetto Croce – continues to live "*as it has lived and will live forever throughout history, under threat and fighting*"[1].

Undoubtedly under threat is the existence of those who subject those affirmations that are handed down "from on high" to the most intense criticism and who desecrate what is considered most sacred and inviolable by a part of the population, challenging those who feel the need to defend by all and any means an "absolute truth", revealed by the prince or the ministers of some or other deity[2]. Journalism is not, however, necessarily a tranquil occupation even for those who exercise it in liberal systems or in areas where the reaction of those who feel offended is usually restricted to a lawsuit and not death threats or murder.

The notion that comes down through the centuries and various political regimes is that, as in the famous phrase attributed to Edward Bulwer-Lytton, *the pen is mightier than the sword*, influential and therefore a source of danger to authority in all its forms, clerical or secular, for individuals who might find their dignity offended, but also for those who use that pen in expressing their beliefs and direct some light on to the realities of society.

From this point of view, what Constitutions need to protect is the value of the free exchange of ideas, one suitable to arrive at a truth that is necessarily relative and provisional. And it is the voice of the irreverent, those who mock the most deeply held beliefs of society, which should be guaranteed above all. Thus, the effective guarantee of an open and tolerant space continues to be one of the main criteria for evaluating the "wellbeing" of a liberal-democratic system, a system where even thoughts that "*offend, shock or disturb*", according to now ritual formula of the Strasbourg

[1] B. Croce, *La storia come pensiero e azione* (1967).

[2] According to data provided by the International Press Institute of Vienna, around the world journalists killed because of their work number about one hundred every year; cf. the dossier "Death Watch", available at http://www.freemedia.at/death-watch.html, which shows a progressive increase in killings from 1997 to recent years. Data for 2015 is obviously influenced by the eight journalists murdered in the terrorist attack of January 7 on the offices of the satirical newspaper "Charlie Hebdo".

Court[3], have a place, as instead does the harshest criticism of authority. Limiting, restricting and conditioning public discourse, in fact, ends up creating a chilling effect, a cooling, almost a stifling of freedom of information and, therefore, of the free debate of ideas.

In fact, if democracy postulates the transparency of decision-making mechanisms and an ongoing process of information and the shaping of public opinion, the existence of a space where a comparison of the different interpretations of reality can develop freely becomes a necessary condition for the creation of a favourable environment for the widest possible circulation of any information or idea, and therefore to render effective the right of citizens to be informed and – consequently – to contribute to determining national policies.

In other words, the free circulation of ideas is an individual right and a fundamental value of the democratic system, an instrument for the realisation of the person and for the search for truth in the fields that are most relevant to community life (politics, law, religion, economics, etc.) and, in this vision, a "guarantee for the guarantees", a condition for the maintenance of all other freedoms.

In this sense, I feel I have to reiterate – despite the authoritative criticism of Alessandro Pace[4] – that freedom of expression can be defined as a right which is individual and social at the same time; a fundamental right of the individual "*so that* – according to the famous definition of Esposito – *man can join his fellow man in thought and with thought*"[5], but also a social right, that is, there is an expectation of active behaviour on the part of the State, so that, through the formation of informed public opinion, not only is "the development of the human person" guaranteed, but also "the effective participation of all workers in the political, economic and social organisation of the country", as laid down in Article 3, para. 2, of the Constitution[6].

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[3] Among the first European Human Rights Court judgments, 7 December 1976, *Handyside v. United Kingdom*, Appl. no. 5493/72, para. 49, still today a fundamental leading case concerning the right of criticism.

[4] A. Pace, *Informazione: valori e situazioni soggettive*, 26 Dir. & Soc. 743 (2014).

[5] C. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano* (1958).

[6] G.E. Vigevani, *Informazione e democrazia*, in M. Cuniberti, E. Lamarque, B.

This reading does not imply a functionalist interpretation of Article 21 of the Constitution, nor does it lead to a recognition of a "right to be informed" as a subjective legal situation of a favourable nature, which corresponds to a general obligation for those who inform to provide information or, even more, information that is "true".

The "social" right to information instead seems to imply an obligation on the part of the system to make as accessible as possible news regarding the public sphere; hence the "privileged" nature of freedom of expression in the judgment of equilibrium with other personal rights, when through such freedom power becomes visible and can be controlled, be it political, economic, religious, scientific or cultural[7].

This reading also makes it possible to render the interpretation of the freedom to inform pursuant to Article 21 of the Constitution more consistent with the traditional approach of the European Court of Human Rights, which presupposes "the diversification of the level of protection of a news item in terms of its specific contribution to a debate of general interest"[8], and thus to encourage a gradual integration of the systems of guarantee for the freedom of expression[9].

To measure concretely the actual extent of the free marketplace of ideas and interactions between legislator, national courts and supranational bodies it is necessary to climb down from the ivory towers and study everyday case law on the right to criticise.

The verification of how freedom of expression and other

Tonoletti, G.E. Vigevani & M.P. Viviani-Schlein (eds.), *Percorsi di diritto dell'informazione* (2011).

[7] This seems to be the position of Pace and Petrangeli, when they explain that information correctly disclosed by a journalist prevails in the balance of judgment insofar as "*Article 21 of the Constitution and, more generally, in the overall context of the constitutional framework, there exists... also the freedom to seek information (cf. among others, Article 10, para. 1, of the European Convention on Human Rights), which though passive... is, in ours as in other systems, as an immanent constitutional value*" (A. Pace & F. Petrangeli, *Diritto di cronaca e di critica*, 5 Enc. dir. 307 (2002).

[8] Thus, G. Resta, *Dignità, persone, mercati* (2014).

[9] On the topic, allow me to refer to G.E. Vigevani, *Libertà di espressione e discorso politico tra Corte europea dei diritti e Corte costituzionale*, in N. Zanon (ed.), *Le corti dell'integrazione europea e la Corte costituzionale italiana* (2006).

personal rights confront each other in courtrooms helps, in fact, to define those bradyseisms that move, sometimes even only by millimetres, the line between the right to inform and other conflicting interests and perhaps demonstrates the trends of liberal-democrats legal systems and, for our purposes here, of the Italian system, more than great affirmations of principle which are pronounced perhaps in the wake of traumatic events.

2. The crime of offending the honour and prestige of the President of the Republic of Italy between national echoes and the indications of the European Court

Recent legal proceedings also show how the path of press freedom is a rocky one, with a direction that is certainly not straight and how, in many cases, the legal system provides instruments for those who want to prevent expressions intended to show that the king is naked, whether adorned with a crown or a tiara.

A paradigmatic example in some ways is represented by the maintenance in our system of a crime of "lese majesté", namely the crime of "insulting the honour or prestige of the President of the Republic" (Penal Code Article 278)[10], recently "revived" in a judgment of the Court of Rome of 21 November 2014, which condemned the former senator Francesco Storace to six months in prison (suspended) for this crime, for a comment, published on his blog, which questioned the morality and dignity of the then Head of State[11].

[10] The same protection is extended to the Pope, for public offences and insults against him committed in Italian territory, pursuant to Article 8 of the Treaty between the Holy See and Italy of 11 February 1929, which came into effect with Law no. 810 of 27 May 1929.

[11] The story dates back to 2007: the Government led by Romano Prodi had on several occasions obtained a majority in the Senate thanks to the votes of life senators, and for this reason a part of the opposition launched a campaign for the repeal of Article 59 of the Constitution. In this context, a highly critical comment was published on the website of the then senator and secretary of "La Destra", Storace, which defined the venerable senator for life Rita Levi Montalcini a "*crutch*" of the executive and announced the delivery to her home of a pair of these walking aids. A few days later, the President of the Republic Giorgio Napolitano said it was "simply unworthy" to lack respect and seek to intimidate the Senator; words to which Storace replied by addressing the President in these terms: "*For your unseemly personal history, for your blatant and*

This is, as we know, one of the "crimes of opinion" that harks back to pre-republican times and was kept alive by the legislator despite its obvious anachronism and incompatibility with the Constitutional position of the individual in the democratic state. This applies particularly for crimes of defamation (of the Republic, of the constitutional institutions and the armed forces, of the Italian nation, the flag or other State symbols) that are placed on a collision course with the free expression of thought and the right to criticise, even bitterly and disrespectfully, power and those who personify it[12].

Article 278 of the Penal Code, placed among the crimes against the state, seeks to protect the honour and prestige of the institutional figure who represents national unity and to ensure the smooth performance of the functions related to the office, through the provision of a penalty (imprisonment from one to five years) which is far more severe than that provided by Article 595 of the Penal Code for libel[13].

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nepotistic family status, for obvious institutional bias, you are unworthy of a position usurped by a majority". Hence the opening of an investigation by the Prosecutor of Rome, the granting by the Minister for Justice of the authorisation to proceed, pursuant to Article 313 of the Criminal Code, the annulment by the Constitutional Court, with judgment no. 313 of 10 December 2013, of a resolution of the immunity of the Senate, as a result of a conflict of attribution raised by the Court of Rome, and finally, the trial which concluded in the first instance with the condemnation of Storace. For the reconstruction of the affair, see the essay by T.E. Frosini, *Libertà di critica vs. vilipendio*, in 4 Federalismi.it (2015). A careful examination of the early stages of the affair can be found in A. Filippini, *La vicenda Storace-Montalcini-Napolitano*, in 3 Costituzionalismo.it (2007); for the offence under Article 278 of the Penal Code cf. M. Sbriccoli, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna* (1974) and B. Pezzini, *Presidente della Repubblica e Ministro della Giustizia di fronte all'autorizzazione a procedere per il reato di offesa al Presidente (art. 278 c.p.)*, in 5 Giur. Cost. 3286 (1996), in addition to the previously mentioned work by T.E. Frosini, *Libertà di critica vs. vilipendio*, cit.

[12] On the topic cf. E. Lamarque, *I reati di opinione,* in M. Cuniberti, E. Lamarque, B. Tonoletti, G.E. Vigevani & M.P. Viviani-Schlein (eds.), *Percorsi di diritto dell'informazione,* cit. at 6, which *inter alia* recalls the crystal-clear reasoning of Paolo Barile according to which "*one of the characteristics of democracy is the protection of criticism, not prestige, or reverence for the institutions, which the opposition must be able freely to undermine*". P. Barile, *Il "vilipendio" è da abolire*, in 2 *Temi* 539 (1969).

[13] Thus the Supreme Court Penal Sect. I, on 4 Feb 2004, no. 12625, held that: "The provision of an offence under Article 278 P.C. (Offence against the honour and prestige of the President) clearly does not contrast with Articles 3, 21, 24, 25

It is no coincidence, in fact, that on 4 June 2015 the Senate approved a bill[14] which, while not going as far as *abolitio criminis*, modifies the applicable sanctions: it restricts the possible use of a prison sentence (a minimum of fifteen days and a maximum of two years) only to cases where the offence against the Head of State consists in the attribution of a given fact, and replaces it with a fine in other cases. It seems clear that the completion of the legislative process would alleviate the doubts about respecting the criteria of proportionality and necessity imposed on a democratic society, as will be seen below, by the Strasbourg Court.

However, returning the application of the incrimination in the "Storace" case, the *punctum dolens* is not to be found in the sentence imposed, but in the identification of the area of the criminal offensive with different and wider criteria than in cases of defamation. In other words, the Court of Rome, excluding that the incriminating words constitute a legitimate exercise of the right to political criticism, seems to assume that the law in question finds an insuperable limit in the protection of the prestige, dignity and authority of the highest institution. And thus it seems somewhat impervious to the guidelines of the European Court of Human Rights, which tends to leave no room for restrictions on freedom of expression which might limit the free discussion of matters of

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para. 2, and 111 of the Constitution, and it can be complemented by statements which, falling outside the bounds of the legitimate right to criticise, have (assessed in the whole context in which they are contained) a character that is insulting, abusive and ridicules". A few years earlier, the Constitutional Court had declared manifestly unfounded the question of the constitutionality of Article 278 P.C., raised, with reference to Article 27 para. 3 of the Constitution, in the part which provides a statutory minimum penalty of one year in prison (Constitutional Court, 20 May 1996, no. 163). For the judge, the constitutional value protected by the provision – identified in the prestige of the republican institution itself and the national unity that the President of the Republic as Head of State is called on to represent – justified the provision of a range of sanctions that properly highlighted the particular negative value for the entire community of the offence against the honour and prestige of the highest judiciary of the State.

[14] Senate of the Republic, XVII leg., Bill nos. 667 and 1421-A "Modification of Article 278 of the Penal Code, in terms of the offence against the honour or prestige of the President of the Republic". For a considered criticism of such a reading and in general the choice of the republican legislator to limit itself to replace the figure of the King with that of the President, despite the overturning of the system of laws and principles in relation to sovereignty, cf. T.E. Frosini, *Libertà di critica vs. vilipendio*, cit. at 11, 54.

public concern and requests of those who hold public office a greater tolerance to any criticism they might receive.

From this point of view, in two cases with elements not dissimilar to the one mentioned above, the Strasbourg judges have assumed a fairly restrictive view regarding the conformity of the crime of insulting a Head of State with the freedom of expression protected by Article 10 of the Convention.

In the judgment *Colombani and Others v. France* of 2002[15], the Court found incompatible with the Convention the regulation of the crime of offence against a foreign Head of State, provided by Article 36 of the French law of 1881 on the freedom of the press, insofar as this norm, unlike the general rule in libel actions, did not allow the journalist to rely on the *exceptio veritatis*, namely the proof of the truth of the facts alleged, as exonerating the offence. According to the Court, in fact, a discipline that had as its goal that of depriving the right to criticise foreign heads of state only because of their function or status granted them an exorbitant privilege, not compatible with "*la pratique et les conceptions politiques d'aujourd'hui*" (para. 68). An interference with the freedom of expression based on that regulatory substratum did not answer, therefore, any overriding social need that might justify such a derogation from the right to inform. It was excessive in relation to the objective pursued by the law, that is, the interest of the State in maintaining friendly relations with the rulers of other countries[16]. Following the decision, the French legislature repealed the offence in question and introduced the offence against foreign Heads of State among the aggravating circumstances of the crime of defamation.

More recently the judgment *Eon v. France* 2013[17], in which

[15] European Court of Human Rights 25 June 2002, *Colombani and Others v. France*, Appl. no. 51279/99; the case concerned the conviction of the editor and a journalist of "Le Monde" for the crime of offending a foreign head of state (in this particular case, the then King of Morocco Hassan II).

[16] On this decision, cf. D. Voorhoof, *Cour européenne des Droits de l'Homme - Affaire Colombani (Le Monde) c. France*, in 9 IRIS 212 (2002), which can be found at http://merlin.obs.coe.int/iris/2002/9/article1.fr.html e P. Gori, *Brevi note sulla libertà di critica ad un Capo di Stato nella CEDU: il caso Eon, affinità e differenze con l'affaire Colombani*, in www.europeanrights.eu/public/commenti/GORI.pdf.

[17] European Court of Human Rights 14 March 2013, Eon v. France, Appl. no. 26118/10; for a detailed commentary, cf. I. Gittardi, *Vilipendio al Presidente della Repubblica e libertà di espressione alla luce della Convenzione europea*, in 23 Dir. Pen.

the Strasbourg Court considered a conviction, albeit a symbolic one (a 30-euro fine), contrary to the Convention for the crime of "*offense au Président de la République*"[18], of a Socialist activist who had help up a sign reading "*Casse toi pov'con*" addressed to President Sarkozy, on the occasion of a visit to his hometown. This particularly trivial expression mimicked an identical phrase pronounced by Sarkozy himself against a protester some time before, which made the President an easy target for satire.

Unlike the *Colombani* case, the European Court does not arrive at a declaration of outright incompatibility with the Convention of the crime of offence against the President of the Republic[19]. However, it believes that in this case there has been a breach of Article 10 of the Convention: according to the Court, the applicant had intended to publicly address a criticism of a political nature to the Head of State, employing the weapon of albeit extreme irony, and Article 10, para. 2, of the Convention leaves no room for restrictions on freedom of expression in the context of political debate or public issues. The limits to the right of criticism of a politician (among whom we find, par excellence, the President of the Republic) are, in fact, wider than those of an ordinary citizen, since the former inevitably and knowingly exposes his behaviour to thorough checks, both in the press and on the part of the mass of the citizens, and must therefore exercise greater tolerance (paras. 58-59). In addition, the European judge believes that in this case the applicant made his criticism employing a satirical tone, which allows the use of exaggeration and distortion of reality. Thus, criminalising such behaviour would result in a deterrent effect on satire aimed at public figures, which is not compatible with the democratic system.

What seems to emerge from these two decisions is a secular

Cont. 63 (2013).

[18] Article 26, law on the freedom of the press of 29 July 1881, later abrogated by Law no. 2013-711 of 5 August 2013. This norm stated that: «*An offence against the President of the Republic using one of the means indicated by Article 23, is punishable with a fine of 45.000 euros*».

[19] Thus I. Gittardi, *Vilipendio al Presidente della Repubblica*, cit. at 18, where he gives an account of the dissenting opinion of Judge Power-Forde, in which he argues that the Court should have judged the removal of the President of the Republic from criticism, which the very existence of the crime seems to guarantee, as in the Colombani case, as a privilege incompatible with the current way of thinking about politics.

vision of the institutions, which excludes "*any 'sacred' concept of the public authorities, that might justify the repression of the thought of the* quisque de populo"[20]. This condition does not rule out *a priori* the possibility for states to provide special arrangements for heads of state, but that system cannot result in free zones or excessively condition the activity of providing information. In fact, even the organ placed at the top of a constitutional system is not beyond the incisive control of the public and cannot claim some sort of immunity from criticism and even bitter and irreverent satirical expressions, invoking a sacral conception of his/her person and role. On the contrary, the involvement of "absolute personalities of contemporary history", which is what institutional leaders are, extends the right of criticism up to also covering mere expressions of indignation and personal animosity towards the state and whoever exercises significant portions of its power[21].

This applies just as much to the French President, invested by the Constitution of the Fifth Republic with a decisive role in identifying the political direction of the country, as to the King of Morocco, the victim in the "Colombani" case, a key figure in the form of government in his country, especially before the constitutional reform of 2011.

The constitutional position of the Italian Head of State is not comparable with that of the French president nor with that of the sovereign of Morocco, especially during the reign of Hassan II.

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[20] Thus C. Caruso, *Il "Political speech" nella Convenzione europea sui diritti dell'uomo: il caso Eon c. France*, in www.dirittocomparati.it (2013).

[21] Emblematic in this respect, the European Court of Human Rights 1 July 1997, *Oberschlick v. Austria* no. 2), Rec. 1997-IV, where the Court concluded that the conviction of an Austrian journalist who had called the then governor of Carinthia Jörg Haider "an idiot" constituted a disproportionate interference with the exercise of the freedom of political expression and was not necessary in a democratic society. A partial exception to this trend is represented by the decision *Rujak v. Croatia* of 2 October 2012 (rec. no. 57942/10). The applicant was sentenced to a term of imprisonment for the offence of damaging the reputation of the state, because after an argument he had disowned his belonging to the Croatian state and railed against its Christian roots. The Strasbourg Court declared the appeal inadmissible, because the words spoken were intended to offend the state institutions and not to express critical opinions. In this way, the Court seems to "*consecrate, for the first time in half a century of work, the merits of a new form of logical limit to freedom of expression*", according to P. Tanzarella, *Il limite logico alla manifestazione del pensiero secondo la Corte europea dei diritti*, in www.forumcostituzionale.it (2013) 3.

However, in Italy, since at least the time of President Cossiga, the conventional rule that excluded the resident of the Quirinal from the political controversies of the day seems to be have been applied less and less, a rule stating that political players should refrain from politically censuring the President of the Republic and demanding, in return, a position from the President that was extraneous to party-political goings-on[22].

Italian constitutional doctrine itself, having overcome a conception that was more attentive to preserving the sanctity of the highest judiciary of the Republic, has largely held that, in light of the gradual demystification of the presidential role, a diffuse political responsibility may also be attributed to the Head of State, which is mainly reflected in the submission of his/her acts and conduct to the critical judgment of the public as well as of political forces[23].

From this point of view, the guidance that emerges from Strasbourg, according to which unquestionable power is incompatible with "la pratique et les conceptions politiques d'aujourd'hui", and protected as well from irreverent and disrespectful criticism, could be taken as a guideline by the national courts to verify the effective existence of an offence against the majesty of the State and its Head.

3. Trends in the field of political criticism in dialogue with the Strasbourg Court

In relation to the crime of offending the President of the Republic, Strasbourg case law appears to have had more influence on the legislature than the court of Rome; in other areas that affect the width of the space available for criticism, the indicators developed at European level are producing not insignificant changes in Italian courts.

What we are witnessing, in fact, is a slow movement

[22] On this convention, cf. G.U. Rescigno, *La responsabilità politica* (1967); ID., *La responsabilità politica del Presidente della Repubblica. La prassi recente*, in 1 St. parlam. & Pol. Cost. 10 (1980).

[23] In this sense N. Pignatelli**,** *La responsabilità politica del Presidente della Repubblica tra valore storico e "inattualità" costituzionale della controfirma ministeriale*, in www.forumcostituzionale.it (2005), which states that "*the evolution of the form of government has brought out a "widespread" political responsibility, which has proved very important in constitutional dynamics*".

towards a more libertarian conception of the relationship between freedom of the press/criticism and other conflicting interests, especially when the subject who believes they have been offended is a public figure. Identifying a trend from the extensive case law, which is often contradictory and, in any event, linked to the peculiarities of the actual case such as that on defamation, is an operation that opens itself to easy objections. However, it does not seem arbitrary to gather evidence of a shift in the balance towards freedom of information, reading both the declarations of the Supreme Court[24] as well as statistical surveys on the case law of the main appeal courts[25].

This trend is accompanied by a process of gradual osmosis

[24] Among the most significant in recent months Supreme Court Penal Section V, April 20, 2015, no. 20998 and Supreme Court Civil Section III, 20 January 2015, no. 841, which states that where the narration of facts is supplied along with opinions, so as to constitute at the same time exercise of the press and criticism, the evaluation of the moderation requires a balancing of the interest to reputation with that of the free expression of thought, a balance that is apparent "*in the relevance of the criticism to the interest of public opinion in knowledge not of the fact subject to criticism, but the interpretation of the fact*". Supreme Court Penal Section V, September 23, 2014, no. 49570. A few years earlier, but exemplary in its clarity Supreme Court Penal Section V, 3 October 2012, no. 38437, reiterates in a particularly clear way the width of the boundaries to be allowed to political criticism "*because it guarantees the full unfolding of the democratic process and allows citizens to form strong opinions about the various events; criticism can also be very harsh, irreverent and ironic, provided, however, that they meet the standards of public interest in the news and/or affair criticised, that the presuppositions actually exposed to criticism are true and that there is an exhibitory moderation, even if the harshness of the political and union struggle allows criticism that is also very pungent and the use of phrases and images that are likely to capture the interest of the distracted reader and the listener*".

[25] Vincenzo Zeno-Zencovich has recently published an interesting statistical study on the guidelines of the Civil Court of Rome regarding damage to reputation and the unlawful processing of personal data, analysing the judgments filed in the year 2013. V. Zeno-Zencovich, *Quantificazione del danno alla reputazione e ai dati personali: ricognizione degli orientamenti 2013 del Tribunale civile di Roma*, in 32 Dir. Informazione e Informatica 405 (2014). These indicate that, with regard to damage to reputation, there is a prevalence of negative decisions (73% versus about 40% twenty years ago); the figure is even more unequivocal as regards politicians, who did not seen even one of their 23 cases taken any further (p. 408). A not dissimilar although less sharp tendency also emerges from the analysis of Sabrina Peron on the judgments issued by the Civil Court of Milan, in 2011-2012, on defamation through the media (S. Peron, *Diffamazione tramite mass-media. Un biennio di giurisprudenza ambrosiana*, in Resp. civ. e Prev., 2013, pp. 1839 ff.).

between the different levels of jurisdiction, demonstrated *inter alia* by the increasing frequency with which Italian courts cite Article 10 of the Convention and Strasbourg case law to justify decisions, particularly in the area of political criticism, that recognise the prevalence of the freedom of expression[26], as though, as I have observed elsewhere[27], Italian legislation and case law are not always capable of providing a sufficiently solid basis.

The outcome of this process is, in reference to the right to political criticism, the accentuation of the distinction between "judgments of fact" and "of value", and the resulting limited importance of the requirement of the truth of the fact in the latter case, insofar as the request to prove the truth of a value judgment leads to an evident deterrent effect on the freedom of information[28].

Dialogue with Strasbourg has also had some effect also on the interpretation of the requirement of the "civil form". For the European judges, "*the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression, as it may well merely stylistic purposes. Style constitutes part of communication as a form of expression and is as such protected together with the content of the expression*"[29]. Criticism expressed with foul and abusive language can therefore prevail over the right of an individual to be protected from personal insults if the value judgment refers to characters with an important public role and is based on known

[26] Among the most recent, Supreme Court Penal Section I, on 5 November 2014, no. 5695, which will be dealt with below, and Supreme Court Penal Section I, 13 June 2014, no. 36045, where it is stated that "*Moreover, as noted by ECHR case law (...), the right to freely express opinions does not only have to do with ideas that are favourable or inoffensive or indifferent, the occurrence of which nobody would ever be opposed to, but is, on the contrary, mainly aimed at ensuring freedom of opinions that offend, shock or disturb. And all the more so if such vehement opinions are addressed to persons holding or representing a public power, and are therefore felt to be justified by the need to respond with violence to the violence of power (except, as stated, for mocking expressions or ones that strike for no reason in private sphere, i.e. argumenta ad hominem which are not admitted*".

[27] G.E. Vigevani, *Libertà di espressione e discorso politico tra Corte europea dei diritti e Corte costituzionale*, cit. at 9, 475.

[28] Thus Supreme Court Penal Section V, 26 September 2014, no. 48712, citing the European Court of Human Rights 27 February 2013, *Mengi v. Turkey*, nos. 13471/05 and 38787/07.

[29] European Court of Human Rights, 21 February 2012, *Tusalp v. Turkey*, no. 32131/08, para. 48.

facts and opinions, the subject of public debate.

Some evidence to that effect is obtained by illustrating, albeit in an "impressionist" way, two recent legal proceedings.

At the end of 2014, the First Penal Section of the Supreme Court[30] ruled that the criticism of a public figure has very wide margins, allowing the use of a degree of exaggeration or provocation, as long as the event which inspired it is true. The ruling put an end, with dismissal without appeal, to the odyssey of a preventative action, which began with the sequestering of two articles which described the then President of the Upper Council of Cultural Heritage in an irreverent tone, taking their cue from a number of episodes of managing public money that were not entirely limpid. The Court makes a distinction between harsh, biting and sarcastic polemic, permissible if directed against public figures, and gratuitous aggression, illegal insofar as it affects the moral sphere of the person without any relation to the facts. The balance appears to be as follows: the greater the power, the more necessary the control of public opinion and therefore the lower the limits also in terms of the means of spreading news. According to the Supreme Court, because the form is "civil" it is not necessary to use language that is "grey and anodyne". There is room for provocative polemic, for biting satire and the desecration of those who manage public affairs, provided that the facts forming the basis of the criticism are true.

It really is like hearing from the mouth of the Italian judge that refrain of the European Court of Human Rights, according to which freedom of expression is the rule and the protection of reputation the exception, which requires a narrow interpretation, especially when it comes to a discussion on issues regarding the *polis*.

The same wind seems to be blowing in an equally recent judgment[31], in which the Supreme Court, altering the appeal decision, considered it legitimate to express concerns about the handing of an assignment of a political nature to a magistrate who in the past had been subject to disciplinary and criminal proceedings, if the facts underlying the criticism are true, the tone is not offensive and the exculpatory outcome of those proceedings

[30] Supreme Court Penal Section I, on 5 November 2014, no. 569.
[31] Supreme Court Civil Section III, 12 March 2015 no. 4931.

is described. According to the Supreme Court, judges do not have to teach journalism to journalists, but only mark out the boundaries of what is permissible; moreover, it has been stated that "*neutrality is a requirement that might the duty of journalist who reports facts, not of one who makes judgments of political criticism*", who indeed has a duty not to be neutral, since only the alternation of thesis and antithesis allows the reader to achieve a new and more comprehensive synthesis. Therefore, heretical opinions have full citizenship in our system, provided they are based on true facts and expressed in a way that is non-trivial.

4. The prevalence of Strasbourg: heading towards the end of prison sentences for defamation

The influence of Strasbourg case law is evident, then, in the perhaps most significant movement regarding the rules for journalists, namely the gradual rethinking of the provision for custodial sentences for crimes of defamation, considered excessive compared to the feeling of the social conscience and supranational case law.

As we know, Italian legislation provides for rigorous penalties for this crime[32], which though is not matched by a similar severity at the time of its concrete application and actual implementation[33]. There are, thus, relatively infrequent – but not

[32] "Simple" defamation (Article 595 Penal Code) is punishable with the alternative penalty of imprisonment up to one year or a fine of up to €1,032. The legislature has provided for an aggravated hypothesis: if the offence consists of a determined fact the penalty is imprisonment up to two years or a fine of up to €2,065; if it committed through the press or by any other public means (internet, for example), or in a public act, the penalty increases again and imprisonment is from six months to three years or a fine of not less than €516. If then the offence is aimed at a political administrative or judicial body, one of its representatives or an authority formed by a college, the penalties are increased by one-third. In addition to those listed, there is a further aggravating factor contained in Article 13 of Law no. 47 of 1948 ("Law on the Press"): when the defamation is committed by means of the press (and only with this, in virtue of the principle of the obligatory nature of prosecution in criminal matters) and consists of the attribution of a given fact, it provides for the cumulative application of imprisonment and a fine (imprisonment from one to six years and a fine of not less than €258), while in all other cases the two sanctions are alternatives.

[33] Despite the severity of the penalty prescribed by law, in practice it is quite rare for prison sentences to be handed down to journalists, even in the

entirely sporadic – cases where a prison sentence is imposed: recent research by "*Ossigeno per l'informazione*"[34], found that in the last four years about twenty journalists were sentenced to imprisonment[35] and only two of these spent a few days in jail (Francesco Gangemi from Reggio Calabria, sentenced to two years' imprisonment for defamation and perjury) or under house arrest (the editor of "Il Giornale", Alessandro Sallusti).

The problem remains that current Italian legislation hardly seems compatible with the very well-known, established case law of the European Court – which made its debut with the sentence of the Grand Chamber of 17 December 2004, *Cumpănă et Mazăre v. Romania* and which involved the Italian system with the judgments in *Belpietro v. Italy* of 24 September 2013, and *Ricci v. Italy* of 8 October 2013[36] – according to which, in their assessment of the proportionality of the restriction, it is necessary to verify that the nature and severity of the sanction are not likely to deter others from the exercise of the right of criticism. Therefore, the provision of prison sentences for crimes related to the exercise of

hypothesis of Article 13 of the Law on the Press. This is by virtue of a special mechanism: the act in question is not considered a crime in itself, but an aggravation of the offence under Article 595 of the Penal Code, which makes it an element of balance between circumstances which the court is called upon to perform. So, even if it finds only the recognition of extenuating circumstances, the court does not apply the aggravated defamation of Article 13 of the Law on the Press, but that provided by Article 595 of the Penal Code, which provides for the alternative penalty of imprisonment or a fine and typically imposes only the latter.

[34] Cf. http://notiziario.ossigeno.info/2015/05/carcere-per-diffamazione-dal-2011-sedici-anni-di-carcere-a-20-giornalisti-57933/

[35] Some cases are indeed unique: among the more recent, the judgment of the Court of Bologna of 21 May 2015, not yet published, which condemned under Article 57 of the Penal Code the editor of the local newspaper, guilty of deliberately failing to control the publication of a death notice which invoked the mercy of God to forgive "the ruthless barbarity, the great and cruel malice against weak people who could not defend themselves" which the deceased – father-in-law of the author – supposedly committed during his life.

[36] Cf. among many M. Castallaneta, *La libertà di stampa nel diritto internazionale ed europeo* (2012), M. Cuniberti, *Pene detentive per la diffamazione, responsabilità del direttore e insindacabilità delle opinioni del parlamentare: il "caso Belpietro" davanti alla Corte europea dei diritti dell'uomo*, in Oss. AIC (2014) and C. Melzi d'Eril, *La Corte europea condanna l'Italia per sanzione e risarcimento eccessivi in un caso di diffamazione. Dalla sentenza qualche indicazione per la magistratura, il legislatore e le parti*, in Dir. Pen. Cont. (2013).

freedom of information is not, in principle, compatible with freedom of expression, except in exceptional circumstances, in particular when other fundamental rights have been seriously attacked, as in the case of the dissemination of hate speech or an incitement to violence.

To adapt Italian law to European Court case law, the legislator is following the road of legislative reform: a bill passed by the House on 17 October 2013, by the Senate with amendments on 29 October 2014 and currently being examined in committee in the House[37], intervenes *inter alia* on sentences: it eliminates the penalty of imprisonment for defamation, following in the footsteps of European case law which believes that such a punishment is intimidating and replaces it with a fine that ranges from 10,000 to 50,000 euros in the most severe case. On closer inspection, however, the set of sentences for libel and a failure to rectify and compensate, which has no limits placed on it, is perhaps an even more threatening arsenal against the freedom of information, also due to the absence of an effective block on reckless lawsuits[38].

The Italian system has also responded to "pressures" from Strasbourg in ways that are perhaps not entirely usual and orthodox, almost anticipating the legislative reform through the "extreme" use of the canon of interpretation in conformity with the Convention.

Thus, in 2013 the Supreme Court[39] overthrew a sentence of six months in prison for aggravated defamation against a journalist (and a failure to check against the editor of the magazine), for the sole reason that the trial judge had opted for

[37] XVII Legislature Bill C-925B: Amendments to Law no. 47 of 8 February 1948, the Penal Code, the Criminal Procedure Code and the Civil Procedure Code on defamation, defamation by the press or other means of communication, of insult and condemning the plaintiff as well as professional secrecy. Additional provisions for the protection of the person defamed.

[38] For a brief critical analysis of the texts adopted so far by the two chambers, please cf. G.E. Vigevani and C. Melzi d'Eril, *Niente carcere per diffamazione a mezzo stampa: la riforma è ora al Senato per essere completata*, in Guida dir., 2014, n. 2, pp. 14-17 and Id. *Diffamazione: il legislatore che voleva troppo*, in *www.medialaws.eu* (10 November 2014).

[39] Supreme Court Penal Section V, 11 December 2013, no. 12203; on this decision cf. S. Turchetti, *Cronaca giudiziaria: un primo passo della Corte di Cassazione verso l'abolizione della pena detentiva per la diffamazione*, in Dir. Pen. Cont. (2014).

imprisonment instead of a fine. The Supreme Court considers this to be incompatible with the case law of the European Court which, to use a custodial sentence, specifically requires the recurrence of exceptional circumstances: this on the grounds that, otherwise, the "watchdog" role of journalists would not be guaranteed, while their task is to communicate information on matters of general interest and, consequently, to ensure the public's right to receive it.

The same logic seems to have moved the Public Prosecutor of Milan as well when, in October 2013, following the publication of the *Belpietro* judgment, he signalled in a statement to his deputies the orientation of European judges regarding sentences for libel and invited them to limit the application of custodial sanctions and to inform him of those "exceptional circumstances" that would render the request for a custodial sentence proportionate[40].

These are obviously different episodes, which clearly demonstrate however the strength of European case law, capable of impacting not only on the criteria for the balance between freedom of speech and the right to reputation, but also on the normative situation, increasingly making an exception of what the Italian legislator had set as a rule, in the name of the ever- more dominant value of the free exchange of ideas.

[40] The press release of the Prosecutor's Office of 8 October 2013 can be found at http://www.penalecontemporaneo.it/materia/-/-/-/2543-pena_detentiva_e_diffamazione__la_presa_di_posizione-_del_procuratore_della_repubblica_di_milano/ For a brief comment, cf. G.E. Vigevani & C. Melzi d'Eril, *Diffamazione: i diversi confini tra Italia ed Europa*, in Il Sole 24 Ore, 22 October 2013, p. 27.

THE RULES OF EVIDENCE IN THE ITALIAN SYSTEM OF ADMINISTRATIVE JUSTICE

Andrea Crismani[*]

Abstract

The article examines the rules of evidence in the Italian system of administrative justice and shows how the issue of rules of evidence does not seem of a secondary importance in relation to other issues of administrative justice such as jurisdiction, the powers of the judge, preliminary injunctions, compliance, etc., but it is considered "the central moment of the whole administrative trial". The aim is to highlight the *leitmotiv* of Benvenuti's analysis referred to the position of inferiority of the citizen *vis-à-vis* the public administration and his prospective of creating new concept of relationships among Public Administration and Citizens based on the theory of egalitarian administrative law, which would come (and then has come) into an existence through the creation of legal tools within the administrative procedure and the administrative trial and their further improvement.

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1. The safeguard of citizens and the rules of evidence in the system of administrative justice

Administrative justice refers to those mechanisms, which are provided by a State to its citizens as a tool for safeguarding their rights against the public administration[1]. Every State has a system of administrative justice[2]. Such systems differ, though, in the kind of tools provided for the safeguard of citizens' rights and in the way such tools interact with each other[3]. In fact, each State took its own approach due to historical, ideological and political reasons[4].

Feliciano Benvenuti notes that States, historically, adopted different approaches with regard to the following two aspects, which are shared by such States but have had a different influence in the organization of their system of administrative justice.

The first aspect relates to the problem of reconciling, on the one side, citizens' freedom and, on the other side, the authoritative powers of administrative justice.

The second aspect, which is a consequence of the first aspect, relates to the choice of the judge that should be competent for the resolution of disputes between the citizens and the public administration: the judge that decides the disputes among private citizens, *i.e.* the ordinary judge, or a different judge specifically created for deciding these disputes, *i.e.* the administrative judge. In fact, systems of administrative justice can be substantially divided into, or better described through, the following two categories: monistic (or basically monistic) systems and dualistic systems.

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[1] M. Nigro, *Giustizia amministrativa* (1983), 22.

[2] On how legal systems solve disputes can be found in the recent study by G. della Cananea, '*Public Law Disputes' in a Unified Europe*, 7 IJPL 102 (2015); while for a comparative approach in the field of administrative justice see the study of A. Sandulli, *The Importance of Comparative Law in Administrative Justice*, 7 IJPL 6 (2015).

[3] F. Benvenuti, *Gli studi di diritto amministrativo*, Arch. Isap 1239 (1962). See also the same Author, *Contraddittorio (principio del)*, IX Enc. dir. 739 (1961).

[4] F. Benvenuti, *Gli studi di diritto amministrativo*, cit. at 3, 1239.

The aspect that concerns us the most, with the view of analyzing the rules of evidence in the Italian system of administrative justice, is the first aspect. Such aspect relates to the safeguard of the rights of individuals in their role of citizens, not anymore subjected to the governmental powers as mere subordinates.

It is to be noted that the relationship between the public administration and the citizens has been regulated and later on modified substantially in connection with the evolution of the procedural tools for the safeguard of citizens' rights *vis-à-vis* the public administration.

In fact, the theory and practice of administrative justice have always been the ideal setting for the elaboration of the fundamental principles and concepts of substantive administrative law[5].

In particular, the evidentiary stage of the administrative trial has been one of these settings.

Feliciano Benvenuti, in his work "*L'istruzione nel processo amministrativo*" ("*Rules of evidence in the administrative trial*"), published in its final version in 1953, analyzes the topic of citizens' safeguard through the issue of rules of evidence in the system of administrative justice[6].

At first sight, the issue of rules of evidence may seem of a secondary importance in relation to other issues of administrative justice such as jurisdiction, the powers of the judge, preliminary injunctions, compliance, etc.

In reality, in any kind of trial (civil, criminal or administrative) the evidentiary stage is a central stage of the proceeding, where the foundations for the decision of the case, based on the "truthfulness of the facts", are set.

Particularly, also in the administrative trial the evidentiary stage is central[7]. In fact, starting from the Constitutional provisions (artt. 24 and 113) that explicitly prohibit any limitation

[5] F.G. Scoca, *L'evoluzione del sistema*, in Id. (ed.) *Giustizia amministrativa* (2014), 27 and for a complete overview of the administrative process in Italy see the essay of the same Author entitled Id., *Adminstrative Justice in Italy: origins and evolution*, 1 IJPL 118 (2009).

[6] Edited in Padua (1953).

[7] A. Police, *I mezzi di prova e l'attività istruttoria*, in G.P. Cirillo (ed.), *Il nuovo diritto processuale amministrativo* (2014), 434.

to the right to a judicial decision on the merit and to the right to oppose any public administration decision, it is self-evident that there must be a clear reconstruction of the factual elements at the basis of the case before the judge[8].

The rules of evidence are extremely important for their tight connection with several aspects of the trial: the roles of the parties and of the judge, the duty of the parties to indicate and submit the necessary evidence and the power of the judge to integrate such evidence, cross-examination, accessibility to public documents, fair trial.

2. The evidentiary stage as the "central moment of the whole administrative trial"

The work of Benvenuti[9] was published 30 years after the most recent general reform of the system of administrative justice (legislative act called "*Testo Unico*" n. 1054 dated 24 June 1924) and almost half-a-century after the enactment of the regulations on the proceeding before the judiciary sections of the Council of State (R.D. n. 642 dated 17 August 1907).

Benvenuti indicated at the basis of his decision to analyze the issue of evidentiary rules in the system of administrative justice the observation that, after almost 10 years from the enactment of the Italian Constitution, there still had been no complete fulfillment, within the system of law, of those conditions "which would grant the recognition of the full personality of the individual, who (had changed his position from being) subjected to the public power (…) to finally being a citizen".

This negative aspect had an impact on the administrative trial as well. Undoubtedly, it was contrary to the idea of a modern State that would guarantee justice in the public administration.

This observation led Benvenuti to consider the rules of evidence of the administrative trial in force at the time as a set of provisions, which were still "absolutely embryonic". The objective

[8] C.E. Gallo, *L'istruttoria processuale*, in S. Cassese (ed.), *Trattato di diritto amministrativo* (2003), V, 4393 and P. de Lise, *La prova nella procedura delle giurisdizioni amministrative*, II Cons. Stato 954 (1974) and also Id., *L'istruzione nel processo amministrativo*, 2-3 JUS (2008).

[9] It is referred to *L'istruzione nel processo amministrativo* ("Rules of evidence in the administrative trial").

of Benvenuti, thus, was to give to the evidentiary stage of the administrative trial the "independence", which it deserved.

Two reasons justified his decision. The first reason moves from the assumption that the evidentiary stage is a fundamental stage of the proceeding for both the parties and the judge. The second reason relates to the purpose of the evidentiary stage.

According to Benvenuti, with the evidentiary stage "one realizes the full alignment between the trial and the reality". Such stage is the moment when "the party cooperates with the judge in the formation of the final decision".

Based on these assumptions, the evidentiary stage is considered "the central moment of the whole administrative trial". And Benvenuti offers us, in his work, several elements that help us in understanding the legislative and case law developments of the following decades.

Such elements are the acting of public administration, the role of the individual, which had changed from being subjected to the public power to being a citizen, the scarcity of evidentiary tools, the allocation of the activities of evidence collection between the judge and the parties and the independence of the system of administrative justice from other proceedings.

The *leitmotiv* of Benvenuti's analysis is the position of inferiority of the citizen *vis-à-vis* the public administration. This, both outside the administrative trial, *i.e.* before the trial, and within the administrative trial. The prospective of Benvenuti was the creation of a theory of egalitarian administrative law, which would come into an existence through the creation of legal tools within the administrative procedure and the administrative trial[10].

The path for strengthening citizens' rights passed through the creation and consolidation of the rules of administrative procedure, such as: the duty to adopt the administrative decision in a fixed term, the communication of the beginning of the administrative procedure, the duty to provide the reasons for the administrative decision, the duty for the public administration to evaluate any brief and documentation submitted by the individual

[10] F. Benvenuti, *Per un diritto amministrativo paritario*, published for the first time in *Studi in memoria di Enrico Guicciardi* (1975). See also the prologue on egalitarian administrative law by M. Clarich, *Tipicità delle azioni e azione di adempimento nel processo amministrativo*, 3 Dir. proc. amm. 557 (2005).

involved in the procedure, the right of accessibility to administrative documents[11].

This path had as a consequence that, besides the original component of administrative law, which rested on the juxtaposition "authority-freedom", another component was created, which then became predominant. This component was the recognition of citizens' rights *vis-à-vis* the public administration.

The recognition of citizens' rights (including the so-called "third" and "forth generation rights") led to an increase in the mechanisms of safeguard and protection of those rights.

Essentially, the following three factors can be mentioned as the main drivers of the increase in the number of mechanisms of safeguard of citizens' rights *vis-à-vis* the public administration: (i) national case law, (ii) national legislation and (iii) the influence of European legislation. Set aside a detailed analysis of the same, we hereby only wish to stress the fundamental role of case law. Judges, developing norms to be applicable to the case at issue, have also created important rules of general application and have strengthened many mechanisms of safeguard. The national legislator played its role in a secondary phase, most of the time simply formalizing principles, which had already been developed by the case law. Supra-national law, coming from the European Union and the European Convention on Human Rights and Fundamental Freedoms, has instead the role of further reinforcing the whole system, particularly introducing in the national systems principles such as fair trial and the principle of effectiveness in the judicial protection of individual rights[12].

[11] For an overview on this issue consider the essays of G. della Cananea, *Administrative procedures and rights in Italy: a comparative approach*, R. Caranta, *Participation into administrative procedures: achievements and problems*, G. Corso, *Administrative procedures: twenty years on*, B.G. Mattarella, *Participation in rulemaking in Italy*, G. Pastori, *The origins of Law no 241/1990 and foreign models*, J. Ziller, *The convergence of national administrative procedures: comments on the european perspective*, all published in 2 IJPL (2010).

[12] C. Franchini, *Giustizia e pienezza della tutela nei confronti della pubblica amministrazione*, in *Il diritto amministrativo oltre i confini* (2008), 168.

3. The rules of evidence and the substantive equality of the parties

The analysis of the evidentiary stage of the proceeding has been the opportunity for Benvenuti to highlight the disparity between the parties in the administrative trial. Such disparity, however, did not come into existence with the beginning of the trial but was generated in a previous phase, *i.e.* at the initial contact of the individual with the public administration.

The disparity was, in a way, genetic, going from the procedural phase to the trial phase. Only the rules on administrative procedure and administrative trial would mitigate such disparity.

The administrative trial is a proceeding that begins with the so-called "*vocation iudicis*". In the administrative trial, the parties have a non-equal role. Save some limited exceptions, the citizen has to face several obstacles to give evidence of the right the he/she is trying to enforce, as his/her arguments depend on fact or acts that are internal to the public administration. This derives from the substantive, or better institutional, inferiority of the citizen *vis-à-vis* the public administration[13].

The rule on the burden of proof in the administrative trial has been analyzed by several scholars[14] and by the case law.

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[13] As said Benvenuti.

[14] See among many and omitting those already mentioned: G. Chiovenda, *Principi di diritti processuale civile* (1923); A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati* (1963); L. Migliorini, *L'istruzione nel processo amministrativo di legittimità* (1977); P. de Lise, *La prova nella procedura delle giurisdizioni amministrative*, II Cons. Stato 954 (1974); A. Palottino, *L'istruttoria nel processo avanti ai giudici amministrativi*, V Foro. it. 162 (1980); P. Stella Richter, *La riforma del sistema delle prove nel processo amministrativo*, II Giust. civ. 416 (1984); G. Abbamonte, *La prova nel processo amministrativo*, in Riv. amm. rep. it. 689 (1985); A. Travi, *Garanzia del diritto di azione e mezzi istruttori nel giudizio amministrativo (nota a sent. Corte cost. 10 aprile 1987 n. 146*), Dir. proc. amm. 558 (1987); G. Virga, *Attività istruttoria primaria e processo amministrativo* (1991); R. Villata, *Considerazioni in tema di istruttoria, processo e procedimento*, Dir. proc. amm. (1995); F. Cintioli, *Giudice amministrativo, tecnica e mercato - poteri tecnici e "giurisdizionalizzazione"* (2005); L. Bertonazzi, *L'istruttoria nel processo amministrativo di legittimità. Norme e principi* (2005); L. Perfetti, *Prova (processo amministrativi)*, II Enc. dir. ann. 917 (2008); E. Picozza, *Il processo amministrativo* (2009), 367; N. Saitta, *Sistema di giustizia amministrativa* (2009), 209; L. Perfetti, *Mezzi di prova e attività istruttoria,* in G. Morbidelli (ed.), F. Cintioli, F. Freni, A. Police (coords.), *Codice della giustizia amministrativa* (2015), 657.

The main issue with reference to the burden of proof relates to evidence collection.

In the Italian system of administrative justice, the burden of proof lies with the parties (so-called "*principio dispositivo*") but the judge has the power to order the submission of additional evidence (so-called "*principio acquisitivo*").

In such a system, the relevance and intensity of the powers of the judge are, or at least were, justified based on the need to re-establish a balance between the public party and the private party. The reason for such an evidentiary system, in fact, is that the private party is generally subjected to the unilateral power of the public administration and is in a particularly weak position[15]. Based on the above-mentioned explanation, it became necessary to re-establish a situation of substantive equality of the parties out of the trial too[16]. In fact, this system is in many ways disharmonic[17] and it elects the judge as the "lord of the proof"[18].

Nowadays, the above-mentioned justification has become less convincing. The administrative procedure, *i.e.* the context were the public administration expresses its power, is currently regulated by the legislation in order to avoid public administration secrecy and privacy. This has granted to the citizens transparency and access to the acts of the administrative procedure. Consequently, the gap of inequality has diminished and the evidentiary tools available to the private parties have been enhanced, even if in many occasions the public administration still holds an advantage position, at the minimum in those situations, where it exercises its power.

The burden of proof has been explicitly regulated, for the first time, by the Italian Code of Administrative Procedure. The former legislation on administrative procedure, *i.e.* RD n. 1054 of 1924, set some rules on evidence at art. 44 but had no provisions at all on the burden of proof.

Today, the rule on the burden of proof is clearly set forth in art. 64, section 1, of the Italian Code of Administrative Procedure,

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[15] F. Benvenuti, *L'istruzione nel processo amministrativo*, cit. at 269.

[16] L. Giani, *La fase istruttoria*, in F.G. Scoca (ed.), *Giustizia amministrativa* (2014), 378.

[17] F.G. Scoca, *Articolo 63 - Mezzi di prova*, in A. Quaranta, V. Lopilato (eds.), *Il processo amministrativo* (2011), 539.

[18] M. Nigro, *Il giudice amministrativo «signore della prova»*, V Foro it. 9 (1967).

despite there are different interpretations of such provision in the scholarly debate.

According to art. 64, section 1, of the Italian Code of Administrative Procedure: "The burden of proof lies with the parties, which must submit to the court all the evidence available to them with regard to the facts at the basis of their judicial request and any objections".

Nevertheless, it is to be added that, pursuant to art. 63, section 1, of the Italian Code of Administrative Procedure "the judge may ask to the parties to submit any additional clarification and documentation".

Furthermore, pursuant to section 2 of the same provision, "the judge may order to third parties to submit documentation or any other evidence which is deemed necessary" and may "order inspections, verifications and expert opinions".

Therefore, the judge may require to the parties, based on its own decision, to submit any piece of evidence with the only limit of art. 64, section 1, *i.e.* that such evidence relates to those facts that have been indicated by the party as the basis of the judicial request.

In this way, the general rule set forth by art. 2697 of the Italian Civil Code, according to which "the person who wishes to enforce a certain right must give evidence of the facts at the basis of that right", has become applicable to the administrative trial as well.

This means that the party, which fails to provide the related evidence, will not obtain a favorable judgment[19]. However: how can this conclusion be reconciled with art. 63 of the Italian Code of Administrative Procedure, providing that the burden of proof lies with the party but also that the judge has the power to order the submission of additional evidence?

The explanation may be that the judge only interferes with the process of evidence collection upon request of the party and when such party, with no fault, may not provide sufficient evidence for the claim because of objective reasons. In other words, the judge may intervene only when the evidence is not available to the party, who has the burden of proof.

[19] F.G. Scoca, *Articolo 63. Mezzi di prova*, cit. at 17, 543.

There are not many reasons to doubt that art. 2697 of the Italian Civil Code has become (i) the general rule on the burden of proof and (ii) the criteria that the judge must follow in deciding the case. This rule has been recognized by the above-mentioned artt. 63 and 64 of the Italian Code of Administrative Procedure.

The question, of course, revolves around the limits of the power of the judge. There are several factors to take into account, which not only refer to the availability of the evidence to the party and to the kinds of facts in relation to which the party must submit the evidence. Indeed, the rule on the burden of proof must be considered also in connection with the different types of administrative jurisdictions and the different types of legal actions available[20].

Whenever there are situations of inequality, the judge may step in and mitigate the rule of art. 2697 of the Italian Civil Code. This happens in the so-called "jurisdiction of legitimacy". To the contrary, this does not happen in the so-called "exclusive jurisdiction" and in the legal action for damages, where the rule of art. 2697 of the Italian Civil Code should apply with no interferences and the administrative judge should behave as the ordinary judge[21].

4. From the scarcity of evidentiary tools to a unified system of evidence

Benvenuti underlined the scarcity of evidentiary tools available in the administrative trial. The current state of the law has changed. As it has been noted, after 120 years the rules of evidence in the administrative trial have been adjusted to grant the individual an articulated and satisfying system of judicial protection[22].

[20] As it is well know, administrative jurisdiction is divided in the so-called (i) "jurisdiction of legitimacy", (ii) "exclusive jurisdiction" and (iii) "jurisdiction on the merit" (art. 7, par. 3, Italian Code of Administrative Procedure). Moreover, as it is also well-known, there are a plurality of legal actions that may be commenced in the framework of the administrative trial, thus granting a full judicial protection.

[21] A. Police, *I mezzi di prova e l'attività istruttoria*, in Id. (ed.), *Il nuovo diritto processuale amministrativo*, cit. at 7, 439.

[22] Art. 63 of the Italian Code of Administrative Procedure. See also F.G Scoca, *Articolo 63. Mezzi di prova*, cit. at 17, 536.

The Italian Code of Administrative Procedure, at art. 63, makes wide reference to the Italian Code of Civil Procedure, thus putting an end to any limitation to the submission of evidence provided thereof with the only exclusion of oath and formal interrogation.

To the contrary, the previous legislation on the matter was extremely incomplete and was characterized by different rules of evidence for the different types of administrative jurisdiction.

In particular, the rules of evidence have remained substantially the same, at least with regard to the so-called "jurisdiction of legitimacy", as those provided by the statute of 1889 that had created the Forth section of the Council of State, and were later transposed in the so-called "*Testo Unico*" of the Council of State (1924) and then duplicated, with some amendments, in the statute that created the regional administrative tribunals (TAR) in 1971. The set of evidentiary tools has been increased in 2000, with law n. 205, with particular regard to the "exclusive jurisdiction". With regard to the "jurisdiction on the merit", instead, there have been no limitations except for the admissibility of oath and formal interrogation.

The distinction between the rules of evidence for the "jurisdiction of legitimacy" and the "jurisdiction on the merit" was evident, deriving from the differences of these two jurisdictions.

The "jurisdiction of legitimacy" did not involve the direct assessment of the facts by the administrative judge. The administrative judge, in fact, had to consider as certain (and not challengeable) the facts known to the public administration. The judge could challenge the facts as described in the administrative decision only in case they were contradicted by some documents. In that case, the judge could ask to the public administration to have "new clarifications or documentation" or could order "new verifications" (art. 44, par. 1, RD n. 1054 of 1924).

In light of the above, it is evident that the "judgment of legitimacy" was not a decision on the facts. Instead, the "judgment on the merit" was a decision also on the facts.

In the judgment of legitimacy, only the public administration had to assess the facts. Such assessment would usually occur during the formation of the administrative decision. Exceptionally, such assessment could derive from the request

made by the judge[23]. Viceversa, in the judgment on the merit, according to the law (art. 44, par. 2, RD n. 1054 of 1924), the judge may "order the submission of any other evidence".

The limitation to the autonomous access to the facts by the administrative judge derived essentially from the traditional nature of the administrative trial as a proceeding based on the administrative act, not dealing with the underlying relationship between the individual and the public administration. The administrative act traditionally represented the subject matter of the judgment before the administrative judge. Moreover, there was no possibility to challenge any issues of technical discretionality included in the same.

When the purpose of the administrative trial changed from a mere verification of the (formal) legitimacy of the public administration act to a real judicial proceeding, having as subject matter the request of the individual, the administrative judge started to acquire direct knowledge and to make an autonomous assessment of the facts (and not only of the acts and documents) at the basis of such request, despite the assessment of the public administration[24]. Now, not only the administrative act but also the relationship between the public administration and the private citizen has become relevant. In order to ensure full protection, the judge must have direct access to the facts, which cannot be mediated and delimited by the administrative act.

5. The administrative trial as a proceeding between the parties

The increase in the number of evidentiary tools available to the party is in line with the acknowledgement of the administrative trial as a proceeding between the parties, which should be granted equal role (art. 2 of the Italian Code of Administrative Procedure).

The need to increase the evidentiary tools available to the party became greater and greater over the course of the years for several reasons.

[23] F.G. Scoca, *Articolo 63 Mezzi di prova*, cit. at 17, 536.
[24] F.G. Scoca, *Articolo 63 Mezzi di prova*, cit. at 17, 536.

The first reason relates to the introduction in the administrative trial of new kinds of legal actions, in particular the action for damages. Secondly, the way the public administration expresses its power has also changed, not being this limited to the administrative decision anymore. In fact, the disputes started involving the exercise or the lack of exercise of administrative power, dealing not only with formal decisions and acts but also with agreements and behaviors. Thirdly, the way of interpreting the so-called "*interesse legittimo*" (legitimate interest) radically changed. Following the reform of the administrative trial, the concept of legitimate interest became more defined and identifiable, as its counterpart, *i.e.* the public power, is more and more controllable. The legitimate interest, once a mere legitimization to oppose an administrative decision, has now become a legal position that may find protection also through damages request[25]. Fourthly, the action for damages imports in the administrative trial the dualism of the judgment on the administrative decision and the judgment on the behavior. Thus, the following sequences are identifiable and distinguishable: "legal interest - illegitimacy - annulment" and "legal right - wrongfulness - damages"[26]. Obviously, this has several effects on the system of evidence, with the need to provide evidence of the wrongfulness of the behavior and of the illegitimacy of the administrative decision.

In such evolutionary context, the legislator did not act promptly and it was the case law that created those rules, which were later transposed in the legislation.

The evolution of the rules of evidence, before they became unitary for all the three types of administrative jurisdiction (*i.e.* the so-called "jurisdiction of legitimacy", "exclusive jurisdiction" and "jurisdiction on the merit") with a unified system of evidentiary

[25] For an overview see A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo. Profili teorici ed evoluzione storica della giurisdizione esclusiva nel contesto del diritto europeo* (2000), I, but also Id., *Administrative justice in Italy: Myths and Reality*, 7 IJPL (2015). For a centuries-old debate see the reconstruction of F.G. Scoca, *Riflessioni sui criteri di riparto delle giurisdizioni*, Dir. proc. amm. (1989).

[26] E. Guicciardi, *Concetti tradizionali e principi ricostruttivi nella giustizia amministrativa*, Arch. dir. pubbl. 61 (1937) and about this Author see G. Falcon, *Norme di azione e norme di relazione. Tradizione e vicende della giustizia amministrativa nella dottrina di E. Guicciardi*, Dir. soc. 379 (1974).

tools, occurred in different forms and in different times in the three above-mentioned jurisdictions, with obvious disparities.

With regard to the so-called "jurisdiction on the merit", the law granted the possibility to make use of the totality of the evidentiary tools available (pursuant to art. 27, RD n. 642 of 1907 and art. 44, sec. 2, RD n. 1054 of 1924).

With regard to the so-called "exclusive jurisdiction", a decision of the Italian Constitutional Court was necessary. With the decision n. 146 of 1987, the Constitutional Court had declared the partial unconstitutionality of art. 44, sec. 1, of RD n. 1054 of 1924 and art. 7, sec. 1, of the law that had created the administrative Tribunals with regard to public employment disputes[27], because such provisions did not allow the use of those evidentiary tools provided by the Italian Code of Civil Procedure. However, the Constitutional Court, with a further decision (n. 251 of 1989), clarified that this alignment of evidentiary tools did not involve all issues included in the exclusive jurisdiction but only applied to public employment disputes. It was the legislator, that later extended the applicability of all the evidentiary tools provided by the Italian Code of Civil Procedure to all issues included in the exclusive jurisdiction, allowing the use of expert opinion but excluding oath and formal interrogation (legislative decree n. 80 of 1998 and law n. 205 of 2000).

With regard to the so-called "jurisdiction of legitimacy", art. 44 R.D. n. 1054 of 1924, as amended by law n. 205 of 2000, allowed the use of court-ordered expert opinion.

Therefore, notable progresses had been made. The strengthening of the evidentiary tools available had undoubtedly increased the possibility for the administrative judge to fully understand the facts at the basis of the case (so-called direct access to the fact). This allowed the judge to verify, also with the assistance of court-ordered expert opinion, the cogency, adequacy, reasonableness and appropriateness of the administrative decision and its reasoning[28].

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[27] At the time, these disputes were attributed to the competence of the administrative judges in their exclusive jurisdiction, while today such disputes are decided by ordinary judges.

[28] About this issue F. Saitta, *Il regime delle preclusioni nel processo amministrativo tra ricerca della verità materiale e garanzia della ragionevole durata del giudizio*, www.giustizia-amministrativa.it.

6. The most typical piece of evidence (documents) and the piece of evidence that is generally disregarded (statements)

Art. 63 of the Italian Code of Administrative Procedure, at sections 1 and 2, indicates the most important evidentiary tools available (clarifications, documents, order to show documents also against third parties, inspections), at section 3 indicates the possibility to obtain statements from witnesses, at section 4 indicates the procedure of verification and the possibility to obtain expert opinions and at section 5 states that the judge may adopt any other evidentiary tool available in the Italian Code of Civil Procedure, with the exclusion of oath and formal interrogation.

We will hereby focus our attention on documents and statements. This, because we hold that such evidentiary tools have played an important role in the evolution of the system of evidence in the administrative trial, and their evolution has given a special imprinting to the whole administrative trial.

An analysis of the role of documents in light of the historical characteristics of the administrative trial is useful to better understand their role.

Historically, the administrative trial was an inquisitorial proceeding, whose main purpose was to evaluate the legitimacy of the administrative act. Indeed, the administrative trial was created as a proceeding to evaluate the administrative act and it still maintains this role nowadays. In this kind of a trial, the judge would decide on the administrative act and not on the relationship between the private party and the public administration, which was at the basis of the administrative act. The evolution of the trial toward a proceeding between parties having equal role was slow and gradual.

These historical characteristics of the administrative trial have a series of consequences.

The first consequence relates to the participation of the plaintiff and of other individuals different from the public administration to the process of evidence collection. It is to be noted that historically the participation of the plaintiff and other individuals different from the public administration to the process of evidence collection was only eventual and it depended on the discretional choice of the judge. In fact, the judge made its decision based on the administrative act at issue and the documents submitted by the public administration, with the

possibility of requiring the public administration to provide "explanations" or "additional documents" (see in these terms, historically, art. 37 R.D. n. 6166 of 1889).

The second consequence, which is still applicable today, is the absence of a separate stage of the proceeding for evidence collection. A separate stage, handled by a dedicated judge, is missing. The reasons for this absence derive, once again, from the historical model of the administrative trial.

Another consequence relates to the role of documentary evidence. In a context as the one that we just sketched, documents were, and still are, the most typical piece of evidence. They had, and keep having, a crucial role for evidence purposes. Several provision of the Italian Code of Administrative Procedure make reference to this evidentiary tool, which plays a fundamental role in the decision-making process[29]. This fundamental role, as we have seen, derives from the historical model of the administrative trial. In fact, the main acts and documents relevant for the case were those in possession of the public administration, and the private individual did not have access to such acts and documents because of the secrecy principle. There was only a limited right for the individual to access the public administration documents submitted during the trial. This limited access did not allow the citizen that was a party to the proceeding to develop an appropriate strategy regarding the evidence and this had an obvious impact on the outcome of the proceeding, which was only partially counterbalanced by the powers of the judge to integrate the evidence at its sole discretion.

This situation of uncertainty was remedied by the legislation on the administrative proceeding (art. 22, law n. 241 of 1990), which introduced a general right to access public administrative documents. In this way, the so-called "*principio dispositivo*" was strengthened. As a consequence, some case law developed a connection between the burden of proof (art. 63 of the Italian Code of Administrative Procedure) and the right to access public administration documents[30]. As a result of this connection and of the right of accessibility to public administration

[29] L. Giani, *La fase istruttoria*, cit. at 16, 388.

[30] T.A.R. Campania, Napoli, VIII, 1 December 2001, n. 26440. About this issue E. Picozza, *Il processo amministrativo*, cit. at 14, 37; A. Police, *I mezzi di prova e l'attività istruttoria*, cit. at 7, 439 and nt. 24.

documents, it is held that the issue of evidence collection in the administrative trial is nowadays essentially a matter of the parties. Therefore, the judge has no more the duty to actively participate in the process of evidence collection, as there is no need for the judge to integrate the evidence when such evidence is accessible to the party using due care, through its right of accessibility to public administration documents.

Evidence obtained through statements, instead, lies at the very opposite side of the spectrum. Such evidence has always been inadmissible with regard to disputes on the exercise of public administration powers, *i.e.* controversies on legitimate interests. In fact, it used to be held that in such cases the subject matter of the judicial decision should focus only on the extrinsic verification of the legitimacy of the administrative decision. This verification could not be based on facts different from those identified through the trial and resulting from submitted documentation.

The debate that arose on the admissibility of oral statements as evidence in the "jurisdiction of legitimacy" showed some inconsistencies of the Italian administrative trial with the principle of prevalence of communitarian law, with the jurisprudence of the European Court of Justice on effectiveness of judicial protection and with the European system in general[31].

Art. 63, section 3, of the Italian Code of Administrative Procedure has then introduced the admissibility of oral statements as evidence in the "jurisdiction of legitimacy". According to such provision, oral statements are admissible as evidence only as long as such evidence is requested by the party and is included in a written document. Therefore, such evidentiary tool changes its typical nature of oral evidence and becomes documentary evidence, even if the judge has the right, after the review of the written statement, to order the appearance of the witness in person for testifying.

It is worth noting that written statements have been admissible as evidence for many years in other legal systems. One could mention the so-called "*attestations*" of the French legal system (artt. 200-203 of the *Nouveau code de procedure civile*) or the

[31] M. Sica, *Prova testimoniale e processo amministrativo*, Urb. app. (2001). As a general matter this aspect is studied by E. Follieri, *Sulla possibile influenza della giurisprudenza della Corte Europea di Strasburgo sulla giustizia amministrativa*, Dir. proc. amm. 685 (2014).

British affidavit (art. 32 of the Civil Procedure Rules) or the "*Schriftliche Beantwortung*" (written response to the request for evidence called "*Beweisfragen*").

Scholars have raised a major doubt with regard to this kind of evidence. In fact, it has been underlined that "written statements do not guarantee the equal participation of the parties to the process of evidence formation", thus not guaranteeing the right to cross examination. The point is that written statements are not subject to direct and immediate examination from the counterpart, which is not in the position to assess, based on specific and sharp questions, the reliability and credibility of the witness and of its statements.

In the administrative trial, written statements have been introduced as "genetic modifications" of the so called "*dichiarazione sostitutiva dell'atto notorio*" (declaration substituting a public notary act), which was the mean to obtain a statement from a witness and use such statement in the trial as evidence of a fact, which only the witness could confirm.

Indeed, statements from witness may be useful, for example, when trying to give evidence of the date when the construction works were terminated, with the view of assessing if such works were legitimate or abusive; also, they may be useful to give evidence of the public nature and tasks of the work performed by some employees within the framework of the "exclusive jurisdiction"; again, they may be useful to give evidence that the individual's conduct did not justify the adoption by the public administration of a negative decision; finally, they may be useful to give evidence of the effective destination of real estate.

To tell the truth, the issue of admissibility of statements as evidence in the administrative trial may be considered more a theoretical issue than a practical one. Indeed, this evidentiary tool has been used only very rarely, and when it appears to be useful several questions arise[32].

[32] L. Perfetti, *Mezzi di prova e attività istruttoria,* cit. at 14, 661, 692 and 697.

The approach of case law on this matter is that of limiting its use[33]. Undoubtedly, this approach was rather uncontroversial before the enactment of the Italian Code of Administrative Procedure. After such enactment, some limitations were introduced by case law on the use of oral statements as evidence, particularly with regard to the "jurisdiction of legitimacy". Indeed, the main problem concerns the use of oral statements from witnesses as a means to challenge the truthfulness of the statements contained in an administrative decision.

According to case law, oral statements are admissible when such evidence is crucial for the decision. Moreover, such evidence must relate to circumstances that are external and extrinsic to those described in the administrative decision, and thus should not try to challenge the truthfulness of the statements contained in an administrative decision. Furthermore, oral statements must be "essential", as this term is interpreted with regard to the "necessity for the assessment of the facts and for the opinions" in the context of the procedure of verification and of expert opinions. According to case law, in fact, the rule of essentiality set forth by Art. 63, section 4, of the Italian Code of Administrative Procedure should apply to all evidentiary tools and evidence.

Written statements raise a further question. This question relates to the final moment when such evidence may be requested.

The Italian Code of Administrative Procedure states that witness statements, differently from other evidence, may be admissible only upon request of the party (art. 63 par. 3) but sets no rule as to the final moment when such evidence may be requested. This raises several problems.

In the administrative trial, in fact, differently from what happens in the civil trial, there is not a separate procedural phase dedicated to the collection of evidence and specification of the facts that are at the basis of the judicial request. Such activities may take place also at a very late stage of the proceeding, like at the moment before the discussion of the case, as the party may indicate new facts and the related evidence until the submission of

[33] See, for example, A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati* (1963); V. Cerulli Irelli, *Note in tema di discrezionalità amministrativa e sindacato di legittimità*, Dir. proc. amm. 527 (1984); C.E. Gallo, *Istruzione nel processo amministrativo*, IX Dig. disc. pubb. (1994).

the final documents and briefs (art. 73 Italian Code of of Administrative Procedure).

In essence, in the administrative trial there is no distinction between the evidentiary stage and the decision-making stage. They both take place during the discussion phase.

This fact would support the admissibility of witness statements also at the hearing scheduled for the oral discussion of the case.

However, according to some case law[34], the request to obtain witness statements may not be sustained if it is made for the first time during the discussion hearing. According to such case law, the structure of the new Code seems to move from the assumption that the parties must exercise their right to obtain evidence before the discussion hearing.

In light of the foregoing, it can be concluded that the administrative trial has a very simple structure, but which is also in some ways incomplete and unclear. The structure is simple because, as we have seen, there is no separate and dedicated evidentiary stage and there is no evidentiary judge, as first institutional contact between the parties. To tell the truth, this structure was not supported by all those who participated to the drafting of the Code, as it emerges from the preparatory works of the Code. Some members of the Committee entrusted with the drafting of the Code by the State Council had expressed the opinion that also in the administrative trial there should be, if not a separate evidentiary stage, at least a separate judge who should decide on the evidence to admit[35]. In fact, it would be useful to have a more complete structure and an initial hearing dedicated to preliminary matters, with the possibility of making further necessary notifications and evidence requests, in order to ensure the correct participation of all the parties to the proceeding and the correct application of the rules of evidence[36].

[34] See, for example, T.A.R. Milano, III, 30 May 2011, n. 1374.

[35] F.G. Scoca, *Ammissione e assunzione di prove. Articolo 65. Istruttoria presidenziale e collegiale. Articolo 68. Termini e modalità dell'istruttoria. Articolo 69. Surrogazione del giudice delegato all'istruttoria*, in A. Quaranta, V. Lopilato (eds.), *Il processo amministrativo*, cit. at 17, 554.

[36] F.G. Scoca, *Il contraddittorio nell'istruzione e nella decisone,* cit. at 17, 162.

THE ECB'S BANKING SUPERVISION AND EUROPEAN ADMINISTRATIVE INTEGRATION: ORGANISATION, PROCEDURES AND LEGAL ACTS

*Sandra Antoniazzi**

Abstract

The paper analyses the organisation, proceedings and legal acts of the ECB in the banking supervision after the new specific tasks assigned to it in 2013, according to Regulation (EU) no. 1024/2013. Furthermore, it examines the implementation of this Regulation both on the Single Supervisory Mechanism (SSM) in national banking systems and on the Single Resolution Mechanism (SRM) for crisis of bank by showing all the difficulties of harmonisation and of administrative integration. It concludes with a reflection on the necessity of resolving the issue of democratic legitimacy, of transparency and accountability of the new system

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1. Introduction: the legal framework and the object of the paper

This paper analyses the organisation, proceedings and legal acts of the ECB in the banking supervision after the new specific tasks assigned to it in 2013, clearly different from the role exercised on monetary policy[1], after a rapid evolution because of the complexity of the economic and financial crisis that required the Banking Union; the new legal framework has lead to a significant contribution to the *administrative integration* for the Member States participating in the Monetary Union.

As is widely known, the primary objective of the European System of Central Banks (ESCB) is *price stability*; the main activities consist of defining and implementing the monetary policy of the EU, conducting foreign-exchange operations, holding and managing the official foreign reserves of the Member States and promoting the smooth operation of the payment system[2]; in addition the ECB shall have the exclusive task of authorising the issue of Euro banknotes[3]. In order to carry out the tasks entrusted to the ESCB, the ECB has *regulatory powers* and may adopt legal acts[4], regulations and recommendations, deliver opinions and take decisions, and issue guidelines and instructions[5]; these legal and administrative acts are intended to establish rules for the ESCB or addressed to third parties and they are particular measures of primary level in comparison with the other instruments of the EU law[6], because the ECB does not have legislative power. In fact regulations are general in their application, binding in their entirety and directly applicable in all Euro-area Member States without the need for implementation in national law; however, the ECB may be involved in legislative procedures as the proposer or adviser in emending certain provisions of the Statute[7] and in drafting EU and national legal acts[8].

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[1] For organisational principles and legal acts see: S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria* (2013), 1, 49.
[2] Art. 127 TFEU.
[3] Art. 128 TFEU.
[4] Art. 132 TFEU.
[5] Art. 14.3 Statute ESCB-ECB.
[6] Art. 288-298 TFUE.
[7] Art. 40-41.
[8] Arts 127.6, 133, 289.4, 292, 294.15 TFEU.

Since January 1999, the ECB has had exclusive competence on monetary policy and it did not exercise direct supervision on credit institutions until the Council Regulation[9] (EU) no. 1024/2013. In fact, the ESCB and the ECB shall only contribute "to the smooth conduct of policies pursued by the competent Authorities relating to the prudential supervision of credit institutions and the stability of the financial system"[10]; indeed, the complexity of the economic and financial crisis[11] has led to a rapid

[9] Council Regulation (EU) no. 1024/2013 of 15 October 2013 "conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions". It has been legally binding since 3rd November 2013, and the ECB started to exercise its duties since 4th November 2014.

[10] Art. 127.5 TFEU. On the cooperation system between national authorities for the integration of the banking and financial sectors before the recent innovation: G.A. Walker, *European Banking Law, Policy and Programme Construction* (2007), 233; M. van Empel, *Financial Services in the EU: Harmonization and Liberalization*, in Id (ed.), *Financial Services in Europe* (2008), 25 ss.

[11] About the causes of the crisis, the possible remedies and consequences on the current framework of European institutions: J.C. Rochet, *Why Are There So Many Banking Crises?* (2008), 21; on the legal constitution of markets and reasons for crisis: T.C. Halliday and B.C. Carruthers, *Bankrupt, Global Lawmaking and Systemic Financial Crisis* (2009); A.E. Goodhart, *The Regulatory Response to the Financial Crisis* (2009), at 45 ss.; D. De Figueiredo Moreira Neto, *Crisis y regulación de mercados financieros. La autorregulación regulada: ¿Una respuesta posible?,* Revista de Administración Pública 9 (2009); N. Moloney, *EU Financial Market Regulation After the Global Financial Crisis: "More Europe" or More Risks?*, Common Market Law Review 1383 (2010); P.D. Amri-B.M. Kocher, *The Political Economy of Financial Sector Supervision and Banking Crises: A Cross-Country Analysis,* Eur. L. J. 24 (2012). On the economic and not financial nature of the crisis as caused by the securitisation of the credit risk see J. Black, *The Rise, Fall and Fate of Principles-Based Regulation*, in A. Kern and M. Niamh (eds.), *Law Reform and Financial Markets* (2011) 3; F. Giavazzi-A. Giovannini, *Central Banks and the Financial System,* in S. Eijffinger and D. Masciandaro (eds.), *Handbook of Central Banking, Financial Regulation and Supervision After the Financial Crisis* (2011), 3; A. Singh, *The Economic and Financial Crisis of 2008-2010: The International Dimension* in M. H. Wolfson and G.A. Epstein (eds.), *The Political Economy of Financial Crises* (2013), 213; F. Merusi, *Il sogno di Diocleziano. Il diritto nelle crisi economiche* (2013), 53; O. Butzbach and K. von Mettenheim (eds.), *Alternative Banking and Financial Crisis* (2014); E.G. Tsionas, *The Euro and International Financial Stability* (2014); M. Liberati, *La crisi del settore bancario tra aiuti di Stato e meccanismi di risanamento e risoluzione*, Riv. it. dir. pubbl. com. 1339 (2014); D. Wydra and H. Pülzi, *Solidarity Discourse in National Parliaments: The European Crisis Hits Home!*, Archiv des Völkerrechts 92 (2014; G. Bocuzzi,

evolution of a new role[12] for the ECB, albeit one clearly different from the activity exercised in monetary policy.

The Regulation on the *Single Supervisory Mechanism* (SSM) – the first pillar of the Banking Union[13] - provides specific tasks of prudential supervision on credit institutions and financial holding companies, except for insurance companies[14], and special legal procedures, with the consultation of the European Parliament and the ECB. Provision has been made for further legal acts, with regard to the well-known categories of monetary policy as well as new administrative procedures in compliance with the activity of supervision and the new bodies; however these acts have, in the hierarchy of norms, a lower value than the rules of the European Commission and the EBA[15]. The paper aims to examine the critical profiles of this new additional administrative integration in relation to European banking supervision and its guarantee of effectiveness.

Further requirements of Banking Union are provided for by European Parliament and Council Regulation (EU) no. 806/2014 and Directive no. 2014/59/EU: that is to say, the *Single Resolution Mechanism* for crisis of banks (SRM) and *Resolution Authority*, in order to remove the "vicious circle" between crisis and sovereign debt, sustain banks, overcome financial fragmentation and finally adopt a common policy to rescue banks[16]; new authorities, proceedings and legal acts are introduced, creating a new complicated scheme.

L'Unione Bancaria Europea. Nuove istituzioni e regole di vigilanza e di gestione delle crisi bancarie (2015), 29.

[12] See Art. 127.5 TFEU. For the effects of the ECB's monetary policy on shares, bonds and money-market instruments, according to an empirical investigation for a number of European markets see D. Faber, *Auswirkungen geldpolitischer Maßnahmen der Europäischen Zentralbank auf Aktien-, Anleihe- und Währungsmärkte, Eine empirische Untersuchung ausgewählter europäischer Märkte*, (2009), 5.

[13] The three fundamental pillars of the European Banking Union are the SSM, the SRM and the Deposit Guarantee Schemes (DGS) with the Single Rulebook; see the recitals of Regulation on SSM.

[14] Art. 127.6 TFEU.

[15] Art. 4, para 3.1. of the Regulation on SSM.

[16] See "Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 806/2014 in order to establish a European Deposit Insurance Scheme", 24 November 2014; COM(2015) 586 final 2015/0270 (COD), in *www.eur-lex.europa.eu.*

2. Prudential supervision and regulation: separation in the SSM

In November 2011 the Commission had already requested a number of experts to draft a report (*Liikanen Report*) about the pros and cons of a *future structural reform* of the EU banking system, also making a comparison with the experience of other systems[17]. The report[18] was presented in October 2012 and was clearly a compromise between the US solution and the UK solution, according to a number of recommendations applied when the SRM was created. These recommendations focus on compulsory separation into different legal subjects of trading activity from the remaining banking activity, but the separation is not compulsory when the trading activities are either 15-20% of the profits or under 100 billion Euros. This will not entail a complete end to the "universal bank" for all banking activities, but a legal separation, although the best practice should lead to the first scenario[19]. The report released a Proposal[20] to separate legal trading entities and the rest of the banking group, and to separate retail activities and investment business by means of a clear distinction between transparent essential banking activities for the real economy (credit disbursement, payment systems and deposits) and investment activities.

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[17] For instance in the USA the debate about the *Volcker rule* and *Dodd-Frank Act*. About the separation between banking activities see reforms in France (*Loi de séparation et de régulation des activités bancarie,* n. 2013-672 du 26 juillet 2013, in *www.legifrance.gouv.fr*), in Germany (*Trennbankengesetz* del 2013, at *www.bundesfinanzministerium.de*) and in the United Kingdom (*The Financial Services (Banking Reform) Act 2013,* in *www.legislation.gov.uk*.

[18] See the Report "*High-level Expert Group on reforming the structure of the EU banking sector, Chaired by Erkki Liikanen, Final Report*", Brussels, 2 October 2012, IP/12/1048, at *http://ec.europa.eu/internl_market/bank/docs/high-level_expert_group/report_en.pdf*; "*Follow-up to the Liikanen report – 16-17 May 2013*" on Stakeholders meeting on Bank Structural Reform and Consultation: reforming the structure of the EU banking sector, in *www.consilium.europa.eu*.

[19] About the "dangerous" encroachment of banks into finance see F. Merusi, *Il sogno di Diocleziano*, cit. at 11, 67.

[20] See Press Releases "*Structural reform of the EU banking sector*", Bruxelles, 29 January 2014, at *http://europa.eu/rapid/press-release_IP-14-85_en.htm.*; "*Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions*" (29 January 2014, COM (2014) 43 final; "*Banking structural reform: ECOFIN Council agrees its position – 19 June 2015*", in *www.consilium.europa.eu*.

A huge reform of supranational banking system is about to be introduced, in relation to the current single supervision and resolution of banking crises. Evidently, national systems should adhere to it whether directly (regulations) or indirectly with ancillary legislation (directives). The reform will be inspired by a number of points highlighted by the *Economic and Monetary Affairs Committee*[21], such as the encouragement of competition, the demarcation between economic activities (especially when harmful) and traditional banking operations, the improvement of corporate governance, the will to strengthening banking capital assets and rules on liquidity (Regulation (EU) no. 575/2013), and the fourth revision on financial conditions (Directive no. 2013/36/EU), resources for the real economy and means to implement correctly the mechanisms for recovery and crisis resolution. Moreover, other instruments are relevant, such as the Directive no. 2013/14/EU on *rating agencies*[22] and the Proposal for a regulation of the European Parliament and of the Council on the indices used as benchmarks in financial instruments and contracts[23].

In this context of reform, the debate preceding the Regulation (EU) on SSM on whether to grant the ECB direct powers of banking supervision also depended on a certain

[21] See "Draft Report" 8 March 2013, (2013/2021- INI) and *Amendments*, 2013/2021 (INI), 18 April 2013, about "*Reforming the structure of the EU banking sector*" and rules to separate risks of investment activity and of banking services; *Report* 24 June 2013 (A7-0231/2013) at *www.europarl.europa.eu*.

[22] For details see G. Deipenbrock, *Trying or Failing Better Next Time? – The European Legal Framework for Credit Rating Agencies after Its Second Reform*, European Business Law Review 207 (2014); A. Kern, *The Risk of Ratings in Bank Capital Regulation*, European Business Law Review 295 (2014).

[23] See these documents available in *www.ec.europa.eu*: Commission proposals to prohibit and criminalise manipulation of benchmarks (27 July 2012); Consultation on benchmarks and market indices (5 September 2012); Proposal of Regulation of the Commission COM (2013) 641 final (18 September 2013); EU Council backs European Commission proposal to fight against the manipulation of financial benchmarks (13 February 2015); European Parliament agrees negotiating mandate for regulation of financial benchmarks (19 May 2015) and the text adopted (P8_TA(2015)0195, in *www.europarl.europa.eu*); Agreement between the Parliament and the Council on a Regulation of financial benchmarks (25 November 2015). See the opinion of the ECB 7 January 2014 (CON/2014/2) with some integrations and press release 29 January 2014 (IP/14/85) in *www.ecb.europa.eu*.

difficulty in the theoretical framework of the administrative function of supervision in the absence of a precise legal definition[24], as also emerges in our own legal system; furthermore, the European integration of the banking and financial sector has accelerated unexpectedly because of widespread consequences of the crisis.

As is known, supervision is not the only typical task of the national central banks, given that their aims and tasks have evolved over time: not only the issuance of money, but also lending to the banks, control of the money and foreign exchange, control of the loan instrument and direction of the economy (structural supervision), a strategic role for financial stability (prudential supervision). Furthermore in some orders (UK, Germany), prudential supervision was exercised by authorities other than the central bank; for example in UK, until the Financial Services Act 2012, there was a single supervisor - Financial Services Authority[25] - which had the power to regulate banks,

[24] On the concept of regulation of the banking sector see: C.M. Peláez and C.A. Peláez, *Regulation of Banks and Finance* (2009), 4-20; the authors state that the economic theory of regulation is "the essence of the private interest view of regulation with predictions that are different than those of the public view. The public view predicts that regulation will occur in response to market failures. The excess profits charged by a monopolist or the externalities of pollution cause the government to intervene to find an efficient allocation that cannot be obtained in a free market"; while the private-interest view claims that the regulated industrialists, politicians, and government officials interact to create regulatory agencies and measures to optimise their own interests. For details on regulation: A. Busch, *Banking Regulation and Globalization* (2009), 23; F. Zatti, *La vigilanza tra regolamentazione e controllo* (2015), 51-53; for the debate on international banking regulation about its role and the right way of exercising the function of the controls, see A. Carretta, P. Schwizer, *La vigilanza bancaria dopo i controlli interni: verso la consulenza regolamentare e il knowledge management*, in A. Carretta, P. Schwizer (eds.), *Governance 2.0*, (2015), 21.

[25] On the concept of a unified financial service regulator and the case of the UK: K.K. Mwenda, *Legal aspects of financial services regulation and the concept of a unified regulator*, (2006), 37, 82. About the reform in the UK: A. Adami, *La regolazione dei mercati finanziari nel Regno Unito dopo il Financial Services and Markets Act 2000* (2004); J. Russen, *Financial Services*, (2006), 63; A. Busch, *Banking Regulation and Globalization*, cit at 24, 123; for a critical view on FSA's tasks: T. Arthur, P. Booth, *Does Britain Need a Financial Regulator?* (2010), 24; E. Lomnicka, *The Control of Banking Activities in the United Kingdom*, in E.P. Ellinger, E. Lomnicka and C.V. M. Hare (eds.), *Ellinger's Modern Banking Law* (2011), 26; G. Morton, A. Marsh, *UK Central Banking and Financial Stability,* in M.

insurance companies and other sectors (e.g., investment and pensions advisers, stockbrokers, fund managers and derivatives traders), but the financial and banking crises of 2008 revealed the weaknesses of this system with the numerous responsibilities that the Authority failed to anticipate creating many difficulties[26]. A new system of financial services was introduced under the Financial Services Act 2012 establishing three regulatory institutions to achieve increased effectiveness on systemic financial stability rather than an individual authority which adopts too many decisions for different sectors. The first is the Financial Policy Committee (FPC) of the Bank of England, responsible for macro-prudential regulation; the Financial Conduct Authority (FCA) as the formal successor of the FSA and responsible for consumer protection and market regulation; the Prudential Regulation Authority (PRA), a subsidiary of the Bank of England and responsible for the prudential regulation of firms. The FCA has a strategic role which is "ensuring that the relevant markets [primarily the financial markets and regulated markets for financial services] function well"; its general functions are the making of rules, preparing and issuing codes, the provision of general guidance under the Act and "determining the general policy and principles by reference to which it performs particular functions under this Act"[27]. It has rule-making, investigative and enforcement powers to protect and regulate the financial services industry and grants permission to individuals or firms to carry out regulated activities; while the PRA is responsible for the prudential regulation and supervision of banks, credit unions, insurers and major investment firms, and it has statutory objectives: to promote the safety and soundness of these firms and to contribute for insurers to the securing of an appropriate degree of protection for policyholders[28]. It makes forward-looking judgments on the risks posed by firms to its statutory objectives

Blair QC, G. Walker and S. Willey (eds.), *Financial Markets and Exchanges Law* (2012), 101.

[26] Originally established as a wholly owned subsidiary of the Bank of England, its existence now rests on the Act of 2000, s. 2A as amended by the 2012 Act, s. 6 (1).

[27] Act of 2000, s. 1B (6) as amended by the Act of 2012, s. 6.

[28] At *http://www.bankofengland.co.uk/pra/Pages/default.aspx*, For the tasks and objectives of the PRA see the 2000 Act, s. 2E-I as amended by the 2012 Act, s. 6 (1).

and also has powers to grant permission to carry out regulated activities[29]. The focus of these bodies and issues is on the greatest risk to the stability of the financial system and their functions and powers spelled out in detail in law mean that financial regulation is more complicated. The extent of the FSA's failures during the financial crisis and after meant that the public interest demanded the far-reaching changes outlined[30]; the Financial Services Banking Reform Act 2013 also introduced more control over bank executives.

In Germany, until the new European system arrives, there is a reverse evolution and banking supervision is divided between *Bundesanstalt für Finanzdienstleistungsaufsicht* and *Bundesbank*: the first authority, established in 2002 after the merger of three pre-existing authorities for different sectors, is given the task of grant the banking authorisation; the central bank is responsible for the supervision of credit institutions in the strict sense[31].

The Italian solution allows some general comments on supervision due to the function of administrative control; the normative reference is the Italian Banking Act (*Testo Unico Bancario*): art. 5 about the "sound and prudent management" exercised by banks, a benchmark for the lending authority exercising the power of supervision, for the evaluation of the Statute of the shareholders and managers within the banking authorisation, to the provisions of regulatory supervision, inspection activities and information. More generally, banking

[29] See the 2000 Act, s. 55N as amended by the 2012 Act, s. 11.

[30] See T. Prosser, *Regulation and Legitimacy*, in J. Jowell, D. Oliver D., C. O' Cinneide (eds.), *The Changing Constitution* (2015), 336; the author explains that, in the context of financial crisis, "the Authority was criticized as having failed to supervise effectively the rapidly changing developments which had undermined financial stability. The effectiveness of regulatory supervision had been severely weakened by, among other things, the range of different regulatory functions given to the same body, inadequate coordination due to complex and confused institutional relationships with the Treasury and the Bank of England, the limited role of national regulators in international markets, and the adoption of a 'light touch' approach to regulation".

[31] For details on the banking system and supervision in Germany see P. Scherer, *The German Banking System*, in P. Scherer and S. Zeller (eds.), *Banking Regulation in Germany*, (2009); A. Busch, *Banking Regulation and Globalization*, cit. at 24, 75; G. Mangione, *La disciplina costituzionale del risparmio in Germania*, in G. Cerrina Feroni (ed.), *Tutela del risparmio e vigilanza sull'esercizio del credito: un'analisi comparata* (2011), 119.

supervision can be defined as a function of administrative control exercised by *Banca d'Italia* as "verification of the regularity" of activity of private enterprise related to important public interests: the protection of investors, stability and balanced development of the financial market. The supervision relates to the banking business as a whole: the organisation, the legal acts, the operational management of the banks, and it is a preventive and permanent management structure. In a broad sense it will operate prior control by the processes of the banking licence, corrective action, sanctions and the replacement of organs that depend on the results of supervision[32].

Furthermore supervision is distinct from the regulation[33], which refers to the prescriptive activity more than the control in the strict sense; it is, however, control of conformation and regularity. There are some essential distinctions for the prudential supervision of a micro-prudential and macro-prudential nature: the first relates to the individual intermediaries for the assessment of the risks, while the second is concerned with phenomena not limited to individual intermediaries but more extensive and requiring the management of systemic risk, which is based on the close relationship between prudential controls of individual intermediaries and the assessment of risks to the entire financial

[32] See S. Amorosino, *La* governance *delle banche fra Banca centrale europea e banche centrali nazionali*, in Bancaria 55 (2005); on three kinds of supervision provided by the *Testo Unico Bancario*: supervision as absolute transparency, as inspection and as regulatory function (capital requirements, prudential supervisory review and information to the depositors), see *amplius* R. Costi, *L'ordinamento bancario*, (2012), 553, 567.

[33] On the concept of banking regulation and prudential rules see L.E. Panourgias, *Banking Regulation and World Trade Law, GATS, EU and 'Prudential Institution Building* (2006), 18; on regulation through authorisation, requirement, and approval: J. Russen, *Financial Services*, cit. at 25, 1. On the central issues of the regulation after the crisis: A.E. Goodhart, *The regulatory response to the financial crisis* (2009), 45; in consequence of the recent turmoil, there are at least seven fields of regulation that became, according to the author, major issues for discussion: deposit insurance, bank insolvency regimes, money-market operations by central banks, liquidity risk management, capital requirements, boundaries of regulation and reputational risk and crisis of the management. For other details: L. Dragomir, *European Prudential Banking Regulation and Supervision* (2010), 65; J. Black, *The rise, fall and fate of principles-based regulation*, in A. Kern, N. Maloney (eds.), *Law Reform and Financial Markets*, (2011), 3; J. R. Barth, G. Caprio Jr., R. Levine, *Guardians of finance: making regulators work for us*, (2012), 205.

system; the purpose is to identify critical signs in the financial system to study its effects on the system and micro-prudential level. The Larosière Report[34] excluded responsibility for the ECB for monitoring micro, while the decisive role could be the macro-prudential supervision[35].

The discipline of European banking and financial supervision has traditionally been based on the national authorities and the principle of coordination and collaboration between the regulators of the Member State of origin and the host Member State in case of cross-border services[36]; as a result, the initial model was reshaped on a national basis to introduce a harmonisation of rules and, therefore, the conditions for a single market in banking and financial services[37].

In particular, the law of the SSM has distinguished the macro-prudential supervisory function from regulation in the strict sense and there are supervisory powers for the ECB and residual tasks for national authorities, in relation to the criteria of systemic significance or "less significance" of banking institutions. The ECB has a primary regulatory power, but it will be affected by the rules at European and international level; for the limited area left by the Regulation, the ECB will draw up its own standards in the form of soft law, as implemented by banks. In some cases the provisions of the SSM Regulation are so detailed as to implicitly exclude any discretion in the supervision of the ECB. The question arises whether the current regulatory framework is adequate or whether it would require specific regulatory powers for the ECB

[34] For details see *http://ec.europa.eu/internal_market/finances/docs/de_larosiére_report_en.pdf.*

[35] For the concept of prudential supervision see L.E. Panourgias, *Banking Regulation and World Trade Law, GATS, EU and 'Prudential Institution Building*, cit. at 33, 9, 17. The author considers in particular the term "macro-prudential supervision" "to mean arrangements for monitoring and dealing with systemic stability aspects of the operations of financial institutions as well as of economic and financial systems development. Such arrangements include information gathering from financial institutions and assessment of risks for systemic stability, analysis of macroeconomic conditions and financial markets, fine-tuning of individual capital requirements, regulation of payment systems and management of liquidity crises and banks'insolvencies".

[36] For details on the general political and economic history of Europe: G.A. Walker, *European Banking Law*, *Policy and Programme Construction*, (2007), 43.

[37] On the EU and global banking regulation see L. Quaglia, *The European Union and Global Financial Regulation* (2014), 25.

as it is the authority responsible for prudential supervision; in fact the EBA exercises the regulatory function and the Regulation establishing the EBA no. 1093/2010 was adapted to the new system[38].

Since the late 1990s, there has been an intense debate about which institutional framework for the regulation and supervision of banking could effectively allow the *financial integration process* that had been accelerated by the introduction of the Euro. As is known, in the Maastricht Treaty, the assignment of monetary policy to the ECB has not been accompanied by a transfer of banking supervision powers as strong as the national authorities. The debate on the need for a greater European coordination of banking supervision has been complicated by the tendency of some European States to entrust the powers not to the national central bank, as happened traditionally, but to a different independent authority without an European policy.

There was also a heated debate before the EU Regulation of 2013 especially as regards the allocation to the ECB of the supervisionary function. It is clear, however, that no provision of the EU provided for the prohibition of the exercise of supervisory powers to the national central banks or the ECB, but there are limitations in art. 127.1 TFEU and art. 14.4 of the ECB Statute: the primary objective is price stability, but also that the ESCB should support the general economic policies for the purposes set out in art. 2 of the Statute, while the central banks may perform functions other than those specified in the Statute unless the Governing Council considers they run counter to the objectives and tasks of the ESCB. Another issue that has been much discussed is the concentration of powers in the ECB on monetary policy and banking supervision, and different solutions also opposed emerged from the debate[39]; for example, vigilance would allow

[38] See Regulation EU no. 1022/2013.

[39] For details on the debate about the separation or concentration of monetary and supervisory functions, see R. Smith, *The European Central Bank* (1997), 323; for the conflict of interest in case of concentration and, on the other hand, the efficiency of decisions arising from the exercise of both functions, there are some risks, such as the excessive power of the ECB in relation to national banks. The author examines the issue of independence of the national central banks and the condition of the ECB and supports the solution of the exercise of monetary function and supervision by a single institution with clear objectives

the acquisition of relevant information on the economy useful for monetary policy decisions, or the centralisation of tasks would depend on the role of lender of last resort and, in fact, the ECB and the ESCB have already acted as the guarantor of the overall stability of the banking system before the SSM[40].

The current regulatory framework is the product of institutional arrangements which have existed per a period of time and should be reviewed; this situation is caused by the complex peculiarities of the EU which is not a federal state. In fact, on the one hand, there is the goal of achieving an integration of the regulatory structure of banking supervision also in the absence of a federal authority and, on the other, there is a layering of very detailed rules of primary level applicable directly or through national laws, regulations issued by the Commission on the basis of delegation. There are also legal acts of the ECB for its supervisionary tasks and the national authorities included in the SSM.

3. Regulation (EU) no. 1024/2013: principles of administrative organisation, tasks and the independence of the ECB

The legal framework on organisation and functions is very complex and the specificity of the tasks of the ECB[41], provided for by Regulation (EU) no. 1024/2013 may be interpreted in a twofold manner. These tasks include the authorisation of banks and ensuring compliance with requirements regarding e.g., their own funds, securitisation, liquidity and governance arrangements. First, they can be interpreted in an objective way, as it may suggest specific activities. On the other hand in a subjective way, as the direct surveillance concerns systemic banks, namely "credit institutions, financial holding companies or mixed financial holding companies, or branches, which are established in participating Member States, of credit institutions established in non-participating Member States"[42], whose *significance* shall be

to safeguard the independence and the close connection with the supervision of payment systems.

[40] Art. 127.5 TFEU.

[41] Art. 127.6 TFEU.

[42] Art. 6.4.

evaluated on the basis of *automatic criteria* instead of exercising discretionary power. Furthermore, the general criteria, following the specific protocol[43] adopted by the ECB, are useful in order to identify on the one hand the ECB's set of competences and on the other hand the remaining power of supervision by competent national authorities. In addition, the criteria are based on actual economic data, e.g. dimension, relevance for the economy of the Union and each participating Member States and the value of transnational activities. Particularly, supervision of the ECB involves credit institutions or financial holding companies or mixed financial holding companies that "shall not be considered *less significant* unless justified by particular circumstances to be specified in the methodology"[44].

Moreover, the ECB "may also, on its own initiative, consider an institution to be of *significant relevance* where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities subject to the

[43] If any of these conditions is met; (i) the total value of its assets exceeds 30 billion Euros; (ii) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20% unless the total value of its assets is below euro 5 billion Euros; (iii) the ECB takes a decision confirming a *significance* such as significant relevance with regard to the domestic economy considered by the national authority, following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution (art. 6.2). See the Decision ECB 2014/3 of 4 February 2014, identifying the credit institutions that are subject to the comprehensive assessment and with the same title: the Decision ECB 2015/839 of 27 April 2015; the "*List of significant supervised entities and the list of less significant institutions. Latest update of the list: 4 September 2014*"; the full "*List of supervised entities (as of 30 December 2015)*"; "*The Supervisory Review and Evaluation process 2015*" in *www.bankingsupervision.europa.eu*. The ECB has conducted its annual significance assessment (arts. 6.4 of SSM Regulation; 43 of the SSM Framework Regulation (ECB/2014/17); as a result of this assessment, the full list contains the names of each supervised entity and supervised group which is directly supervised by the ECB (art. 2, points 16 and 22 of the SSM Framework Regulation). The list also indicates the country of establishment of the entities and the specific grounds for significance. For the five supervisory priorities (business model and profitability risk, credit risk, capital adequacy, risk governance and data quality, liquidity) for 2016 see "*ECB Banking Supervision publishes priorities for 2016*". Documents on SSM are available in the website *www.bankingsupervision.europa.eu*

[44] Art. 6.2.

conditions laid down in the methodology"[45]. Indeed of significant relevance are those institutions for which has been requested or received public financial assistance by ESFS or ESM. However the ECB carries out its activity on the three most important credit institutions of each Member State, unless particular circumstances prevent this[46]. Nevertheless, the competence of the national authorities, which is a residual one, concern bodies which do not match a specific given standard, as they are "*less significant*"[47].

The ECB may broaden its supervisory activity "when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with competent national authorities or upon request of national authority, decide to *exercise directly itself* all the relevant powers for one more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM"[48]; so therefore a replacement power of the ECB to the national supervisory authorities is expected.

The organisation follows the principle of *shared exercise* of supervision between the ECB and national authorities in this manner: a) the ECB holds the centralised prudential supervision of all Eurozone banks and banks of other Member States participating on a voluntary basis; b) it has the direct supervision of the "more significant" banks with the assistance of the national competent authorities; c) national authorities exercise a de-centralised supervision on "less significant banks" and the ECB has a replacement power.

In order to carry out specific tasks of prudential supervision and maintain high standards of supervision, the ECB "*shall apply* all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives"[49]. On this point, it has to be highlighted that the ECB shall control the implementation of capital conditions provided for by national law, as well as those provided for by national supervisory authorities, and as the ECB should not base its decisions on

[45] Art. 6.4.3.
[46] Art. 6.4, para 2-5.
[47] Art. 6.4.1.
[48] Art. 6.5. b).
[49] Art. 4.3.

national law. Nevertheless if the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB *shall* also *apply* the national legislation exercising those options; so the discretion of the ECB is very limited.

The competent national authorities have *macro-prudential tasks* and *tools* consisting of various measures[50]: they shall apply requirements for capital buffers to be held by credit institutions at the relevant level in accordance with relevant Union law in addition to own funds requirements provided by this Regulation[51], including capital buffer rates, and any other measures aimed at addressing systemic or macro-prudential risks provided for, and subject to the procedures set out, in Regulation (EU) no. 575/2013 and Directive no. 2013/36/EU. The ECB should be informed about the measures adopted by the national authorities and, as a consequence, it may produce written *objections*, which are to be examined by the relevant authority[52]. Besides the ECB may apply *higher requirements* for capital buffers than applied by the competent national authorities or national designated authorities of participating Member States in addition to own funds requirements[53] and more stringent measures aimed at addressing systemic or macro-prudential risks at the level of credit institutions subject to the procedures set out in Regulation (EU) no. 575/2013 and Directive no. 2013/36/EU.

The principle of *cooperation*[54] between the ECB and the national authorities is frequently invoked: the ECB "shall *cooperate*

[50] Art. 5.

[51] Art. 4.1, d).

[52] Art. 5.1.

[53] Art. 5.2.

[54] See Regulation (EU) no. 468/2014 of the ECB of 16 April 2014, establishing the framework for cooperation within the SSM between the ECB and competent national authorities and with designated national authorities, in *www.bankingsupervision.europa.eu.* We can consider this cooperation like a new form of administrative cooperation (art. 197 TFEU); in general, see E. Chiti, *La cooperazione amministrativa*, Giorn. dir. amm. 241 (2010); M. Macchia, *La cooperazione amministrativa come «questione di interesse commune»*, in M.P. Chiti, A. Natalini (eds.), *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (2012), 87. Administrative cooperation contributes to new integration developments, but it could also limit the establishment of new European composed administrations, as art. 197 TFEU seems to statue; however, the interdependence between national administrations and between

closely"[55] and perform its tasks in the framework of the SSM consisting of the ECB and the competent national authorities; it is responsible for the effective and consistent functioning[56] and both the ECB and competent national authorities shall be subject to a *duty of cooperation* in good faith and an obligation to exchange information; competent national authorities shall provide the ECB with all the information necessary for supervisory tasks. This duty of *close cooperation* of the ECB may also involve credit institutions established in participating Member States whose currency is not the Euro[57] and after their request, the decision is adopted by the ECB, by using a number of instruments (i.e. duty of national authorities to respect the guidelines, to give information about credit institutions and to implement instructions about measures relating to the tasks and which should be adopted by a national authority). A detailed procedure has to be put into effect, when the relevant authority has not adopted "*decisive correct actions*", indicated by ECB, in order to suspend or cease previous connections[58]. Through the instrument of cooperation, the ECB carries out supervision on branches of credit institutions[59].

As mentioned above, the relevant authorities of Member States are bound to cooperate in the field of supervision on credit institutions seeking to open branches or acting under the free movement of services, carrying out activities not specifically provided for[60]. As regards tasks, the ECB shall respect a "*fair balance*" between all participating Member States[61] and "in its relationship with non-participating Member States, respect the

them and the European authorities in European legislation is well-established; on this aspect see E. Chiti, *La costruzione del sistema amministrativo europeo*, in M.P. Chiti (ed.), *Diritto amministrativo europeo* (2013), 82-83; on European organisational structure see C. Franchini, *L'organizzazione amministrativa dell'Unione europea, ibid*., 205.

[55] "The ECB shall in particular notify its intention to the concerned national competent authorities or national designated authorities ten working days prior to taking such a decision" (art. 5.4.).

[56] See art. 6, "Cooperation within the SSM".

[57] See art. 7. On the progress of Member States with a derogation to the Euro-system about their obligations regarding the achievement of Economic and Monetary Union see ECB, *Convergence Report,* June 2014, in *www.ecb.europa.eu*.

[58] Arts. 7.4; 7.5.

[59] Arts. 4.2; 5.

[60] Arts 4; 17.1.

[61] Art. 6.8.

balance between home and host Member States established in relevant Union law"[62].

A tricky point regards supervisionary powers[63], as the ECB, regardless of other competences, has a number of instruments to impose the fulfilment of duties on any credit institution, financial company or mixed financial company throughout the territory of the Union, in order to adopt "the *necessary measures* at an early stage to address relevant problems", when there is a lack of requirements[64]. Besides, the ECB may require a plan in order to restore the conformity of requirements and a reduction in the risk of the activity of the institutions. That plan could also exhibit the use of net profit in order to strengthen funds or lay down a further duty of information, that are common in the field of capital or liquidity assets, and in order to lay down specific duties regarding liquidity. The ECB can also require a credit institution to directly remove its members from the Board of directors when they do not comply with specific requirements[65]; so as regards these aspects the ECB has an important power.

The Council Regulation (EU) no. 1024/2013 fully confirms the approach used on the monetary policy, particularly the *operational independence*[66] of the ECB, from the interests of politics and the economy, with the character of an independent authority with full extension of powers[67]. In fact, the ECB and the competent national authorities play their role in the SSM independently to fulfil their assignments, although they are subject to the rules of

[62] Art. 17.3.

[63] Art. 16.

[64] Art. 4.3.1. Otherwise, either the ECB may use proof that credit institutions will break those requirements in the aftermath, specifically 12 months, or, in the framework of a *supervisory review* in accordance with point (f) of article 4(1), the arrangements, strategies, processes and mechanisms implemented by credit institutions and their own funds and liquidity held by it do not ensure "a sound management and coverage of its risks" (art. 16.1, a, b, c). Article 16.2 envisages specific faculties. For instance, the ECB can require strengthening of systems, strategies, processes, mechanisms, possession of greater funds in respect of capital requirements given by art. 4.3 para 1, for elements of risks which are not covered by relevant EU acts (art. 16.2, (a).

[65] These requirements provided for art. 4.3 para 1.

[66] Art. 19.

[67] On the concept of an independent but accountable regulator see K.K. Mwenda, *Legal aspects of financial services regulation and the concept of a unified regulator*, cit. at 25,19 ss.

this Regulation. EU institutions, EU bodies, national governments and any other body must respect the independence of the *Supervisory Board* and the *Steering Committee* in carrying out the assignments given by the ECB. Furthermore, a code of conduct has been established by the *Governing Council*, to be addressed to the staff and managers of the ECB, as they supervise in the field of conflict of interest. There are concerns about the possible conflict of interest in the context of the two functions and, in particular, with regard to the tasks of the ECB for the "solidity" of the banks if that would affect the stability of prices. The positive solution depends on the organisational structure and adequate internal procedures to be shaped in the light of efficiency.

Moreover the fundamental characters of the European banking supervision arise from the organisational principles[68], that is to say the independence of the ECB, which is linked to responsibility, as it is subject to the European Parliament and the Council through *accountability and reporting*[69]. In that regard a number of guarantees has been adopted, for instance that the ECB submit a report annually to the European Parliament, the Council, the Commission and *Eurogroup*, in order to provide information about the implementation of its duties and other developments of the structure. The Chair of the Supervisory Board may, after the request of the *Eurogroup*, be heard on the execution of its supervisory tasks or at the request of the European Parliament[70], and the ECB shall reply orally or in writing to questions put to it[71]. Moreover there are instruments given to the European Court of Auditors to control the operational efficiency of the ECB, as the Court has to consider the activity of supervision[72]. In addition, the compulsory and simultaneous submission of reports to the

[68] Art. 19.

[69] Art. 20. See "*Interinstitutional Agreement between the European Parliament and the ECB on the pratical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the SSM*", *Legal Framework for Banking Supervision*, I, December 2014; on the procedures (e.g. reports, hearings, exchanges of view) of accountability see "*Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the SSM*", ivi, in *www.bankingsupervision.europa.eu*.

[70] Arts. 20.4; 20.5.

[71] Art. 20.6.

[72] Art. 20.7.

national parliaments has been launched, which in turn can submit back well-motivated observations or call upon the President of the Supervisory Board to provide "an *exchange of view* in relation to the supervision of credit institutions in that Member State together with a representative of the competent national authority"[73]; so there is a clear political and administrative accountability. However, national authorities are liable to national parliaments for activities which cannot be carried out by the ECB, as well as the tasks conferred[74], in compliance with relevant national law.

The rule of *separation from monetary policy function*[75] is another organisational principle that has been the subject of extensive discussion. It is particularly important as the ECB must only pursue its objectives in compliance with the Regulation, in a completely independent way from the tasks falling under the exclusive competence on monetary policy. In order to avoid a conflict of interest, as well as to ensure both functions are exercised in compliance with the objectives[76], the ECB shall ensure a *complete organisational separation* and refrain from interfering with the tasks, the personnel and the hierarchy.[77]

As mentioned above, in this new organisation, the Supervisory Board plays a great role, as it can appoint the *Steering Committee*[78] which does not have any decisional power, but rather preparatory ones including cooperating with the Board in "*full transparency*". The numeric composition is more limited, although a "*fair balance* and rotation between competent national authority" is guaranteed. The *Steering Committee* should adopt internal rules on relations with the *Supervisory Board,* which in turn has internal rules based on the "*equal treatment* of all participating Member States"[79].

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[73] Art. 21.3.

[74] Arts. 6; 21.4.

[75] Art. 25. See the Decision of the ECB on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39).

[76] On the conflict between monetary policy and banking supervision in some aspects see S. Glatzl, *Geldpolitik und Bankenaufsicht im Konflikt* (2009), 247, 267.

[77] On the topic of separation between monetary function and banking supervision see R. Smits, *The European Central Bank*, cit. at 39, 322.

[78] Art. 26.10, para 2.

[79] Art. 26.12.

4. Administrative proceedings and legal acts

The administrative activity consists in implementing new measures by means of complex proceedings, legal acts according to the categories used for monetary policy, but with some significant restrictions, and typical administrative acts; this further development involving legal and administrative aspects and organisation in the banking sector, favours a new example of *administrative integration*[80]; but the legal framework appears very complex for the execution and requires an extended time before the new mechanism is fully efficient in its activity.

In particular, the granting of a European administrative act[81]: the *authorisation* to credit institutions in participating States after a *composed administrative proceeding* involving the ECB and competent national authorities which submit a first draft to both the ECB and the applicant in order to propose the granting of authorisation for credit activity[82]; it is conditioned by law, as well as the revocation whose scope is to sanction where there is a lack of conditions provided. Nevertheless there is still a margin of *technical discretion*, because of the focus on technique coming from different authorities; however, the decisions taken by the ECB on the acquisition and transfer of shareholdings in credit institutions are discretional (apart from the case of the resolution of a bank crisis) as regards technical profiles, after a thorough evaluation by the authority.

The *authorisation*[83] is necessary to start the business activity of a credit institution within a Member State in the Eurozone, and

[80] On European administrative integration see E. Chiti, C. Franchini, *L'integrazione amministrativa europea* (2003); M.P. Chiti, *Diritto amministrativo europeo* (2011), 330, 340-341; the author considers the ECB and the SEBC an evident example of an integrated European administration as a cohesive system with relations for the economic and monetary coordination according to an organisation focused on the ECB; from this context derive a full integration between national authorities (central banks) and a European institution (ECB) and composed organisational relationships. On the integration process favouring the coexistence of different national administrative systems and European law that acts centrally for the unification see G. della Cananea, C. Franchini, *L'amministrazione europea e il suo diritto*, in G. Della Cananea, C. Franchini, *I principi dell'amministrazione europea* (2013), 41.

[81] On European administrative acts see C. Franchini, *Il procedimento*, in G. della Cananea, C. Franchini, *I principi dell'amministrazione europea*, cit. at 80, 233.

[82] Art. 14.

[83] Art. 14.

has to be requested to competent national authorities, according to the requirements set out by national law; so this new European administrative act has *transnational* effects, but the principle of mutual recognition[84] has already operated for national authorisations favouring the convergence of similar legal acts. The requirements reflect the prudential method by which it is necessary to ensure economically solid and well-organised institutions, in relation to the activity of deposit and credit, can carry out banking activities. If the applicant complies with all conditions, the competent national authority shall prepare a first draft decision and propose it to the ECB in order to grant the authorisation, and the draft decision shall be notified to the ECB and the applicant; the specific procedure of authorisation shall be settled in compliance with EU law and the general principle of fair process, principle of transparency, and the recipient's right to be heard. Clearly due to the references to national law and EU law, it is a conditioned activity of the ECB.

Furthermore the possibility of *tacit approval* of the authorisation has been established, in fact the decision has to be approved when no objection has been expressed within 10 days, a period which can be extended once for valid reasons; otherwise the draft of the decision could be rejected in written form. Furthermore, according to EU law, the ECB has the power to *withdraw the authorisation* in the cases set out in relevant Union law on its own initiative, following consultations with the competent national authority or on a proposal from such a competent national authority[85] with the possibility of deciding necessary remedial actions (for example, resolution measures).

For that matter a revocation could undermine the resolution of a crisis or the maintenance of financial stability; on the one hand, the relevant national authorities can express their objection to the ECB on the basis of valid reasons to prevent the jeopardy of negative effects. The EU Institution may indeed abstain from adopting the revocation for an agreed period of time and also defer it if "*sufficient progress* emerges"[86]. On the other hand, the ECB can take a decision, stating the national authorities

[84] See G. della Cananea, C. Franchini, *L'amministrazione europea e il suo diritto*, 43-45, cit. at 80.
[85] Art. 14.5.
[86] Art. 14.6.

have not adopted the necessary measures on financial stability, and this leads to an immediate revocation of the authorisation; the scope of the revocation may depend on those procedures and it would confirm its nature of sanctioning because of the lack of legal conditions or the ECB would exercise its margin of discretion to evaluate requirements. Moreover, if the national authority decides the revocability of the authorisation, it shall submit to the ECB a valid reason on the basis of which the ECB would make its decision[87].

The ECB shall adopt the legal acts provided by the art. 132 TFEU, such as *guidelines*, *recommendations* and *decisions*[88], but in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to arts. 290-291 TFEU; the supervision of the ECB is *subjected* to binding regulatory and implementing technical standards developed by the *European Banking Authority*[89] (EBA, from here on) and adopted by the European Commission in accordance with arts. 10-16 of Regulation (EU) no. 1093/2010 and to the provisions of that Regulation on the *European supervisory handbook* adopted by the EBA. The acts of the ECB, unlike those used for monetary policy, are bound by the measures of other institutions; so the ECB is entrusted with the supervision tasks, while the EBA is given the regulatory function together with the European Commission.

The ECB may also adopt "*regulations* only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks[90]", but after *open public consultations* and *analysis* of

[87] Art. 15.5, para 2.

[88] See art. 4.3, para 2. About different categories of legal acts (regulations or administrative acts) see S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 49; B.G. Mattarella, *Procedimenti e atti amministrativi*, in M.P. Chiti (ed.), *Diritto amministrativo* europeo, cit. at 54, 356; in general, for legal acts of EU see H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union* (2014), 88 ss.

[89] EBA, ESMA (*European Security and Market Authority*) and EIOPA (*European Insurance and Occupational Pension Authority*) were established in 2010 as new European supervisory bodies, according to the De Lorosière project, for the general strengthening of international cooperation; see S. Antoniazzi, *La Banca centrale europea tra politica monetaria e vigilanza bancaria,* cit. at 1, 145; G. Boccuzzi, *L'Unione Bancaria Europea*, cit. at 11, 46.

[90] See art. 4, para 3.2 of Regulation (EU) of 2013; Regulation (EU) no. 468/2014 of the ECB of 16 April 2014 "*establishing the framework for cooperation within the SSM between the ECB and competent national authorities and with designated national*

the potential related costs and benefits, unless they are disproportionate in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency. These open public consultations are unusual as regards the procedures of the ECB, but they are part of the technical rules of regulation adopted by the EBA[91] and finally provided by Regulation (EU) no. 1024/2013 for banking supervision; the public consultations are possible before the ECB adopts a regulation, unless they are *disproportionate* in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency[92]. In addition, they shall take place before calculating the amount of fee levied on a credit institution or branch[93]. The institute was not part of the first draft of the regulation by the EU Commission, so that it seems it has been inserted into it to fill the gap of the *deficit of democracy* which actually concerns the independent administrative authorities, by embedding a guarantee for stakeholders to participate in the decision-making process.

As is known, the regulatory power of the ECB in monetary policy is inserted in the primary level but it produces non-legislative acts; in fact, the ECB may adopt regulations such as legal acts of "general application" that are very close to the laws of a general and abstract nature[94] and the ECB, under the art. 34.1 Statute, adopts regulations to the extent necessary to implement the tasks defined in the same Statute; so the rules are mandatory

authorities. SSM Framework Regulation" (ECB/2014/17) and in the title it is qualified as *"(Non-legislative acts)"*.

[91] Art. 10, Regulation n. 1093/2010; *"ESAs consult on margin requirements for non centrally cleared derivatives"*, 10 June 2015; the *European Supervisory Authorities (ESAs)* has introduced a second consultation on draft Regulatory Technical Standards outlining the framework of the European Market Infrastructure Regulation; this second consultation document is the result of an intense engagement with other authorities and industry stakeholders in order to identify all the operational issues that may arise from the implementation of such a framework.

[92] Art. 4.3, para 3.

[93] Art. 30.2.

[94] See art. 288 TFUE.

and directly applicable in the Member States and in relation to national central banks[95].

Otherwise this framework seems not be present for the supervisory function; in fact art. 4, para 3.1 of the EU Regulation no. 1024/2013 specifies that acts adopted by the ECB in prudential supervision have, in the hierarchy of norms, a *value lower* than that of the EU Commission and the EBA; the regulations of the ECB may only cover the organisation of supervisory functions and prudential decisions and other acts bound by EU law which has a higher precedence. This is in contrast to the independence accorded to supervisors as independent authorities with extensive powers of regulation; the regulation of 2013 clarifies that the powers of the ECB are equivalent to those of the national authorities[96]; this approach does not appear to be coherent with the classification of the ECB as an European institution like the Commission, Council and European Parliament and the primary level of legal acts in monetary policy.

Besides the ECB contributes with legislative and administrative acts to the activity carried out by national authorities when supervising less significant credit institutions[97], because it shall issue *regulations, guidelines* or *general instructions* to competent national authorities[98], while supervisory decisions are adopted by competent national authorities. Instructions may refer to the specific powers[99] for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM[100]; the ECB also adopts instructions to request national authorities to use their powers, e.g. of investigation according to national law; this is the case when the ECB cannot use these specific powers, although it shall be always be informed[101]. The national legislation may envisage *precautionary powers* and those of *urgent intervention*[102] not

[95] For details see S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 56; A. Malatesta, *La Banca Centrale Europea* (2003), 122.
[96] Art. 4.
[97] Art. 6.5 a).
[98] For the tasks defined in article 4 excluding points (a) and (c) of paragraph 1 (such as grant or revocation of authorisation).
[99] Art. 16.2.
[100] Art. 6.5, (a.
[101] Art. 9.1, para 3.
[102] See *Whereas* no. (35) of the Regulation (EU) no. 1024/2013.

provided for in EU law yet; in fact, the usage of these powers could be requested by the ECB for the scope of SSM's effectiveness.

As concerns legal acts and the *close cooperation* with the relevant national authorities of participating third countries, the ECB can adopt *decisions* or *guidelines* and *instructions* (e.g. on evaluating the adoption of specific measures towards credit institutions by using complex procedures); besides, doubts have been raised about the implementation of these measures, mostly because of the complexity of rules and the suspension or cessation of the activity of cooperation, when remedies have not been put in place.

The role of the EBA is slightly different from the ECB, as it is a regulator working on the drafts of technical rules, opinions, and recommendations, in the light of a convergence in banking supervision and coordination between national authorities, in compliance with the Regulation establishing the EBA no. 1093/2010 and Regulation no. 1024/2013 and no. 1022/2013. Moreover, as is known, the ECB should adopt regulations when necessary for its specific assignments, when there is a lack or incompleteness of rules coming from EU law or national authorities; on this point, doubts have been raised since the ECB is in charge of evaluating completeness of law and this possibility seems to exceed the powers conferred on the EBA and European Commission. In addition, *technical rules* are part of delegated acts and implementing acts[103]; as a consequence, there is a mismatch between the competences of European Commission and the adoption of supervisory measures by the ECB falling within art. 132 TFEU whose regulatory competences are *residual*. So the intention to maintain the 2010 regulation system is reasonably clear, which cannot *completely* rule out, *a priori*, the regulatory power[104] of the ECB. Furthermore the ECB contributes, if necessary, to draft technical rules in order to implement the rules of the EBA, or it can request the EBA to submit a proposal of modifications to the European Commission[105]. Specifically, the

[103] Arts. 290-291 TFEU.

[104] On the relationship between the regulation of the EBA, the power of adopting acts of the ECB and remarks about limits: F. Guarracino, *Supervisione bancaria europea. Sistema delle fonti e modelli teorici* (2012), 165.

[105] Art. 4.3 para 4, and art. 4.1, d).

ECB has *to apply* the law on prudential supervision provided for by EU Regulations and Directives which include the standards of the *Basel Committee on Banking Supervision* (e.g. banking balance sheet requirements[106]) and to ensure the correctness of national ancillary law. On the base of these rules, the ECB may request higher capital requirements on credit institutions in comparison with those applied by the national authorities, just as they can be also requested in addition to or substitution of its own funds[107].

Besides the ECB adopts *guidelines* and *recommendations* and makes *decisions* according to the relevant provisions of EU law and recommendations of the EBA. Therefore the ECB is the authority in charge of macro-prudential supervision, but the EBA still holds regulatory powers to be exercised on the basis of Regulation no. 1093/2010 amended and it influences the legal acts of the ECB in a relevant way. In addition, the EBA maintains the possibility to adopt binding decisions on implementing the *Rulebook* as regards the ECB as well, when there is a breach of EU law[108] or in a case of emergency operations[109] and resolution of disputes between competent national authorities on transnational operations[110].

Regulation (EU) no. 1022/2013 has grown out of these tricky points so that it modifies the Regulation establishing the EBA, in such a way as to put into effect a *necessary compliance* of the procedures to the specific tasks of supervision by the ECB and to the fact that the ECB may be not in accordance with the decisions of the EBA. In fact, equal treatment and equal representation must be guaranteed among Member States regardless of their participation in SSM, to ensure a fair decision-

[106] On the tasks (e.g. capital requirements and agreements, risk control) of the Basel Committee see R. Costi, *L'ordinamento bancario*, cit. at 30, 581. The Basel Accords contain international standards and Basel III is implemented in Europe through the CRD IV package of EU law (Capital Requirements Regulation no. 575/2013 and Directive no. 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms).

[107] Art. 5.2. For details on capital requirements see D. Howarth, L. Quaglia, *Banking on stability: the political economy of new capital requirements in the European Union*, Journal of European Integration 333 (2013).

[108] Art. 17.

[109] Art. 18.

[110] Art. 19.

making process and the integrity of the single market for financial services.

For banking supervision too, the ECB shall decide discretionally to adopt *administrative penalties*[111] towards credit institutions (or financial holding, companies, or mixed financial holding companies) which intentionally or negligently breach a requirement under relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent national authorities. Besides, it may impose penalties of up to twice the amount of the profits gained or losses avoided because of the breach, where they can be determined, or up to 10 % of the total annual turnover of a legal person in the preceding business year or such other pecuniary penalties as may be provided for in relevant Union law[112].

The sanctions adopted by the ECB and national authorities including the procedures set out in Regulation (EC) no. 2532/98 must be "effective, proportionate and dissuasive"[113]; in approving the sanction the ECB exercises its supervisory and investigatory powers[114] as well as those conferred upon the competent authorities on the basis of EU law. Moreover the ECB may request national authorities to adopt appropriate sanctions on the basis of legal acts[115] and national remedies providing for specific instruments which are not part of EU law; to determine whether and which sanction is to be applied, the ECB should act "in close cooperation"[116] and with the assistance of the competent national authorities[117]. The ECB may adopt sanctions in compliance with Regulation (EC) no. 2532/1998 and art. 132.3 TFEU, in case of a breach of its regulations or decisions[118]; these guiding principles

111 Art. 18. See for general references O. Jansen, *Administrative Sanctions in the European Union* (2013).

112 See the Regulation of the ECB 16 April 2014, no. 18, emending the Regulation (EC) no. 2157/1999 about the power of the ECB for administrative penalties (ECB/1999/4), in *www.ecb.europa.eu*.

113 Art. 18. See Recommendation for a Council Regulation amending Regulation (EC) no. 2532/98 concerning the powers of the ECB to impose sanctions (ECB/2014/19), in *www.bankingsupervision.europa.eu*.

114 Art. 9.2.

115 Art. 4.3 para 1.

116 Art. 9.2.

117 Art. 6.3 para 1.

118 Apart from the cases set out in art. 18.1-6.

are also applicable both to those economic sanctions against credit institutions as a consequence of a breach of national rules for the ancillary law and against a member of the board of directors of any credit institution or any other responsible body according to national law. Besides, it has been established a duty of publication of the sanctions, even if appealed, in compliance with EU law.

The measures of the ECB are legally adopted in the field of its supervisory activity and since they are capable of affecting third persons they are subject to the *review* of the Court of Justice of the European Union[119] (CJEU) under art. 263 TFEU (apart from recommendations and opinions). Moreover they are also subject to art. 340 TFEU concerning damages coming from non-contractual liability. Despite the general provision, the ECB is *directly responsible* for any damage to compensate in relation to its duties[120].

As regards the judicial review, Regulations no. 1022/2013 and no. 1024/2013 do not provide detailed rules, even if it would be particularly useful, because of the number of competences: ECB, EBA, ESMA, EIOPA and the national authorities. As mentioned earlier, decisions binding third parties and national authorities are subject to the jurisdiction of the CJEU[121]; there is the possibility for natural or legal persons to appeal against acts laid down by bodies, offices and agencies of the Union under specific conditions and arrangements[122], as was established in the previous Regulations of 2010. In fact the *Board of Appeal* has the power to control the decisions of the EBA, the ESMA and the EIOPA[123], either confirming the decision or referring the matter to

[119] See M.P. Chiti, *La tutela giurisdizionale*, in M.P. Chiti (ed.), cit. at 54, 383.; G. della Cananea, *La giustizia*, in G. della Cananea, C. Franchini (eds.), *I principi dell'amministrazione europea*, cit. at 80, 310 ss.

[120] Art. 340, 2nd-3rd, TFEU "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties".

[121] Arts. 263 TFEU; 24.11.

[122] Art. 24.5 of SSM Regulation.

[123] Art. 58, in Regulations (EU) no. 1093/2010, Regulations no. 1094 and no. 1095/2010.

the competent authority[124]. Similarly, the *Administrative Board of Review*[125], established by the ECB, can judge on the administrative acts of the same institution; in fact, any natural or legal person may activate an *internal administrative proceeding* concerning the procedural and substantive conformity of the decisions with the Regulation. In any case, the internal procedure does not undermine the judicial control of the CJEU under art. 263 TFEU and art. 24.11 of the Regulation. The Board is particularly technical and has professional competences on supervisory activities; its members are not bound to any instructions and they act only in the public interest.

Any request for review has to be made in writing, alongside a statement of grounds, to be submitted to the ECB within one month of the date of notification of the decision to the applicant or, in its absence, of the day on which it came to the knowledge of the applicant. It has to be remembered that any natural or legal person could request a review of an act "which is addressed to that person, or is of a direct and individual concern to that person". After the ruling of admissibility of the review, the Board may express an opinion within a reasonable period or, at any rate, within two months, in order to defer the matter to the *Supervisory Board*. The latter submits to the *Governing Council* a new draft that is *abrogative* of the initial decision, by replacing it either with a new one of identical content or with an amended decision which cannot be appealed against. Here a *tacit approval* could play its role, as the decision is adopted when the Governing Council makes no objections within a maximum period of ten working days[126]. In addition, the initial opinion, the new draft opinion and the conclusive one always have to be reasoned and notified to the parties and the request of review does not automatically have a *suspensive effect*, although the Governing Council may decide whether to suspend the decision contested, on a proposal of the Administrative Board of Review, having considered the circumstances[127].

[124] For details see W. Blair, *Board of Appeal of the European Supervisory Authorities*, European Business Law 165 (2013).
[125] Art. 24.
[126] Art. 24.7.
[127] Art. 24.8.

5. Critical considerations on administrative procedures and legal acts

According to the Regulation, it is crystal clear that the competences conferred on the ECB must follow one *single set of rules* which has to be the same for all Member States, but the legal framework is very complex[128]. At this point, it is essential to distinguish between measures of the ECB and measures of the EBA, as the latter is in charge of *regulation activity*, drafting *technical standards*, *guidelines* and *recommendations* in the light of a converging of the results arising from the activity of bank surveillance within the Union[129]. Currently, the ECB's supervision does not replace that of the EBA and it may adopt legal acts under art. 132 TFEU, in the lack of or flaw in any act of the EBA and EU law on fundamental aspects, in order to carry out its tasks.

Therefore, legal instruments in the field of banking supervision are the same that the ECB may adopt in the field of monetary policy, apart from the opinions, not explicitly recalled but linked to art. 132 TFEU and art. 34 of the ESCB Statute; otherwise this framework has no primary position. As it is well known, legal acts, including the regulations, are adopted by the Governing Council[130] which may interest the *Supervisory Board*, as the latter has supervisory powers and, as a consequence, new rules for the ESCB Statute will be necessary. Moreover, the Supervisory Board adopts internal rules on proceedings[131], ensuring equal treatment amongst participating Member States. Particularly, the Regulation[132], adopted by the Supervisory Board on 31st March 2014 and which came into force on 1st April 2014, provides for rules on setting meetings, the participation of different Member State, access to information and voting

[128] For some critical considerations on the fragmentation of tasks and measures and stratification of standards see A. Pagliacci, *The Three Pillars of the European Banking Union: An Evolutionary Road*, IJPL 327 (2014).

[129] On the relationship between the ECB and the EBA and if the latter has a sufficient capacity to protect the internal market interest, see N. Moloney, *European Banking Union: Assessing its Risks and Resilience*, Common Market Law Review 1663 (2014).

[130] Art. 17.1 of internal regulation of the ECB.

[131] Art. 26.12 of Regulation (EU) no. 1024/2013.

[132] See "*Rules of procedure of the Supervisory Board of the European Central Bank*", in *www.ecb.europa.eu*.

procedures, empowerment and *Steering Committee* (functions, setting and organisation of meetings).

The ECB may adopt *guidelines* and *recommendations* and it makes *decisions* and *regulations*, but only if they are necessary to organise its tasks[133]; the ECB "shall issue regulations, guidelines or general instructions to competent national authorities, according to which the tasks defined in art. 4 excluding points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by competent national authorities"[134]. Such instructions[135] may refer to the specific powers for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM.

Finally, the Supervisory Board shall carry out preparatory works regarding the supervisory tasks conferred on the ECB and propose to the Governing Council of the ECB *complete draft decisions* to be adopted by the latter, pursuant to a procedure to be established by the ECB[136]; it can only exercise its powers in relation to draft decisions or regulations adopted, only to the extent necessary to organise or specify the arrangements for tasks[137], according to the planning and implementation of the tasks of the ECB. However the Supervisory Board is not involved in the procedure regarding other legal acts, although they are part of the supervisory activity. This has raised a number of doubts, as the Executive Committee implements the monetary policy according to the guidelines and decisions taken by the Governing Council adopting necessary instructions to national central banks[138].

As mentioned above, the legal acts that bind third parties can come under the judicial control of CJEU[139]; indeed, not all the measures coming from national authorities are the expression of a discretionary power, as they might be a mere implementation of decisions of the ECB and it needs to be clarified whether the

[133] Art. 4.3 para 2. See e.g. Regulation (EU) no. 468/2014 of the ECB on the framework for cooperation within SSM, *supra* n. 54.
[134] Art. 6.5 a).
[135] Art. 16.2.
[136] Art. 26.8.
[137] Art. 4.3, para 2, as declared in art. 26.7.
[138] Art. 12.1, ESCB Statute.
[139] Art. 263 TFEU and art. 35.1 of the ESCB Statute.

instrument of the ECB or the one coming from the national authority has to be contested. For example, as the request for authorisation needs to comply with national law[140] and EU law[141], that has to be highlighted in the draft of authorisation by national authorities to the ECB. Clearly this will lead to some difficulties in judicial review when contesting rejection or revoking the authorisation[142]. Otherwise the system is perfectly accomplished, in coherence with the principle of effective justice, because individual rights and interests are protected by judicial and administrative review; in fact, in order to reduce the number of disputes lodged before CJEU, which is also competent on preliminary rulings concerning the interpretation of EU law, the administrative review has been introduced. Moreover the view of the Court has also legitimated new bodies and legal instruments; in fact the judgment[143] of the Court on the ESMA clarifies that art. 114 TFEU is the legal basis of that institution, as well as of SRM and the Single Resolution Board which is a new European authority. This solution has been also followed by the German Federal Constitutional Court[144] which recently decided on the European Stability Mechanism (ESM), in line with the CJEU case law.

Presently the responsibilities conferred upon the ECB, EU and national authorities build up a scheme of *administrative composite proceedings*[145] involving the cooperation of different

[140] Art. 14.1.

[141] Art. 13.3.

[142] Art. 14.3-5.

[143] Court of Justice EU, 22 January 2014, C-270/12, in *www.europa.eu*.

[144] The German Constitutional Court, in line with the EU Court of Justice (Full Court, 27 November 2012, C-370/2012, in *www.europa.eu*), with decision 2 BvR 1390-1312, 18 March 2014, in *www.bverfg.de/entscheidungen/rs20140318_2bvr139012.html*, affirmed the legitimacy of the ESM Found (European Stability Mechanism applied to help banking systems of Ireland, Greece, Portugal, Cyprus and Spain) confirming the preliminary decision 12 September 2012 (2BvR 1390/12) for the ratification of the ESM by the German Parliament.

[145] About composite proceedings of the EU see: S. Cassese, *Il procedimento amministrativo europeo*, in F. Bignami, S. Cassese (eds.), *Il procedimento amministrativo nel diritto europeo*, Quaderno n. 1, RTDP 31 (2004); G. della Cananea, *I procedimenti amministrativi composti dell'Unione europea*, ibid, 307; L.F. Maeso Seco, *I procedimenti composti comunitari: riflessioni intorno alla problematica della impossibilità a difendersi ed eventuali alternative*, in G. della Cananea, M. Gnes

bodies and legal instruments and creating a mixed organisational framework[146]; in fact administrative procedures are often characterised by the action of both EU and national administrative agencies, but this is also a prevalent trend in competition and the electronic communications sectors. Procedural *guarantees*[147] are provided: the opportunity of being heard for a person subjected of the proceeding, rights of defence and the right of access to the documentation[148]. As is known, in these proceedings there is the question to establish which parties are to be protected, making clear which acts are part of the proceeding and which of the final decision[149]. As a consequence, we have to focus on the source of the measure in order to consider the jurisdiction of either the CJEU or the national judge. Indeed, the solutions will be different in the case of "less significant" credit institutions subject to the supervision of national authorities and their legitimate measures apart from the authorisation coming from the ECB. If the ECB

(eds.), *I procedimenti amministrativi dell'Unione europea. Un'indagine* (2004), 18; M. Veronelli, *Procedimenti composti e problemi di tutela giurisdizionale*, *ibid*, 59; L. Saltari, *I procedimenti composti e l'integrazione funzionale nella nuova disciplina delle telecomunicazioni*, *ibid*, 4; M.P. Chiti, *L'organizzazione amministrativa*, in M.P. Chiti, G. Greco (eds.), *Trattato di diritto amministrativo europeo*, *Parte generale*, II (2007), 415; G. Greco, *L'incidenza del diritto comunitario sugli atti amministrativi nazionali*, *ibid*, 978; S. Antoniazzi, *Procedimenti amministrativi comunitari composti e principio del contraddittorio*, Riv. it. dir. pubbl. com. 641 (2007); L. Saltari, *Amministrazioni nazionali in funzione comunitaria* (2007), 213; M.P. Chiti, *Diritto amministrativo europeo*, cit. at 80, 469; B.G. Mattarella, *Procedimenti e atti amministrativi*, cit. at 54, 336; C. Franchini, *Il procedimento*, in G. della Cananea, C. Franchini, *I principi dell'amministrazione europea*, cit. at 80, 222; H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, cit. at 88, 405 e 918-919.

[146] The distribution of supervisory powers results from a scheme of mixed organisational figures: see S. Cassese, *La nuova architettura finanziaria europea*, Giornale dir. amm. 80 (2014); O. Jansen and B. Schöndorf-Haubold, *The European Composite Administration* (2011). In general on organisation and procedures of co-administration since the 1990s see C. Franchini, *Amministrazione italiana e amministrazione comunitaria. La coamministrazione nei settori di interesse comunitario* (1993), 203; M.P. Chiti, *Diritto amministrativo europeo*, cit. at 80, 81.

[147] See for details J.C. Laguna De Paz, *El Mecanismo Europeo de Supervisión Bancaria*, Revista de Administración Pública 66-67 (2014).

[148] Art. 22.

[149] On this point see M.P. Chiti, *Diritto amministrativo europeo*, cit. at 80, 470-472.

takes upon itself the supervision of "less significant" credit institutions[150] the CJEU is still competent for judicial review.

Comparing the tasks assigned to the ECB and the national authorities, we actually note the ECB has an *exclusive competence* on a number of matters of prudential supervision (e.g. investigation powers on national banks, final administrative acts such as the banking authorisation or its revocation, powers on requests for the acquisition or cessation of shareholdings related to credit institutions) and finally limited regulatory powers. The national authorities are requested to draft preparatory acts which are auxiliary to the measures of the ECB. However, they maintain full powers towards both credit institutions which are "less significant" and credit institutions of third countries based or active in the territory of the Union. Therefore, when national authorities assume preparatory and auxiliary powers, they act as part of the *Single Supervisory Mechanism* (the same as the national central banks of the ESCB) and as they have direct knowledge of the national credit market they play a very important role.

As is known, because of the crisis, on occasion the ECB has inserted *unconventional measures*[151] (or *non-standard monetary policy measures*) into its decisions or other legal instruments. They are *implicit powers* exercised in order to ensure the effectiveness of monetary policy, as well as to ensure the relations between Member States, the ECB and other institutions as a consequence of the crisis. However it should be noted that unconventional measures have been taken as a result of the inactivity or tardiness of Member States in responding to the financial and economic crisis that has overrun specific Member States and the Community in general. The absence of adequate decisions by Member States has been explained by the absence of political *impetus*, the complexity of EU decision-making procedures, legal limits imposed by EU law and national limits. Often, when the decision is taken at EU level, a reasonable period of time is necessary from

[150] Art. 6.5, b.

[151] See on the asset purchase programmes the *Introductory statement to the press conference (with Q&A)*, M. Draghi and V. Constâncio, Frankfurt am Main, 3 June 2015, in *www.ecb.europa.eu*: "the asset purchases of Euro 60 billion per month are intended to run until the end of September 2016 and, in any case, until we see a sustained adjustment in the path of inflation that is consistent with our aim of achieving inflation rates below, but close to, 2% over the medium term".

adoption to implementation to comply with democratic proceedings. To a certain extent we can assume that Member States have obliged the ECB to assume their powers since the *Governing Council*'s acts are indeed faster, in the absence of any parliamentary consent or unanimity.

The Governing Council during the crisis has managed to take majority decisions in relation to both unconventional measures and bank rates; moreover the ECB does not account to electors, as a member state does, and the consequences of its decisions are mostly perceived by stakeholders rather than of citizens. *De facto* the ECB is considered the only institution acting quickly enough to keep up with the dynamism of the financial markets which clearly clashes with the slowness of democratic procedures.

On the basis of these general considerations can be explained the acquisition of *bonds*[152] by the ECB and assistance over credit to support national banking systems. However the ECB has to give different reasons to intervene on national economic policy, by putting *pressure* on those Member States facing difficulties in implementing structural reforms, that is to say, all the conditions necessary to make unconventional measures effective. It can be interpreted as an attempt to highlight the limits of managing its institutional role and the provisional nature of unconventional measures. It is obviously a necessary attempt, though not sufficient to resolve the crisis of the Member States. During the various tardy reactions to the crisis, the ECB has taken measures on monetary policy so as to factually implement those reforms that bind a number of interventions (the recent case of the Greece[153]). However the influence of the ECB to introduce national

[152] For national *bonds* see: P. De Grauwe, *The European Central Bank: Lender of Last Resort in the Government Bond Markets? CESIfo Working Paper*, n. 3569 (2011). Recently on easing of financing rates/spreads offered in the provision of funding to clients collateralised with government bonds, high-quality corporate bonds and covered bonds versus tightening of maximum amounts and maximum maturity of funding, see *Results of the June 2015 survey on credit terms and conditions in euro-denominated securities financing and OTC derivatives markets (SESFOD)*, 3 July 2015, in *www.ecb.europa.eu*.

[153] See *Press Release,* 6 July 2015, *ELA to Greek banks maintained*; the Governing Council of the ECB decided to maintain the provision of emergency liquidity assistance (ELA) to Greek banks at the level decided on 26 June 2015 after discussing a proposal from the Bank of Greece, in *www.ecb.europa.eu*.

reforms is only related to the Member States of Eurozone, although sometimes it would include all the States that have adopted the Euro for supranational reforms, e.g. the SRM will go beyond bonds market and strengthen the Union through economic and banking governance. It seems that unconventional measures have restricted the doubts about the beginning of a deflation process because of the crisis[154], even if the actual risk of deflation has recently led the ECB to adopt new instruments. As the ECB has chosen flexibility and adopts unconventional measures, at the same time it has been called upon to manage the balance between its powers conferred by TFEU and the Statute on monetary policy and those expressed by the new framework on prudential supervision of the Banking Union[155]. By ordering specific financial and structural reforms of Member States, there is the risk of confusing the role of the ECB, interpreting its attempts as political conditioning, in contrast with its solid independence[156].

6. The implementation of the Regulation (EU) on SSM in national banking systems and the difficulties of harmonisation and administrative integration

The Banking Union is made up of Regulation (EU) no. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and Regulation (EU) no. 806/2014 and the Directive no. 2014/59/EU establishing the SRM. As a consequence, national

[154] See P. De Grauwe, *The European Central Bank: Lender of Last Resort in the Government Bond Markets*, in F. Allen, E. Carletti, S. Simonelli (eds.), *Governance for the Eurozone. Integration or Disintegration?* (2012), 17; about the effects of the so-called "sterilisation" following the programme to purchase bonds by the ECB that simultaneously removes liquidity to the markets: T. Petch, *The compatibility of Outright Monetary Transactions with EU law*, Law and Financial Markets Review 17 (2013).

[155] For recent remarks about European integration see V. Constâncio, *Reflections on financial integration and stability*, Speech at the Joint ECB-EC Conference on Financial Integration and Stability in a New Financial Architecture, Frankfurt, 28 April 2014, in *www.ecb.europa.eu*.

[156] Generally, on independent institutions and regulation in EU see G. García Álvarez, *La Unión Europea Como «Estado Regulador» y las Administraciones Independientes, Revista de Administración Pública* 79 (2014).

governments have substantially empowered supranational authorities and that innovates national banking systems, so that they will manage to adjust or erase previous rules[157]. Therefore, the Banking Union involves a further evolution for the administrative integration in the EU but only for Eurozone Member States; they have to adapt their banking systems to the new rules and the supervisory national authorities are involved in these amendments[158].

Despite the intention to launch uniform mechanisms in line with the Monetary Union, however it has been maintaining a substantive *distinction* amongst Member States and double-faced systems on monetary policy, banking supervision and the resolution mechanism for the banking crisis. In fact a banking centralisation is a distant goal as of now, since the supervision of the ECB (based on the criteria of the distinction between "significant" credit institutions and "less significant" ones[159]) and the SRM is only of interest to the Member States of the Eurozone and States willing to participate in it through the signing of cooperation agreements[160].

This doubling has an impact on application, but not decision-making since there are instruments that are common to all banks, e.g. regulations, directives, legal acts with the purpose

[157] In general, on the necessary adjustment of the national structures as a result of the evolution of the EU see G. della Cananea, C. Franchini, *I rapporti tra l'amministrazione europea e quella nazionale*, in G. della Cananea, C. Franchini (eds.), *I principi dell'amministrazione europea*, cit. at 80, 341.

[158] *Banca d'Italia* is the competent national supervisory authority and in relation to SSM see R. D'Ambrosio, *The ECB and NCA liability within the Single Supervisory Mechanism*, 78 Quaderni di Ricerca Giuridica, January 2015; M. Lamandini, D. Ramos Muñoz, J. Solana Álvarez, *Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of fundamental Rights' Protection*, 79 Quaderni di Ricerca Giuridica, November 2015, in *www.bancaditalia.it*. See the documents *"L'attività di vigilanza svolta dalla Banca d'Italia: linee generali e interventi nei confronti delle quattro banche poste in "risoluzione"*, 30 gennaio 2016; the Report on financial stability no. 2/2015 and the annual report in *www.bancaditalia.it.*

[159] For details see B. Wolfers, T. Voland, *Level the Playing Field: The new supervision of credit institutions by the European Central Bank*, Common Market Law Review 1463 (2014).

[160] See the decision of the ECB 31 January 2014 (ECB/2014/5, in *www.ecb.europa.eu*) about close cooperation with competent national authorities of participating member States which do not have the Euro and relevant procedures.

of harmonising. Nevertheless the distinction on application procedures seems evident and can be confirmed by the role of the ECB and the different role of the EBA, which has been maintained and is partially integrated. The latter has administrative and regulation powers (e.g. drafting technical standards for the *Single Rulebook*) also involving credit institutions which are not part of Eurozone (e.g. the United Kingdom[161]) and so supervises competent national authorities and eventually takes their powers upon itself[162].

The EBA exercises its regulatory and limited supervisory powers (e.g. the application of EU-wide *stress test* results of the 26th October 2014 to verify the solidity of banks[163]) over each banking supervisory authority as well as the ECB; where disputes arise between supervisory authorities (e.g. banking activity

[161] The UK does implement legal instruments coming from the EBA, however it expresses strong criticisms about the European integration, in relation not only to the Monetary Union (they are not willing to adopt the Euro) but also to the Banking Union. The UK point of view has led to a number of debates within British politics about a possible plan for exit from the Union and evidently a fierce debate at EU level about the future and possible consequences of the exit. There were a number of conferences on the UK position about Banking Union: *Britain Alone*, University of London, 9 May 2014, criticising the *Single Resolution Mechanism* (e.g. essay by P. Schammo (Durham University), *Differentiated Integration and the Single Supervisory Mechanism*; by contrast T. Tridimas, *EU Law and Monetary Union: Parallel Universes*, highlights recent news on ECB supervision, SRM and Banking Union which are the consequence of the failure of the European Supervisory Authority (2010), particularly of the EBA which do not have direct powers, but regulation powers, even if not quite the same as the powers of the ECB. See also *Europe in crisis*, 2 June 2014, London, King's College; the crisis has led to adopt authoritative decisions without democratic legitimacy (T. Tridimas) and *accountability*. Crisis of constitutionalism of the so called *Troika* and political fragmentation of the Union (see I. Solty, York University, Canada); the financial and economic crisis is linked to the crisis of politics which is also its consequence (see S. Gill, York University, Canada). Within the financial and banking system the close cooperation between relevant institutions and harmonisation at international level are common and quite complex though (L. Quaglia, *The "ebb and flow" of transatlantic regulatory cooperation in banking*) as well as the new framework involving European and national competent authorities (A.H. Türk, *Institutional Architecture of EU Financial Regulation*); on these points see also P. Petit, *Charting ways out of Europe's impasse.*

[162] Art. 18 of the Regulation (EU) no. 1093/2010.

[163] For this document see *www.eba.europa.eu*. For details on stress-testing function and methodology see N. Moloney, cit. at 129, 1667.

exercised by credit institutions having branches in different Member States), the EBA coordinates and mediates contingent conflicts between national authorities[164]. This *complex architecture* concerns the centralisation of competences on supervisory activity to supranational authorities alongside the empowerment conferred by national governments because of the particular focus on technique[165].

Some matters are still under debate, that is to say the application of criteria for identifying competent national authorities[166] depending on how national governments implement guidelines, the duplication of competences between the ECB and the EBA and the role of the Supervisory Board in banking crises due to the excessive delegation of functions, the complication of the plenary session of the Board and the executive session. Besides there is the question of the implementation of the *Single Rulebook*[167], because it has a complex architecture with a set of rules issued by different authorities and it could be non ineffective in supporting the European Banking Union. In fact it is composed of the *Single Prudential Rulebook* (Directive no. 2013/36/EU and Regulation (EU) no. 575/2013 on capital requirements) and the *Single Resolution Rulebook* (Directive no. 2014/59/EU on bank recovery and resolution, and Council Regulation (EU) no. 806/2014 on SSR); in addition the related technical standards developed by the EBA (in the case of the Directive on resolution this will also include technical standards under Directive no. 2014/49/EU on deposit guarantee schemes) and adopted by the European Commission, as well as the EBA guidelines.

Its rigidity is likely also to limit the effectiveness of ECB supervision activity whose tasks may be increased with specific

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164 On this point see S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 177, 252.

165 See S. Cassese, *La nuova architettura finanziaria europea*, cit. at 146, 80.

166 The competent national authorities are defined by arts. 2.2 of the SSM Regulation and 2.9 of the SSM Framework Regulation (ECB/2014/17) in *www.supervisionbanking.europa.eu.*

167 See *The Single Rulebook* in *www.eba.europa.eu.* On EBA's fundamental role in the harmonisation process and for a more robust Rulebook along with the reinforcement of the EBA, see V. Babis, *Single Rulebook for Prudential Regulation of EU Banks: Mission Accomplished?*, European Union Law Review 779 (2015); B. S. Nielsen, *Main Features of the European Banking Union*, European Business Law Review 809 (2015).

regulatory powers in the prudential supervision sector; in fact the Single Rulebook consists of directives and, therefore, the Member States have some discretion in implementing them even if they have the objective of maximum harmonisation; this context can lead to difficulties for the SSM, because it has to consider the different national rules of company law about the governance of banks. The problems stem from the complex and rigid structure of regulation in the EU, as the Single Rulebook consists of rules stratified on three levels: a) the Commission, the Council and the European Parliament by means of directives and regulations, which are also very detailed because they are derived from complex political compromises; and b) the Commission on the basis of the standards prepared by the EBA. These rules derive from a complex approval proceeding requiring a simple majority of States of the SSM and others. A further third level concerns c) the legislation for the supervision of the ECB and national authorities. The regulation is, therefore, very strict because rules are provided for the legislative procedures of the EU and the agreements between the various national and European institutions derive from political solutions that cannot be changed easily.

In this context it might be difficult for supervisors to have effective regulation that can contribute immediately to the supervisory policies; this problem is even more acute, since for them it is a priority to quickly realise the process of homogenisation of supervisory practices. The EBA, which has extensive experience in cooperation with the various authorities involved, continues to play a central role in the formation of the European Rulebook. Probably it would require a different breakdown of the first two levels of European regulation to allow more space to the national authorities for the adoption of technical rules; also the ECB should have a greater regulatory autonomy to ensure an effective supervision by way of amendments to the Regulation on the SSM in order to recognise to it a dominant role in the supervisory functions as a European institution provided for by the TFEU.

The implementation of the European Banking rules therefore presents many difficulties for national orders also because banking regulation is polycentric and separated from prudential supervision, especially in the Eurozone where the

surveillance has been centralised, but not for an ECB regulatory power. Not only there are many regulators (the Commission, ABE, national authorities), but the rules are very detailed and leave only limited room at other levels in the oversight; or the rules are adopted by national authorities, but they need a complex approval from the European authorities[168]. National authorities, however, have some discretion in the implementation of directives (e.g., for corporate governance), but different solutions may result in difficulties in the intervention of the ECB, unless it adopts its own criteria taken from the principles of the directives and the rules of best practice.

So, the question that arises is the sustainability of this system over time, apart from the political compromises to achieve the Banking Union; the main doubt is whether the current regulatory framework would allow the ECB to exercise prudential supervision efficiently or if the rigidity of the current institutional framework may be a limit to its effectiveness. For example, the SSM refers only to banks and not to the banking group as a whole, including non-banking activities, as it is established in some national systems (e.g., the Italian case[169]); in fact, the ECB is responsible for the supervision of banks and the law on capital requirements defines the bank as a company holding deposits from the public and the granting of loans. In decisions about the identification of significant banks, the ECB has considered only the banking components of the group and they remain under the responsibility of national supervisiory authorities[170]; the Regulation of 2013 does not consider the coordination of the supervision of banking and non-banking members of a credit group.

As it is known the tasks assigned to the ECB by the TFEU are exclusive of this European institution, with the exclusion of any regulatory intervention by the Commission or the Council. Despite this institutional configuration, the Regulation on the SSM has provided some details about prudential supervision: it defines

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168 See macro-prudential measures in the Capital Requirements Directive and Regulation.

169 See R. Costi, *L'ordinamento bancario*, cit. at *32*, 674.

170 See the documents "*List of significant supervised entities and the list of less significant institutions*" (4 April 2014; 15 August 2015); "*Guide to banking Supervision*" (September 2014), *supra* n. 43.

the relations of hierarchy between legal acts of the ECB and the other acts of EU law; the former are subordinate legislative and non-legislative EU acts, including those whose issuance is delegated to the Commission[171]. So the SSM provides for the subordination of the acts and regulations of the ECB to EU law which includes all primary and secondary legislation, the Commission's decisions in the field of state aid, competition rules and control concentrations and the Single Rulebook. So the regulatory power of the ECB is limited to the organisation of the mode of carrying out the duties of supervision and must comply with the acts adopted by the EU Commission based on the technical rules of the EBA.

The ECB is a European institution[172] for the functions of monetary policy, while it is considered by the Regulation on SSM equivalent to the supervisory role of the national authorities for the hierarchy of legal acts and regulatory power is very limited for supervisory functions[173]. The reason for the different configuration depends on the intention of preserving the function of the EBA with the Commission in charge of financial regulation and to safeguard the technical regulatory harmonisation in the EU[174]. Consequently, the ECB is subject to all the powers of the EBA, because it is included in the definition of the competent authorities to ensure equal treatment between the Member States participating in the SSM and the other Member States[175]. This solution does not seem acceptable for the effectiveness of the powers of the ECB, given that the independence of regulators is a distinctive element of the independent authorities; moreover supervision within the Eurozone banks will require a level of harmonisation of supervisory practices higher than in other EU States and the ECB will have to create a unity of the practices followed by the participating States in areas not of interest to other Members States; this phase could be slowed by the need for non-participating States to express consent to being subject to the EBA.

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171 Arts. 290-291 TFEU.

172 Arts. 282 ff. TFEU (Section 6) is inserted in Part six "*Institutional and Financial Provisions*", Title I "*Institutional Provisions*", Chapter I "*The Institutions*".

173 See G. Ferrarini, F. Recine, *Verso un Testo unico bancario europeo, The Single Rulebook and the role of the ECB in prudential supervision*, Bancaria 4 (2015).

174 As expressed in Recital 32 of the Regulation on SSM.

175 See Recital 12 of the Regulation on EBA.

Furthermore, the system of the Banking Union was finally accomplished with the new instruments adopted in 2014 related to the SRM according to the already existing federal view on relation between the ECB and European System of Central Banks[176], as it adheres to both the centralisation of EU decision-making and the decentralisation of their implementation by national authorities.

7. Conclusions on requirements of democratic legitimacy and accountability

The process for structural reform has not resolved yet the matters of democratic legitimacy, transparency and *accountability*[177], especially in relation to SSM and SRM, if we consider that the ECB also plays a strategic role in evaluating credit institutions subject to crisis. Accountability is considered essential for the transparency, legitimacy and independence of supervisory decisions[178] and for the activity of the SRM ; remedies to ensure a higher level of democracy are similar both in SSM (arts. 20-21; see § 3) and SRM (arts. 45-46 of Regulation (EU) no. 806/2014). Particularly remarkable is the report of the *Single Resolution Board* on the carrying out of tasks to the European Parliament, The Council, the Commission and the Court of Auditors and also the annual report to the European Parliament and the Council, also providing a number of hearings and question-times. In addition, the report has to be submitted to the national parliaments of participating Member States which can in turn present reasoned observations. The reports represent a fulfilment of the duties partially requested by the ECB as a guarantee for democracy in the framework of the Monetary Union. These instruments have been adapted, modified or reduced (e.g. reports also submitted to the national parliaments) when applied in the field of supervisory activity. In fact the

[176] On the solution of a federal organization see M.P. Chiti, *Diritto amministrativo europeo*, cit. at 80, 330; S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, cit. at 1, 38, 287.

[177] See S. Antoniazzi, cit. at 1, 241, 288. For details about *accountability* and transparency in EU, see E. Chiti, *L'accountability delle reti di autorità amministrative indipendenti dell'Unione Europea,* Riv. it. dir. pubbl. com. 29 (2012); A. Cygan, *Accountability, Parliamentarism and Trasparency in the EU*, *The Role of National Parliaments* (2013), 34, 67, 185.

[178] See "*Accountability*" in *www.bankingsupervision.europa.eu*.

exercise of *high-technical powers* by independent authorities (especially the ECB) has *de facto* reduced the democratic involvement of parliaments whose activity is mostly fact-finding; although the parliaments do have the right to receive reports and clarifications when required, they do not condition any decision. The democracy gap at EU level and the impoverishment of the role of the national parliaments[179] can be explained as a consequence of the lack of a political Union.

More broadly, due to the EU integration process, there is a progressive empowerment on economic subjects from national organisations towards European bodies. Indeed this has set aside the standard of democratic legitimacy and consequently a number of democratic guarantees have vanished at EU level, increasing the democratic deficit in Europe. Besides it has to be noticed that often decisions are often taken unanimously at intergovernmental level and even if the vote is carried by a majority, the citizens of minority Member States are subject to the decision taken by the other Member States regardless of their interests. After this analysis, we can outline a possible (but complex) solution: the creation of bodies with decision-making powers, effectively supranational and linked to European citizens through a voting system that encourages sharing and awareness.

The supervisory function involves difficult technical judgments based on a variety of monetary, economic and financial factors made by complex procedures adopted by institutions which are not elected nor responsible to the European Parliament; they therefore lack direct democratic legitimacy and they do not apply legal acts which have parliamentary approval (see the legal acts of the ECB or the rules of the EBA). Even where they apply standards developed through EU processes, these typically leave considerable scope for autonomy in how they are applied by the regulatory bodies themselves. Issues of supervision and accountability are thus of great constitutional importance considering their direct effects and consequences on the national orders.

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[179] For Italy see the law passed on 24 December 2012, n. 234 *"Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione Europea"* that involves the Italian Parliament in EU decision-making process. See also A. Cygan, *Accountability, Parliamentarism and Trasparency in the EU*, cit. at 177, 210.

In recent years the improvement of democratic accountability has been an ambitious goal and it has become the leading principle to be applied by European institutions, especially during the crisis due to a greater interference of Europe in national economic and monetary policy. As mentioned already, problems of accountability play a great role in the SSM and the Single Resolution Mechanism[180]. However, the decisions on credit institutions facing difficulties were taken within the Euro Group and so by the governments of the Eurozone which are subject to parliamentary controls. Presently what is desirable is a greater involvement of the European Parliament in the decision-making process, as well as the transposition of the debates of the national parliaments into the European debates because it would strengthen the democratic participation of EU citizens nearer the supranational level[181].

The recent legal instruments adopted are aimed at entrusting *technical and sectorial bodies*[182], provided with independence and technical discretion, in the field of economic, monetary, banking and financial Union. Moreover the focus on Banking Union has helped to examine in depth the relationships between democracy, politics and *technocracy*[183]. This last easily lead the way over the others in the field of EU decision-making processes, due above all to the increase of technical authorities in a number of economic fields.

The SSM and the SRM[184] have created new legal realities and bodies within EU law and so EU integration is bolstered, but

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[180] On *accountability* see C. Bourgault-M. Hauptman, *Single Supervisory Mechanism (SSM), Main Features, Oversight and Accountability*; M. Magnus, *Single Resolution Mechanism (SRM) and Single Resolution Fund (SRF), Main Features, Oversight and Accountability*, in *www.europarl.europa.eu*.

[181] For critical remarks see G. Guarino, *Cittadini europei e crisi dell'euro* (2014).

[182] On the issue of technocracy and the foundation of the power to decide in exceptional situations see G. Cofrancesco, *Fondamenti e prospettive evolutive del potere tecnocratico in Italia*, in G. Cofrancesco, F. Borasi (eds.), *Il potere tecnocratico. Il sistema corporativo in periodo di crisi* (2013), 116.

[183] For the prevalence of technocracy see A. Mozzati, *La strutturale instabilità dei servizi pubblici locali tra ordinamento europeo, spinte tecnocratiche e diritto interno*, in G. Cofrancesco, F. Borasi (eds.), *Il potere tecnocratico*, cit. at 182, 177-178.

[184] On the intricate relationship between the Regulation and Directive on SRM, the complexity of procedures and legal acts see S. Antoniazzi, *L'Unione Bancaria europea: i nuovi compiti della BCE di vigilanza prudenziale degli enti creditizi e il Meccanismo unico di risoluzione delle crisi bancarie*, II, Riv. it. dir. pubbl. com. 739

the key question concerns the *democratic legitimacy* by means of different modes of accountability depending whether the body or persons accounted to can be classified as having a nature that is political, administrative or judicial. Within the EU accountability is often considered as reporting to elected parliaments; indeed, Council Regulation (EU) no. 1024/2013 on SSM requires the ECB to provide information to the EU and national parliaments[185].

The ECB has an exclusive competence for prudential supervisory tasks and the responsibility for these tasks is divided between the ECB and competent national authorities on the basis of the criterion of the significance of the individual credit institutions supervised; the division of tasks implies that the ECB exercises the supervision of significant banks and the national authorities have to consider less significant banks, but the ECB is responsible for the effective and consistent functioning of the SSM and it has specific powers for less significant banks as well, while the national authorities have to notify the ECB of draft material decisions and material supervisory procedures.

As is known, the SSM Regulation provides for a duty of loyal cooperation and information exchange for both the ECB and the national authorities which have to assist the ECB and follow its instructions. This close cooperation between the ECB and the national authorities and the mixed allocation of supervisory powers result in a very complex accountability of a political nature; there is a political accountability aspect in art. 127.6 TFEU too, because it requires unanimity in the Council (i.e. ministerial

(2014); K. Windthorst, *European Stability Mechanism and Banking Union. Principals and Challenges*, Riv. it. dir. pubbl. com. 949 (2014).

[185] Arts. 20-21. For a view in favour of the democratisation of financial market regulation - a topic resisted by many market participants and by some in regulation, yet this is being explored by policymakers in the US and EU, notably in the UK, see N. Dorn, *Policy stances in financial market regulation: Market rapture, club rules or democracy?*, in A. Kern and N. Moloney (eds.), *Law Reform and Financial Markets*, cit. at 33, 35. The author examines two aspects "active democratic oversight of financial market regulation is merited on grounds of principle. Second, accountability to national and regional parliaments would result in regulatory diversity, resulting in more robust market systems at global level. The current de facto "independence" of financial market regulators allows them to network globally yet privately, to negotiate on the basis of market demands (each national regulator championing its home industry) and to converge their rules accordingly – producing common blind spots, systemic vulnerabilities and heightened potential for global crisis".

representatives from Member States) and so the Member States must all agree, expressing a greater democratic consensus, but in conferring direct supervisory powers to the ECB, they have probably chosen a wider reading of the provision[186].

Besides there is a conflictual relationship between the independence of the ECB and the necessary accountability; the Basel Committee on Banking Supervision emphasises the importance of independence and accountability for an effective banking supervision[187], and these two characters are present in SSM Regulation[188]. In fact the ECB should exercise its powers in full independence, in particular free from undue political influence and from industry interference[189], but the ECB is accountable for the supervisory tasks to the European Parliament and the Council as institutions which are democratically legitimised representing the EU citizens and Member States and confirming the existing independence of the ECB; furthermore national parliaments are involved. These contextual aspects create a *tension* between independence and political accountability, but these two elements may be interpreted in a view of an inevitable trade-off or they could be also considered complementary in a complex balance[190]; a good solution would be one whereby the

[186] See G. Ter Kuile, L. Wissink, W. Bovenschen, *Tailor-Made Accountability within the Single Supervisory Mechanism*, Common Market Law Review 162 (2015).

[187] See Basel Committee on banking supervision, *Core principles on effective banking supervision*, September 2012, in *www.bis.org/publ/bcbs230.pdf*.

[188] Arts. 19-21, 55 and 85.

[189] Art. 75.

[190] See for a debate on both solutions: P. Iglesias Rodríguez, *The Accountability of Financial Regulators. A European and International Perspective* (2014), 20. For the first view: F. Ambtenbrink, R.M. Lastra, *Securing Democratic Accountability of Financial Regulatory Agencies – A Theoretical Framework*, in R. V. De Mulder (ed), *Mitigating risk in the context of safety and security. How relevant is a rational approach?* (2008), 121. The authors analyse central issues saying that "it is true that, as has been observed in the context of central banks, that the relationship between independence and accountability is much more complex than a simple trade-off between the two. Indeed, they may actually complement each other. However, the suggestion of 'designing accountability arrangements that will be supportive of agency independence' seems a bridge to far as it may stand in the way of the establishment of a legal framework that will serve the true rationale for accountability mechanisms. Despite the partial function of accountability as guarantor of the independent status of an agency, it cannot be ignored that institutional choices in favour of accountability affect the position of the agency

supervisory authority is controlled, but the principal (or political) body is not able to exercise undue influence over the supervisor[191]. The rule of accountability may inevitably influence the agent's activity and choices; so independence and accountability appear as "communicating vessels" and independence does not rule out accountability, but it does imply a delicate balance[192].

The focus on the supervisory activity of the ECB and the SRM leads to some final considerations about the objectives set out by economics and monetary policy[193]. Important results have indeed been achieved in the field of *administrative integration*, particularly the introduction of a number of objectives to improve national economies[194] using structural reforms pushed by the ECB and the Union and they create a financial market which is supervised closely by Banking Union. The progressive administrative integration involves banking policy by using uniform rules (so as to prevent discretion on the regulation power – regulatory arbitrage - and the study of weak points in legislation) applicable to national law within the Eurozone and eventually to Member State that are non-Euro but adhere to the SSM and SRM.

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vis-à-vis parliament and the executive government and thus, ultimately its independent position. Ultimately there is a trade-off between independence and accountability. Finding the right balance between these two key institutional features becomes a balancing act". For the second view see C. Zilioli, *Accountability and independence: Irreconcilable values or complementary instruments for democracy? The specific case of the European Central Bank*, in G. Vandersanden, D'A. De Walsche (eds.), *Mélanges en hommage à Jean-Victor Louis*, Vol. II (2003), 401-402.

[191] See P. Iglesias Rodríguez, *The Accountability of Financial Regulators*, cit. at 190, 20-22.

[192] See G. Ter Kuile, L. Wissink, W. Bovenschen, *Tailor-Made Accountability within the Single Supervisory Mechanism*, cit. at 186, 166.

[193] On the evolution of monetary policy see M. Draghi, *Euro area economic outlook, the ECB's monetary policy and current policy challenges*, Statement prepared for the twenty-ninth meeting of the International Monetary and Financial Committee, Washington, D.C., 10 April 2014, in *www.ecb.europa.eu*.

[194] On economic convergence of the States of EU before the crisis and current sustainability see P. Praet (Excutive Committee of the ECB), *The financial cycle and real convergence in the euro area*, Annual Hyman P. Minsky Conference on the State of the US and World Economies, Washington D.C., 10 April 2014, in *www.ecb.europa.eu*.

Administrative integration[195] has developed as a consequence of new rules on supervisory activity and SRM and the *mixed administration* represents a complication for an adequate solution of accountability; in fact new bodies have been introduced, e.g. the Board, the agencies, cooperation arrangements, new articulated administrative proceedings and legal instruments, subject to the review of the CJEU and sometimes of the national courts. The legal instruments and in particular those instruments falling within the administrative sphere and, as is well-known, the new legal instruments are closely linked to the financial and economic crisis; indeed it is not always simply to use the *community method* (partially already superseded by the Lisbon Treaty) especially when solutions are needed in emergency situations. Besides the ECB and national authorities have many responsibilities within the SSM and the institution and authorities should be held accountable at both a European and national level and on some occasions simultaneously at both levels with reciprocal obligations of transparency for supervisory information; thus accountability seems possible only by means of a mix of instruments, considering

[195] See F. Giglioni, *European administrative integration through differentiation. Methods of European coordination*, Riv. it. dir. pubbl. com. 311 (2014); in general, see A. von Bogdandy, *Le sfide della scienza giuridica nello spazio giuridico europeo*, *Il Diritto dell'Unione Europea* (2012), 225. For a contribution to the discussion on the recent concept of a systemic deficiency in the rule of law in the EU and the relationship with the economic and financial crisis, see ID, *Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done*, Com. Mkt. L. Rev. 51 ss. (2014). In general, about the rule of law see T. Bingham, *The Rule of Law* (2011); recently J. Jowell, *The Rule of Law and Administrative Justice*, IJPL 94 (2015). In relation to the economic crisis, see a very interesting study: S.A. Ramirez, *The Subprime Crisis and the Case for an Economic Rule of Law* (2013), 186, especially 189-191; the author explains that "the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurist are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized". So "a durable economic rule of law, consistent with both notions of human right as well as macroeconomic growth, seems within the reach of the law" and "A more robust economic rule of law can prevent such crises by limiting the ability of governing elites to subvert legal and regulatory infrastructure, exploit the disempowered, and neglect market development through the maintenance of a broad middle class".

the complexities inherent in supervision and the required independence.

There are many difficulties for accountability and the enforcement of rules in this complex framework; there is a need to highlight the large number of legal acts in the field of banking and finance, that is to say EU regulations and directives, legal acts of the ECB, technical rules of the EBA (also recalled by delegate instruments of the Commission[196] under arts. 290-291 TFEU). This complex system is made up of a large number of legal instruments to be applied depending on each case, though. The complexity involves the banking supervision and the SRM which are both prerequisites of the Banking Union and only the implementation phase will highlight appropriate corrections, mainly in simplifying procedures in order to speed up the adoption of measures and legal acts. Besides the organisation and tasks seem to be overly complicated and administrative accountability sometimes spills over into political accountability in terms of the relationship between the ECB, national authorities and the Governing Council[197].

As mentioned above, evidently the complex scheme is made up of a large number of instruments and authorities, e.g. in the proceedings for banking authorisation. The implementation by national law will be lengthy and matters of interpretation will arise, especially in terms of competent national authorities which are now operative. The same complexity results from the SRM, because of the Regulation, the Directive, the legal acts and the legislation recalled (the regulation and the directive on prudential supervision and the patrimonial conditions of credit institutions). Moreover the Single Resolution Board is bound to technical rules elaborated by the EBA and adopted by the Commission and it is subject to the guidelines, recommendations and decisions of the same body.

The ECB finds itself in a complex framework of accountability relationships; in accounting to politicians, the ECB has to report at both EU and national levels and deal with an intricate system of governance; it must maintain dialogue with representatives of the national supervisors in the Supervisory

[196] Arts. 290-291 TFEU.

[197] E. g. on a draft decision see art. 26.8 of SSM Regulation.

Board and the governors of the central banks in the Governing Council.

In conclusion, only some consequences can be predicted from this scenario and the difficulties in implementation by Member States would depend both on SSM and SRM. Evidently, further empowerment of the ECB by the national central banks and competent national authorities and the identification of the resolution authorities will modify the interpretation criteria of the legal instruments, the role of EU institutions and bodies (including new bodies, with specific competences and independence) and their relationships, assuming there will be a number of contradictions, e.g. the excessive fragmentation of competences, the high number of legal instruments and complex administrative composite procedures and the need for simplification so as to guarantee efficiency in emergency cases and effective measures to be adopted by the ECB and the competent national authorities.

ADMINISTRATIVE REVIEW MECHANISMS WITHIN THE ECB

*Giuseppe Sciascia**

Abstract

The single supervisory mechanism and the single resolution mechanism are the two main pillars of the European banking union. These complex frameworks encompass innovative quasi-judicial systems which allow undertakings and national authorities to contend certain decisions taken respectively by the ECB and the SRB, through two technical independent bodies, namely an Administrative Board of Review (ABoR) and an Appeal Panel. Through a comparison of the founding provisions of these two panels with other similar experiences in highly regulated technical sectors, it is argued that the current architecture of non-judicial remedies available in the banking union is not set up as a single unitary model, but as an hybrid one with distinctive features adapted to the peculiarities of supervisory and recovery functions. It is questionable whether such characteristic may impair the position of private individuals and the ability to cope with the complex matters concerned in an effective way.

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1. Introduction

The single supervisory mechanism (SSM)[1] and the single

*Bank of Italy, Consumer Protection and Anti-Money Laundering Directorate. The opinions, findings, conclusions or recommendations expressed in the paper are those of the authors only and do not involve the responsibility of the Bank of Italy.

[1] For a preliminary analysis of the SSM, see S. Antoniazzi, *L'Unione bancaria*

resolution mechanism (SRM) are the two main pillars of the European banking union. These complex frameworks ideally continue the political and legal track prompted in the EU by the global financial crisis, which eventually resulted in the creation of the three European Supervisory Authorities (ESAs) and the extension of powers of the European Central Bank (ECB)[2]. Despite being founded on different legal bases and decisional paths, the SSM and the SRM intend to pursue certain common objectives: indeed, both aim to safeguard financial stability within the Union in general and the Eurozone in particular. From this main objective, further sub-objectives can be identified as preeminent, such as the enhancement of safety and soundness of credit institutions, the protection of investors and depositors, the preservation of public trust in the financial system, and the prevention of contagion and domino effects in the light of a smooth functioning of the single internal market.

The SSM and the SRM encompass all the financial "entities" of the Eurozone: these will be supervised and resolved according to flexibly distributed functions and tasks, in an institutional realm in which intersections, exceptions and risks of overlapping between European and national institutions are as much as distinctive rules and precise dividing lines. The two mechanisms provide for the use of heterogeneous powers and instruments assigned to public actors which strongly differ for their respective tradition, responsibility and resources.

The high degree of substantial and procedural sophistication of the two pillars may have overshadowed certain of their most interesting and innovative characteristics which directly touch upon the protection of individuals and the possibility to contend the decisions taken by the authorities:

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europea: i nuovi compiti della BCE di vigilanza prudenziale degli enti creditizi e il meccanismo unico di risoluzione delle crisi bancarie, Riv. it. dir. pubbl. comun., (2014) 359, and L. Donato, R. Grasso, *Gli strumenti della nuova vigilanza bancaria europea. Oltre il testo unico bancario, verso il "single supervisory mechanism"*, in Banca Impr. Soc., (2014) 3. For a critical approach to certain problems posed by the SSM under the perspective of European administrative law, see E. Chiti, *Il meccanismo di vigilanza unico: un passo avanti e tre problemi*, in Giorn. dir. amm. 1025, (2013).

[2] See M. Mancini, *Dalla vigilanza nazionale armonizzata alla Banking Union*, in Banca d'Italia - 73, Quaderni di Ricerca Giuridica della Consulenza Legale, September 9 (2013).

reference is made to the quasi-judicial systems of review of certain supervisory and recovery decisions which are respectively entrusted in an *Administrative Board of Review* (ABoR) within the SSM, and in an *Appeal Panel* within the SRM.

This paper analyzes such internal review mechanisms, so as to verify whether these mirror similar tools adopted in other fields of European law; the aim of this exercise is to gather a preliminary understanding of the possible extent of intervention by such newly established review bodies. The contribution is structured as follows: the first two paragraphs describe the functioning and powers of the ABoR and the Appeal Panel; the third paragraph briefly describes the tasks and powers of other similar quasi-judicial review bodies established in the fields of intellectual property, functioning of the internal market and financial regulation in the EU, while the last paragraph will briefly discuss similarities and divergences. It is argued that the appeal bodies established within the SSM and the SRM have not been designed according to a unitary model: indeed, they represent a distinctive framework for technical review of decisions which is adapted to the functions, goals and peculiarities of the systems they belong to.

2. The review of supervisory decisions within the SSM

Under the SSM, both the ECB and national supervisory authorities (NSAs) are entitled to adopt certain decisions towards regulated entities, in accordance with a set of criteria laid down in Regulation No. 1024/2013 (the SSM Regulation). In this respect, Regulation No. 468/2014 on the functioning of the SSM explicitly defines the «ECB supervisory decision» as a legal act adopted by the ECB in the exercise of the tasks and powers conferred on it by the SSM Regulation, which takes the form of an ECB decision, is addressed to one or more supervised entities or supervised groups or one or more other persons and is not a legal act of general application[3].

[3] Article 2(1), line 26), of the Regulation on the functioning of the SSM. No definition of «NSA's supervisory decision» is provided, although this could be implicitly understood as any decision taken by the competent NSA in the exercise of the residual supervisory powers conferred by the SSM Regulation and the relevant national law, and according to the procedures laid down by

Any natural or legal person may request the ABoR to review an ECB supervisory decision adopted under Regulation 1024/2013 which is addressed, or is of a direct and individual concern, to that person. In particular, the ABoR is entitled to assess the procedural and substantive conformity with the SSM Regulation of the decisions taken by the ECB, according to a procedure laid down in article 24 of the SSM Regulation itself.

The ECB supervisory decisions which may be subject to such internal administrative review can be categorized in two different classes. The first category comprehends the decisions concerning the establishment of subsidiaries and the exercise of freedom of establishment by credit institutions which are registered in any EU Member State not participating to the banking union; this category also includes the decisions of the ECB which apply the European and national provisions on prudential requirements, including organizational arrangements, own funds and - most remarkably, for the scope of this review - early intervention and resolution planning. The second category includes the decisions which approve or do not object to draft supervisory decisions by NSAs submitted to the ECB: reference is made to the so called *common procedures* which are regulated under Part V of Regulation No. 468/2014, and which extend beyond the ordinary scope of supervision on significant entities.

According to the wording of article 24(1) of the SSM Regulation, the ABoR is established by the ECB to carry out an *internal administrative review* of the decisions taken by the ECB itself in the exercise of powers conferred on it by the SSM Regulation. Therefore, the ABoR is intended to be an internal body of the ECB: it has been established in April 2014 with decision ECB/2014/16, which also contains certain important provisions on its scope of review and functioning.

The legal framework provided equips the ABoR with an extent of operational powers and arrangements aimed at preserving its independence, and attempting to ensure a sufficient level of resources and expertise to assess the effective exercise of powers by the ECB. In particular, it is established that the members of the ABoR shall be individuals of high repute from Member States, with a proven record of relevant knowledge and

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the latter.

professional experience to a sufficiently high level in the fields of banking and other financial services; current staff of the ECB, of NSAs or any other institution involved in the carrying out of the tasks conferred on the ECB by the SSM Regulation, is not allowed to be appointed as a member of the ABoR. Furthermore, members of the board shall not be bound by any instructions; they are appointed by the ECB for a five-year term following a public call for expressions of interest published in the Official Journal of the EU.

Article 24(1) of the SSM Regulation describes the review procedure before the ABoR. This is triggered by a written request by the natural or legal person concerned, which must be submitted within one month of the date of notification of the decision to the appellant, or, in the absence thereof, of the day on which it came to the knowledge of the latter. The request is accompanied by a statement of grounds, and it is subject to a preliminary ruling on its admissibility[4].

The submission of the instance for review does not suspend the contended decision: nevertheless, the Governing Council of the ECB, upon a proposal of the ABoR, has the power to order the suspension upon request of the appellant and after having heard the opinion of the Supervisory Board. Decision 2014/16 specifies that the suspension can be granted only when the Governing Council is satisfied that the request for review is admissible and not obviously unfounded (*fumus boni iuris*) and the immediate application of the contested decision may cause irreparable damage (*periculum in mora*). It appears that this assessment will be conducted by the ABoR in submitting is proposal for suspension to the Governing Council: nevertheless, it is interesting to note that the suspensory power is granted to a body which *prima facie* did not exercise its power to object as provided under article 26(8) of the SSM Regulation, thus acknowledging to a later contended decision. In the light of the short timing established to submit a request for review before the ABoR, the Governing Council would be called to reexamine the very same decision at the latest by 35-40 days after its adoption (*rectius*: missed objection to such decision).

[4] In particular, the ABoR must establish whether and to what extent the request for review is admissible; any evaluation must be reported in the opinion submitted to the supervisory board.

The ABoR shall adopt an opinion on the requested review within a time period appropriate to its urgency and, in any case, no later than two months from the date of receipt of the notice of review. Following its analysis, the ABoR drafts an opinion which is approved by a simple majority of its members and which is not binding for the decisional bodies of the ECB. In particular, the ABoR may propose to either abrogate the initial decision, replace it with a decision of identical content or with an amended one; in the latter case, the ABoR shall also indicate the amendments to be included.

Upon receipt of the ABoR's opinion, the Supervisory Board shall propose a new draft decision to the Governing Council by 10 or 20 days, depending on whether the new draft is equivalent to the contended decision or it implies the abrogation or the reform of the latter. In submitting such new draft decision, the Supervisory Board may also consider elements other than the grounds indicated by the applicant in its notice of review, and which were relied upon by the ABoR in submitting its opinion. Finally, the new draft decision is deemed adopted unless the Governing Council objects within a maximum period of ten working days[5].

3. The review of decisions within the SRM framework

The SRM Regulation provides for an application of the tools and recovery and resolution powers laid down in the BRRD to the

[5] Article 31(5) of Regulation No. 468/2014 establishes that when an urgent supervisory decision is adopted, a party must be given the opportunity to comment in writing on the facts, objections and legal grounds relevant to such decision without undue delay *after* its adoption. These comments in writing must be submitted within a time limit of two weeks from receipt of the ECB supervisory decision. On application of the party, the ECB may extend the time limit, subject to the general limit of six months. The ECB will review the decision in the light of the party's comments and may either confirm it, revoke it, amend it or revoke it and replace it with a new supervisory decision. This review power resembles a *tertium genus* in respect of the reexamination power of the ABoR and the right to be heard provided in the ordinary adoption of supervisory decisions. The decisions taken following this procedure may also be appealed before the ABoR, as no provision explicitly excludes them from the scope of review of the appeal panel.

peculiarities and features of the banking union[6]. The final version of the SRM Regulation is the pragmatic result of a complex compromise, in which legal and political constraints came to a partial solution in order to ensure the fullest respect of the limits set by Article 114 TFUE as legal ground and a political oversight at the highest level for resolution actions under specific critical circumstances. The SRM is built around a Single Resolution Board (SRB) - some sort of a ECB's "little brother" - and the national resolution authorities (NRAs) established according to the relevant provisions of the BRRD; in addition, certain responsibilities are attributed to the Commission and the Council in the specific context of recovery procedures, with particular regard to those cases in which relevant public interests are at stake[7].

The SRM Regulation encompasses certain provisions on judicial[8] and non-judicial remedies which can be activated to

[6] Article 7(3), paragraph four, last sentence, of the SRM Regulation. A relevant number of provisions of the SRM Regulation reproduces the BRRD: according to Wymeersh, e Zavvos - Kaltsouni, this technique is used to permit to a single resolution authority to use the regulation as the legal basis for its actions and for the use of the powers conferred, thus avoiding any recourse to national law implementing the BRRD. Wymeersh observes that, within the SRM Regulation, the *Single Resolution Board* will delegate the national resolution authorities to apply the resolution measures addressed to single entities and groups which are deemed to be significant; national resolution authorities will apply the internal provisions implementing the BRRD, although the provisions of the SRM Regulation would be intended to prevail in case of any inconsistency, according to the principle of *primauté*: see, E. Wymeersh, *Banking Union; Aspects of the Single Supervisory Mechanism and the Single Resolution Mechanism compared*, in 290 ECGI Law Working Paper, 3-5, (2015) See also, G.S. Zavvos, S. Kaltsouni, *The single resolution mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing*, research paper available at http://www.istein.org/, also published in *Research Handbook on Crisis Management in the Banking Sector* (2015), 12.

[7] On the role of the Council and the Commission, and the importance of financial stability in the balance of recovery powers see G.S. Zavvos - S. Kaltsouni, *cit.*, at 30.

[8] With regard to jurisdictional remedies, the SRM Regulation contains provisions referred both to EU and national remedies. With respect to remedies available in the EU, Article 86 establishes that Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the ECJ against decisions of the Board, in accordance with Article 263 TFEU. In the event that the SRB has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the ECJ pursuant

contend a limited number of decisions taken for the recovery of entities falling in the realm of the banking union: resolution decisions are strictly out of the scope of such review. Quasi-judicial remedies are of particular interest, as they are introduced and regulated directly by the SRM Regulation itself; in particular, the later provides for the establishment of a review body internal to the SRB, *i.e.* the Appeal Panel. Upon request by any natural or legal person, including NRAs, this Panel will be entitled to review a closed number of decisions taken by the SRB as far as addressed to that person or of direct and individual concern to the latter.

Similarly to the founding rules of the ABoR described above, the SRM Regulation establishes certain minimum requirements and independence safeguards for the Appeal Panel and its members. First of all, it is stated that the Appeal Panel must have sufficient resources and expertise to provide expert legal advice on the legality of the exercise of powers conferred to the SRB: note that the wording of the clause is slightly different from the one used for the ABoR in the SSM Regulation, as the latter refers to the capacity of the ABoR to assess "*the exercise of the powers of the ECB*" under Regulation No. 1024/2013.

Secondly, the SRM Regulation establishes that members of the Appeal Panel and two alternates will be appointed by the SRB for a term of five years, which may be extended once, following a public call for expressions of interest published in the Official Journal of the EU; similarly to their colleagues of the ABoR, the members of the Panel will not be bound by any instructions. The five members will be selected according to criteria which resemble those applied to the ABoR: indeed, these will be individuals with high repute from the Member States and with a proven record of relevant knowledge and professional experience, including *resolution* experience, to a sufficiently high level in the fields of banking or other financial services; current staff of the Board, as well as current staff of NRAs or other national or Union institutions involved in performing the tasks conferred on the SRB

to Article 265 TFEU. The SRB will have to take the necessary measures to comply with the judgment of the ECJ. With regard to national judicial remedies, the SRM Regulation establishes that, according to national laws, the courts of Member States will have to *i)* verify the legality of any decisions adopted by NRAs pursuant to a provision of the SRM Regulation, and *ii)* establish the liability in tort of NRAs.

by the SRM Regulation will be automatically excluded from the selection.

Article 85(3) of the SRM Regulation enlists the exhaustive categories of decisions adopted by the SRB which can be subject to the review of the Appeal Panel. First of all, the Panel will review any decisions which declare the inadequacy of measures to address or remove substantive impediments to resolvability of an institution, and instructing the NRAs to require the institution, group, parent undertaking or subsidiary concerned to take the measures listed in Article 10(11) of the SRM Regulation. Secondly, the Appeal Panel can be asked to review those decisions which permit or deny the possibility to apply simplified obligations in relation to the drafting of resolution plans or wave the obligation of drafting such plans, pursuant to Article 11 of the SRM Regulation. Thirdly, it will review those decisions which establish the minimum requirements for own funds and eligible liabilities which significant entities and groups are obliged to fulfill at any time, according to Article 12(1) of the SRM Regulation, as well as those decisions which apply penalties and fines according to articles 38-41 of the SRM Regulation. Finally, the Appeal Panel will be in charge of reviewing certain decisions of the SRB which appear to be of residual relevance, including those concerning the determination of fees due by the entities to contribute to the SRB's administrative expenses pursuant to Article 65(3) of the SRM Regulation, the deferral of extraordinary *ex post* contributions due under Article 71, and the decisions on the access to documents held by the SRB, pursuant to Article 90(3) of the SRM Regulation and Regulation (EC) No. 1049/2001[9].

The concerned natural or legal person must file the appeal in writing together with a statement of grounds within six weeks of the date of notification of the decision, or, in the absence of such notification, of the date on which the decision came to its knowledge. The Appeal Panel will have to decide by simple majority on the referred matter at the latest within one month after lodging of the appeal. Decisions taken by the Appeal Panel are binding for the SRB, and they can be appealed before the

[9] Regulation (EC) No. 1049/2001 of the European Parliament and the Council, of May 30, 2001, regarding public access to European Parliament, Council and Commission documents.

European Court of Justice (ECJ) under Article 263 TFUE: such rulings may either confirm the decision taken by the SRB or remit the case to the latter. Pursuant to Article 85(8), the SRB shall adopt an amended decision following a referral by the Appeal Panel: even though this provision does not clarify whether the Appeal Panel should propose amendments to the decision, it can be argued that these will be derived from the reasoning which must be mandatory provided in its statement by the Appeal Panel itself, pursuant to Article 85(9) of the SRM Regulation.

According to Article 85(6), the submission of an appeal does not automatically suspend the decision contended; nevertheless, the Appeal Panel may grant such suspensory effect if it is satisfied that circumstances so require. The phrasing of such provision is rather vague and ambiguous, as it is not clear whether the circumstances it refers encompass only the risks which may arise from the straight application of the decision before the Appeal Panel completes its review, or a preliminary assessment of the grounds of the review.

4. Some earlier examples …

The European legal framework provides various examples of appeal bodies which have similar characteristics to the panels described above.

When considering the financial sector, the closest example is represented by the *Joint Board of Appeal* of the three ESAs, which is established pursuant to articles 58 to 60 of their respective founding regulations. This body is composed of six members appointed by the three authorities; they should have professional and expertise requirements which are rather similar to those imposed to the members of the two review bodies of the SSM and the SRM. The Joint Board must take its decisions by simple majority, although at least one member of such majority must had been appointed by the ESA whose decision is subject to review. Since its institution around five years ago, the Joint Board issued a total of four decisions to date. In its rulings, the Joint Board provided very few details and limited guidance on the role which it is called to play in the architecture of European supervision, and on its nature and functions; in addition, the ECJ still did not have the opportunity to pronounce on such important issues, as no case

examined by the Joint Board was submitted to the Court. Therefore, it is still unclear whether the Joint Board can exercise a full extent review on the matters referred to its attention, or it only has a limited role which involves a mere legality check[10].

In *Global Private Rating Company "Standard Rating" Ltd v. ESMA* (11), the Joint Board adopted a pragmatic approach in respect of the type of question concerned, *i.e.*, the denial of registration of a credit rating agency by the ESMA. Before analyzing the case submitted to its attention, the Joint Board clarified that it would have verified the respect of both substantial and procedural provisions which regulates the credit rating market in Europe (12). Nevertheless, it should be noted that such a far-reaching scope of review could be justified in the light of the peculiarities of credit rating agencies' regulation in Europe, *i.e.*, the concentration of the procedure for their recognition and registration in the hands of the ESMA, according to a model which anticipated the developments of the banking union[13].

In *SV Capital OU v. EBA*, the Joint Board affirmed that it was not in the position to call in question the discretional power of the EBA to prompt an investigative action pursuant to Article 17 of the EBA Regulation, on the ground that such profile had not been raised by the applicant[14]. It remains unclear whether such statement implies that, in the future, the Joint Board may intervene to assess the correct exercise of discretionary power by

[10] In the literature available, van Cleynenbreugel, underlined that Article 60 does not clarify "*whether the Board merely conducts a legality review or whether it enjoys unlimited jurisdiction*". See, P. van Cleynenbreugel, *Market Supervision in the European Union: Integrated Administration in Constitutional Context*, 157 (2014).
[11] BoA 2013-014.
[12] See paragraph 44 of the decision where it is stated as follows: "*The Board notes that under Article 18(1) of CRAR, where the respondent refuses to register the credit rating agency, it shall provide full reasons for its decision. Having regard to European jurisprudence, the Board considers the approach on the appeal should be as follows. With respect to the grounds raised by the appellant, the Board has to consider whether the respondent correctly applied the applicable Regulations and the other applicable instruments, whether the respondent was entitled to reach the refusal decisions, or was wrong to refuse registration, and whether the decision was vitiated by procedural irregularity or unfairness*".
[13] For such a perspective see the contribution by M. Perassi, *Verso una vigilanza europea. La supervisione sulle agenzie di rating*, in *Analisi Giuridica dell'Economia*, 407 (2012).
[14] BoA 2014-C1-02.

any of the three ESAs, thus analyzing it according to limits and criteria to be defined[15].

The European legal order offers other examples of quasi-judicial review mechanisms, which do not pertain to the financial sector; some examples, such as the twenty-eight *Technical boards of appeal*, the *Legal Board of Appeal*, the *Enlarged Board of Appeal* and the *Disciplinary Board of Appeal* of the *European Patent Office* (EPO) are actually outside the Union, having been established by international treaties signed by a large number of European countries. Certain EU review bodies were established in the context of the creation of European agencies which perform certain specific functions in a number of industrial sectors: these include the *Board of Appeal of the European Chemical Agency* (16), and the *Office for Harmonization in the Internal Market (OHIM) Boards of Appeal*.

In recent years, both the ECJ and the appeal bodies mentioned above had the opportunity to clarify their legal status and the limits of their scope of review, thus outlining a European model of quasi-judicial review. According to such model defined in the European jurisprudence, these bodies tend to be attracted by the functions and structures of the agencies and administrations they relate with: in other words, they do not have the characteristics of independent "judges", in so that they are branches of the administration called to second-guess the technical aspects of the decisions adopted "at first instance".

In *Koninklijke Philips Electronics N.V. v. EPO* (T-276/99), one of the *Technical Boards of Appeal* of the EPO affirmed that it is neither a tribunal not a judicial body, in so that it is not entitled to submit questions for a preliminary ruling under article 267 TFEU.

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[15] According to some commentators, the doubts on the role of the Joint Board and the extension of its review power should be resolved in the sense that such scrutiny should be extensive and intrude the merit of decisions taken by the ESAs. This opinion is argued on the basis that the decisions of the Joint Board can be submitted for review before the ECJ. See, E. Wymeersch, *The European Financial Supervisory Authorities or ESAs*, E. Wymeersch, Klaus J. Hopt, in G. Ferrarini (a cura di), *Financial Regulation and Supervision: a post-crisis analysis*, (2012).

[16] On the role of the *European Chemical Agency* and the remedies available in the field of the regulation of chemical industries and products see M. Bronckers, Y. van Gerven, *Legal Remedies Under the EC's New Chemical Legislation REACH: Testing a New Model of European Governance*, in Com. Mkt. L. Rev., 1823 (2009).

Nevertheless, in *ETA S.A. Fabriques d'Ebauches v. Piranha Marketing GmbH and Junghans Uhren GmbH* (G 0001/97), the *Enlarged Board of Appeal* stated that it can enjoy the *status* of a judicial body, as it presents characteristics which are close to those of courts; in particular, such status should be recognized as its members *i)* are not bound by instructions by other subjects, entities and institutions, *ii)* are obliged to solely respect the provisions of the European Patent Convention, *iii)* are appointed for a fixed period of time and can be removed only for cause, *iv)* are granted by provisions which ensure their impartiality, and *v)* take motivated decisions according to rules of procedure which are established by the panel itself.

In the EU, the ECJ confronted with similar issues in a number of cases. In *Procter & Gamble v OHIM*[17], the Court affirmed that the Board of Appeal of the OHMI cannot be considered as a court or tribunal, but as an internal body of the OHMI itself. In this famous ruling, the ECJ observed that the review bodies of the OHMI are composed of members whose independence is ensured by the appointment criteria and procedure, the length of their mandate and the concrete modalities according to which they exercise their functions; nevertheless, these panels are part of the administration which is in charge for the registration of Community trademarks. According to the Court, which also recalled a previous ruling by the Court of First Instance in *Procter & Gamble v OHIM (Baby-Dry)* (T-163/98) - a *functional continuity* exists among the OHUM and its internal appeal bodies, as the review boards enjoy the same powers in determining an appeal as the examiner: in this respect, the Court noted that while the Boards of Appeal enjoy a wide degree of independence in carrying out their duties, they "*constitute a department of the Office responsible for controlling, under the conditions and within the limits laid down in Regulation No 40/94, the activities of the other departments of the administration to which they belong*". Therefore, a request for review before the Boards is intended as part of the administrative registration procedure.

The principle of the "continuity in terms of functions" expressed by the ECJ dictates specific consequences with respect of the burden and content of proofs and the safeguards for private

[17] T-63/01.

individuals addressing the review bodies: for example, in *Henkel/UAMI – LHS (UK) (Kleencare)*[18], the Court of First Instance affirmed that "*the extent of the examination which the Board of Appeal must conduct is not, in principle, determined by the grounds relied on by the party who has brought the appeal*", in so that, "*even if the party who has brought the appeal has not raised a specific ground of appeal, the Board of Appeal is none the less bound to examine whether or not, in the light of all the relevant matters of fact and of law, a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling*". Accordingly, in *Kaul GmbH v OHIM*, the ECJ reinstated that the continuity in terms of functions does not mean that "*a party which, before the department hearing the application at first instance, did not produce certain matters of fact or of law within the time-limits laid down before that department would not be entitled, under Article 74(2) of Regulation No 40/94, to rely on those matters before the Board of Appeal*", as such party "*is entitled to rely on those matters before the Board of Appeal, subject to compliance with Article 74(2) of that regulation before the Board*"[19].

The principle developed by the Court is intended to apply also to the review conducted by the review body of the *European Chemicals Agency* (ECHA). In *N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ Borssele The Netherlands v ECHA*, the ECJ recalled the statement expressed in the *Baby-Dry* case. In this regard, the Court considered that, according to the very same wording of the founding provisions of the two review bodies, the doctrine of the "continuity in terms of functions" should also be referred to the board of the ECHA, with all the descending corollaries in terms of discretion, decisional power and use of evidences and grounds.

5. … and a new banking union problematic model?

The identification of the effective boundaries of the power of intervention which should be attributed to the ABoR and the Appeal Panel is problematic. Certain peculiarities of their respective legal frameworks suggest that the doctrine of the "continuity in terms of functions" developed throughout years by

[18] T-308/01.

[19] ECJ, *Kaul GmbH v Office for the Harmonization of the Internal Market*, C-29/05, paragraph 29.

the jurisprudence may not appropriately fit in the cases at stake. Therefore, it is important to verify whether the European legislator opted for implementing a model which departs from the traditional review bodies with technical expertise, adapting the former to the distinctive nature of the matters concerned and the sensitivity of the issues at stake. Some preliminary remarks are identified hereafter.

The first interesting profile concerns the positioning of the provisions which establish the two review bodies in the context of the SSM and the SRM regulations. Indeed, it must be noted that while Article 25 on the ABoR is inserted in Part IV of Regulation No. 1024/2013, which is dedicated to the organizational principles of the SSM, article 85 on the Appeal Panel is in Title VI of the SRM Regulation, which contains the "Other Provisions", and shortly before the provisions on the recourse to the ECJ and the contractual responsibility and liability in tort of the SRB. The different placing of the two provisions might suggest that these bodies would play a different role in their respective framework: in particular, the first one would suggest that the ABoR is intended as a body assimilated in the structure of the ECB, and integrated in the system of principles and guarantees which safeguard the adoption of supervisory decisions in compliance with the rule of law; the second one may suggest that the Appeal Panel has a more independent attitude, allocated outside the administrative structure of the SRB and equipped with powers and independence benefits which would approximate it to an impartial judicial body.

The second element to be considered concerns the procedure for the appointment and renewal of the members of the ABoR and the Appeal Panel, provided that this aspect has been frequently stressed by the ECJ in its jurisprudence on review bodies. The members of the ABoR and of the Appeal Panel are respectively appointed by the ECB and the SRB, following a public procedure based on a public call for expressions of interest and according to professional and expertise requirements which mirror the prerequisites imposed for their colleagues in other appeal bodies. The professional skills required, as well as the absence of any involvement with the supervisory and resolution authorities both at national and European level, certainly represent a guarantee of independence and autonomy of the

members as individuals and the body as a whole; these criteria support the capacity of the review bodies to withstand external pressures and to cope with the issues submitted on the basis of adequate expertise and experience, similarly to the other panels described above. Remarkably, the appointment and renewal procedures by the ECB and the SRB emulate the provisions adopted for other review bodies, despite potentially being able to reduce the effective margins for independence due to the direct participation and power of choice by the controlled institutions.

A third element to be taken into account concerns the powers, procedure and means to be used for the review of the decisions according to the requests of individuals. Similarly to the *Joint Board of Appeal* of the three ESAs, the model of the panels considered herein still needs to be defined, although certain hints arise through the compared analysis of the respective relevant provisions.

Firstly, the internal procedures and powers are partially heteronomous and partially autonomous: in particular, while the rules on the functioning of the ABoR are established by a decision of the ECB, the Appeal Panel adopts and publishes its own internal rules, formally without the assistance of the SRB[20]. Nevertheless, in this respect, a discrepancy emerges when analyzing the founding provisions of the two bodies: indeed, while in the context of the SSM the power conferred to the ECB to establish the ABoR descends both from the general power of the central bank to set its internal rules and from the specific power to establish the ABoR's internal rules according to the SSM Regulation, in the SRM Regulation it is not clear what would be the scope of the provision of article 85 which empowers the SRB to establish the Appeal Panel. Article 50(1)p) of the SRM Regulation attributes to the plenary session the power to take any decision on the establishment and reform of the internal bodies of the SRB, as appropriate: it appears questionable whether this reference could be extended to the establishment of the Appeal Panel, and whether the SRB would have any power to modify the characteristics and rules of functioning of such panel provided

[20] The internal rules and procedures can be retrieved at the following address:
http://srb.europa.eu/sites/srbsite/files/2016rules_of_procedure_of_srb_appealpanel.pdf.

that the latter establishes its own internal rules; equally, the acknowledgment of such an extended autonomy may hinder the application of the principles of the "continuity in terms of functions" elaborated in the jurisprudence of the ECJ.

Secondly, it should be underlined the uncertainty of the perimeter of review remitted to both the ABoR and the Appeal Panel, and the absence of a unitary model for reference.

In particular, with regard to the ABoR, Article 10 of its founding decision reinstates that the review of the board will focus on the substantial and procedural compliance of the contended decision with the relevant rules and principles of the SSM Regulation; furthermore, Article 10 establishes that such analysis will be limited to the grounds mentioned by the concerned person in its claim, according to the principle on the correspondence between the ruling and the application. This specification contradicts the jurisprudence of the ECJ in the *Kleencare* case: as shown above, technical review bodies should take into account not only the grounds and material facts indicated by the appellants, but also all those elements considered by the deciding body in the course of the procedure which brought to the enactment of the contended decision. With regard to the Appeal Panel, no clear indication can be derived from Article 85 of the SRM Regulation: in particular, the second paragraph of such provision generically refers to the provision of legal advice on the *legality* of the SRB's exercise of its powers. This rather vague diction seems to comprehend both procedural and substantial aspects, in so that the scope of intervention of the Appeal Panel would extend to the fullest extent possible within the limits of the *Meroni doctrine*. Some concerns may derive from the reference to the "legal advice": this wording appears to suggest that the Appeal Panel does not issue a decision, but rather an opinion which nevertheless remains binding for the SRB.

In this respect, the binding effect adopted for the two systems is innovative, and it shows the highest level of inconsistency both among them and in comparison with the other models previously mentioned. Indeed, it has been observed that while the decisions of the ABoR are not binding for the Supervisory Board and the Governing Council of the ECB and will be categorized as mere opinions, the decisions of the Appeal Panel of the SRB will bind the latter and would eventually also be

anticipated by suspensory measures. Therefore, and despite the use of the term "legal advice" noted shortly above, it appears once again that the Appeal Panel enjoys the highest degree of discretion, and it will be effectively in the position to intrude in the evaluations of the decisions of the SRB brought on its desk.

As already pointed out, the power to order the suspension of decisions is allocated in a different manner in the two systems under review: indeed, while in the context of the SSM these powers can only be exercised by the body with a "strong" decisional capacity, *i.e.*, the Governing Council, the Appeal Panel enjoys such power also with a presumably higher level of discretion - in the light of the generic reference to the circumstances of the case which might justify such a suspension. The contradiction is only apparent: indeed, it should be recalled that the SRM Appeal Panel does not enjoy the power to review *any* decision taken by the SRB, the NRAs, the Commission or the Council in the context of recovery and resolution of entities, but only a limited set of measures, thus benefitting of a very limited competence in comparison with the ABoR. As a consequence, the risk to confer extensive suspensory powers to a third independent body which would be in the position to temporary block recovery and resolution decisions is comparatively reduced in respect of the potential effect of the suspension of a supervisory decision in the context of the SSM.

Finally, it is interesting to highlight the different range of individuals entitled to access the two review bodies. In particular, while access to the ABoR is granted to any natural or legal person concerned by the contended supervisory decision, recourse to the Appeal Panel is also open to claims by NRAs, which might object to the decisions of the SRB addressed to them. This peculiarity descends from the features of the SRM, under which the powers of NRAs are exercised according to instructions provided by the SRB as the single coordination point for the procedures of recovery and resolution. In this respect, the role of the Appeal Panel will be particularly sensitive: this body might indeed be called to settle disputes between SRB and NRAs, thus potentially reinforcing its impartiality and independence from the SRB.

6. Conclusions

The analysis carried out in this paper shows that the European legislator opted for a quasi-judicial system of remedies in the banking union which partially diverges from the model established in other highly regulated technical sectors. Due to its features, this system cannot be reconciled in a single unitary model; indeed, both the ABoR and the Appeal Panel present a number of hybrid characteristics which place them at cross-roads between the principle of "continuity in terms of functions" and a strong connotation as judicial and independent specialized panels. In the SSM, the extended scope of review of the ABoR and the evaluation of the sole grounds submitted by the claimant, understood as judiciary-type features, are counterbalanced by its nature as internal body of the ECB, the absence of suspensory powers and the non-binding value of its decisions; within the SRM, the Appeal Panel enjoys a higher degree of independence and the power to suspend the contended decisions and issue binding opinions, although its powers of review are limited to a minimum number of matters due to the relevance of interests at stake.

In the following years, it will be certainly interesting to assess the concrete functioning of such bodies, and to understand whether these will be in the position to critically approach the issues submitted to their attention. In respect of the ABoR, it would be interesting to note whether it will provide any public information on the approach and principles it intends to apply in analyzing the cases deferred, provided that its decisions cannot be published. Also, the current development of hearings and submission of evidence will have to be assessed, considering that these do not properly represent rights of claimants but rather mere instruments which could be used by the ABoR itself when satisfied that these would help in the decision of the case[21].

Finally, it is important to underline that the limits to the

[21] Articles 14 and 15 refer to hearing and evidence before the ABoR. These provisions do not create a right to be heard or to provide evidences: indeed, the ABoR may call for an oral hearing where it "*considers this necessary for the fair evaluation of the review*"; with regard to evidences, the applicant must request permission to adduce, in the form of a written statement, witness or expert evidence, which will be admitted by the ABoR when considered necessary "*for the just determination of the review*".

possibility to reexamine the decisions taken in the context of the SRM, combined with the restrictions of jurisdictional intervention on the resolution measures taken on the basis of the BRRD, may currently pose a serious threat to the compatibility of the system of judicial remedies with the principles of due process, as well as the right to a fair trial and practical and effective remedies as established and interpreted by the courts. Nevertheless, in the light of the experience of the *Joint Board of Appeal* of the three ESAs, and the limited recourse to its prerogative, one may maliciously question whether these bodies were actually necessary, and whether the extensive procedural guarantees available at each procedural stages of both pillars of the banking union weren't sufficient to ensure an appropriate and fruitful dialogue among individuals and authorities.

NOTES

THE CONSTITUTIONAL DISTRIBUTION OF LEGISLATIVE POWERS IN ITALY: RECENT JUDGMENTS OF THE CONSTITUTIONAL COURT*

*Marco Benvenuti***

1. Explaining to a foreign audience the theme of Italian regionalism and, in particular, of the legislative jurisdiction of Regions in the light of the current Italian constitutional review is not an easy task. My whole lecture, in fact, will revolve around a single word that, among the many possible, I have chosen to summarise this theme and that is *complexity*. Therefore, in a first part, which is mainly historical, I will address the way in which such complexity has been growing and developing within the Italian legal framework (*infra*, § 2). Then, in a second part, which is essentially legal, I will explain how this complexity has become constitutional law (*infra*, § 3). Finally, in a third part, which is also political, I will focus on the current proposals of the so called Renzi-Boschi constitutional review, which has the main goal to reduce, if not to solve, such complexity (*infra*, § 4). Finally, I will raise two short questions, which remain unanswered in the current Italian constitutional review and in the present public debate (*infra*, § 5).

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2. Regionalism is a relatively recent acquisition for Italian constitutional history. It is known that the process of Italian national unification – which developed especially in the sixties of the nineteenth century – was founded on institutional structures firmly based on unity, due to both for the influence of the Napoleonic model in Italy and for the rejection of the mentality and the assets of the pre-unification States. Perhaps, less well known – but not less important – is the fact that, in two sectors in which such standardization did not take place, things went wrong. I am referring to the controversial coexistence of many Courts of Cassation, which lasted for several decades and determined the obvious difficulty of bringing uniformity to the interpretation of the law, and to the presence of many issuing banks, which gave rise to crises such as the famous scandal of the Banca romana in 1892.

The picture significantly changes after fascism and war, with the Italian Constituent Assembly of 1946-1947. Regions, in fact, were seen at the time as an important issue of counter-power and as a major expression of an institutional pluralism combined with a renewed social pluralism. Their main function was precisely legislative jurisdiction, with a clear break with the past, when law was conceived as a general act in force for the whole territory of the State. However, even in this case, Regions are a paradigmatic indicator of the implementation of the Constitution approved in 1947. Apart from the five Regions with special autonomy, more than two decades pass before the other fifteen Regions see the light and even then the transfer of powers from the State is slow and uncertain.

Since the two last decades of the twentieth century, the theme of regionalism intersects with the one of an overall constitutional review. The underlying idea, fostered by mainstream politicians, is that the foremost instrument for solving the political and institutional problems in Italy would be a comprehensive reform of the second part of the Constitution of 1947, involving the organisation of the Republic as a whole. Without delving into the merits and especially into the limits of such approach, it is sufficient now to underline that such idea is hegemonic, not in terms of doctrine, but of politics, for about thirty years.

Nevertheless, until today, widespread constitutional review processes have been unsuccessful and the only part of the Constitution actually amended concerned regionalism (in 1999 and 2001). The guidelines of such constitutional reviews – and, in particular, of the constitutional law n. 3 of 2001 – are three and they are all oriented to the strengthening of the Regions. First: an exaltation of the political and institutional role of the head of the Executive, who may now be directly elected by the regional electorate (so that the President of the Regional Executive is called in the press "governor"), under Article 126, paragraph 3. Second: a reinforcement of the legislative jurisdiction of Regions, organized through an exhaustive indication of the legislative power of the State (Article 117, paragraph 2), an extension of the cases in which the State and the Regions exert a concurrent legislative power (such legislative jurisdiction is vested in the Regions, except for the determination of the fundamental principles, which are laid down by the State: Article 117, paragraph 3) and the provision of a general residuality clause for the benefit of the Regions (Article 117, paragraph 4). Third: a double standard for the legislative jurisdiction, which follows the criterion of the breakdown by matters, and the administrative power, which is submitted to a number of general principles, such as subsidiarity, differentiation and adequacy, and whose key players are not the Regions but the Municipalities, under Article 118, paragraph 1.

3. This general legal framework sets the scene for the second point of my lecture, considering that in the last fifteen years the new part of the Constitution devoted to the legislative jurisdiction of Regions has proven extremely difficult to implement and, most of all, has left an overall mark of complexity. In fact, it is quite clear that one thing is to establish a distribution of matters in theory, and another to subsume in such predefined pattern all the concrete legislative acts from time to time approved by the State and the Regions. The reality of the single policies carried out respectively by the State and the Regions does not always conform to a predetermined grid, even a constitutional one. Hence, many federal systems include a supremacy clause in their legal orders, whereby, in the presence of a significant political interest, the State may nonetheless adopt the law. Such a

supremacy clause, as well as a second chamber for the expression at a central level of territorial interests and instances, are both lacking in the current text of the Italian Constitution. All this has provoked, in the absence of flexibility rules and political forums of dispute resolution, an impressive conflict between the State and the Regions before the Italian constitutional judge. Indeed, the Constitutional Court found itself invested with all the major issues affecting Italian regionalism in the last fifteen years. The Court, and not political bodies, as it is the case in contemporary democracies, has therefore held a sort of rock star status in this crucial field, with an "unsolicited and unwelcome role as substitute", according to one of the its Presidents, Gustavo Zagrebelsky.

It is impossible to explore here in depth the content of thousands of decisions, concerning Italian regionalism, issued by the Constitutional Court since 2002, also because of the small claims often subject of these disputes, ranging from the calendar of hunting seasons to small groups of regional precarious workers. However, two trends of such case law can be quoted, in which the Constitutional Court had made a real effort to solve the two problems of current Italian regionalism mentioned above.

Regarding the lack of political forums for resolving conflicts between the State and the Regions, the Constitutional Court has developed the principle of sincere cooperation, which involves the research by the State and the Regions of an agreement on many of the legislative acts to be approved from time to time. In fact, in the fundamental judgement No. 303/2003, the Constitutional Court ruled that "even in our constitutional system there are devices aimed at making more flexible a pattern that, in areas in which coexist, intertwined, different powers and functions, might frustrate, for the wide articulation of the competences, unification instances present in various contexts of life, which, in terms of legal principles, find support in the proclamation of unity and indivisibility of the Republic". This statement leads to the possibility for the State to adopt laws in fields apparently reserved to the Regions, but under the reserve of reaching an agreement with them.

Regarding the absence of a supremacy clause, through its many decisions, the Constitutional Court has inductively extended individual titles of exclusive or shared competence of

the State, as the "protection of competition" (e.g., judgement No. 14/2004), the "determination of the basic level of benefits relating to civil and social rights that must be guaranteed throughout the national territory" (e.g., judgement No. 282/2002), the "coordination of public finance" (e.g., judgement No. 376/2003). In yet other cases, the Court has extended to the law the application of the principle of subsidiarity, which is meant to cover only administrative functions (e.g., judgement No. 303/2003), or has made reference to context-related arguments, such as the current economic crisis in Italy (e.g., judgement No. 10/2010).

Ultimately, the Constitutional Court, according to most of the doctrine, has rewritten the constitutional provisions on the legislative jurisdiction of Regions. In my opinion, the Court has rather more subtly reworked and reassembled confused and fragmented constitutional provisions, using pragmatically the parameters and the opinions that could be useful each time to solve that complexity which we already highlighted. Certainly, if the intent of the constitutional review of 2001 was to strengthen the legislative jurisdiction of Regions, it can be said that the Constitutional Court, on the contrary, has adopted in its scrutiny an orientation rather favourable towards the State and has consequently enabled the adoption of policies in fields that were literally foreclosed to its legislative jurisdiction.

Basically, the Italian Constitutional Court has built its entire jurisprudence under the essential conviction that Italy is not a federal, but a regional State (e.g., judgment No. 365/2007), which, under Article 5, "recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State". However, the implementation of such principle in the practice has led to major inconveniences to the point that, yet again, in the last annual report on the constitutional jurisprudence, published in 2015, the President-in-Office of the Italian Constitutional Court Alessandro Criscuolo has expressed the "hope of a reform of such Title [of the Constitution] inspired to criterions of simplification and clarity".

4. I rapidly come to my third point, because the proposals contained in the so called Renzi-Boschi constitutional review –

named after the current Italian President of the Council of Ministers Matteo Renzi and the Minister for Constitutional Reforms and Parliamentary Relations Maria Elena Boschi – spring from the poor condition of the Italian regionalism. The solutions presently under discussion concern three main topics, namely: an increase in connecting the political representation between the centre and the periphery, through a substantial transformation of the Italian second chamber, i.e. the Senato della Repubblica; the suppression of one of the territorial levels of power, such as the Provinces, due to the excessive economic cost and the low efficiency of a multi-level apparatus of five different territorial levels of power (i.e. Municipalities, Provinces, Metropolitan Cities, Regions and the State: Article 114, paragraph 1); the simplification of the legislative jurisdiction of the State and the Regions.

I will briefly touch on the latter aspect, which is the specific subject of my lecture. I have already recalled that the legislative jurisdiction of the State and the Regions is currently organized, under Article 117, paragraphs 2, 3 and 4, through: a first list of matters fully covered by the law of the State; a second list of matters with respect to which the State lays down the fundamental principles and the Regions the detailed provisions in their laws; a residuality clause, whereby all matters not included neither in the first nor in the second list are regulated by the Regions. The constitutional reform draft confirms a distribution of the legislative jurisdiction anchored on a matters-based criterion, but with only two lists: a first one – as it is today – enumerating the matters subject to a full legislative jurisdiction of the State and a second one containing the matters subject to a legislative jurisdiction belonging to the Regions.

This allocation of powers, which apparently might seem dual, is accompanied by two significant counterweights. First, concerning the legislative jurisdiction of the State, it is expected that certain competences, which are especially important for the Welfare State, will be regulated only under "general and common provisions". In this way, as can be seen, the legislative power of the State is not truly full, with effects on constitutional conflicts between State and Region before the Constitutional Court, which are difficult to predict. Second, regarding the legislative jurisdiction of Regions, it is expected, under the potentially amended Article 117, paragraph 4, that "the law of the State, upon

a proposal of the Government, can intervene in matters not reserved to its exclusive legislative jurisdiction when this is necessary for the protection of the legal or economic unity of the Republic or the protection of the national interest". In this way, an important flexibility clause in the distribution of legislative power, which would allow to repoliticize what before had been substantially delegated to the Constitutional Court, is finally introduced.

5. At the moment, this is in brief the state of the debate in Italy concerning the current constitutional review on the legislative jurisdiction between the State and the Regions. I would conclude, now, with two brief observations on this subject, referred to topics that are, in my opinion, crucial but too little taken into account in the current public debate inside the Parliament and outside it.

My first remark concerns some profiles of the theme of the legislative jurisdiction of Regions of which there is no trace in the constitutional reform draft. In fact, the submitted proposal concerns only the Regions endowed with an ordinary autonomy, while the Italian legal order includes also five important Regions with special autonomy (Article 116, paragraph 1). It is my firm opinion that the degree of acceptable differentiation among these Regions should be discussed, as such autonomy could result, even more so today in the light of the current economic crisis, in a real privilege, which could be difficult to maintain under its present terms. Regrettably, this aspect remains completely neglected in the current constitutional review and actually rather strengthened, as is the issue of the number, names and borders of the Regions, that are in some cases accidental and nevertheless have remained unchanged for almost seventy years.

My second statement calls into question the role of the Italian legal doctrine, which accompanied, in some cases enthusiastically, in other uncritically, the constitutional amendment of 2001, without advising enough the lawmaker on the systemic problems which would have widely occurred in the following fifteen years. An increased caution from the enthusiasts and a greater attention from the uncritics might have avoided at least the most evident mistakes in that text, considered by the

keenest scholars the same as a hasty "copy and paste". I would quote, for all, the placement of the matter of "large transport and navigation networks" between those subject to a concurrent legislative jurisdiction between the State and the Regions, and not to a full legislative jurisdiction of the State. These are small but capital errors whose prior resolution, however, would have avoided major conflict and damage.

FREEDOM OF COMPETITION IN THE HUNGARIAN CONSTITUTION: A MATTER OF INTERPRETATION

Marton Peter Sulyok[*]

Abstract

Freedom of competition was a product of German ordoliberalism that was influenced by American competition policy. After the political transition in 1989, Hungary codified this concept into its constitution, making it the basis of its market economy and competition law. Freedom of competition came up in a few cases of the Constitutional Court and it was used in connection with basic rights and the principle of market economy. For over two decades, however, the Court could not work out a sustainable definition and content, and, eventually, in 2012, freedom of competition lost its constitutional recognition. Despite this, in a recent decision, the Constitutional Court decided to include it in Article M of the new Fundamental Law.

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I. Evolvement of the concept of freedom of competition

Although the concept of „freedom of competition" originated in the United States[1], its significance in economic policy

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1 In American jurisprudence of the early XX century, "freedom of competition" was often used as a synonym of "free competition". Cf. W. H. Tuttle, *Legitimate Competition*, 43 Central Law Journal 15, 305 (1896); n.a., *The individualism of the Constitution*, 62 Central Law Journal 20, 379 (1906). Also with regard to the Sherman Act, "freedom of competition" meant to refer to free competition in terms of commerce without improper obstacles. See, in particular, concurring opinion of Judge Hook in the Standard Oil case (218. U.S. 681). See also G. W. Wickersham, *Recent Interpretation of the Sherman Act*, 10 Mich. L. Rev. 1. 1 (1911);

was first recognized in the Federal Republic of Germany. During the interwar period, theories of liberalism were reborn in the company of a few professors of Freiburg who also gave rise to an ideological foundation for a new economic policy.[2] This ideology focused on a competitive economic system that would serve as the main economic and political precondition for prosperity and freedom.[3] Unlike the followers of laissez- faire theories[4], the Freiburg School representatives proposed to enact the economic order into a solid public legal framework as they placed the significance of economic competition onto a broader social and political context.[5] This was partly based on the recognition of the strong relationship between economic freedom and political freedom. They held that uncontrolled economic freedom might undermine the democratic institutions of the state since economic conduct is selfish and amoral by its very nature.[6] Consequently, the balance of social order could only be maintained by protecting political power from economic power and the belief of omnipotence of economic markets. This viewpoint led to the attribute "social" to be associated with the theory of market

G. H. Montague, *The defects of the Sherman anti-trust law*, Yale L.J. 103 (1909).

2 For a detailed history of Freiburg School see T. Tóth, *The message from the past: The ordoliberal school of competition policy*, in E. Balogh, M. Homoki-Nagy (eds), *Emlékkönyv Dr. Ruszoly József egyetemi tanár 70. születésnapjára* (2010), 878-880, and L. A. Sullivan, W. Fikentscher, *On the Growth of the Antitrust Idea*, Berkeley Journal of International Law 211-217 (1998).

3 L. Lovdahl Gormsen, *Article 82 EC: Where are we coming from and where are we going to?*, Competition Law Review 9 (2006), and P. D. Schapiro, *The German law against competition – Comparative and international aspects*, Colum. L. Rev. 14 (1962). See also D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 25 The American Journal of Comparative Law 36-38 (1994).

4 P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, V. J. Vanberg, *The Constitution of Markets. Essays in political economy*, Routledge 42-44 (2001).

5 W. Möschel, *The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy*, Journal of Institutional and Theoretical Economics 4 (2004).

6 W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, 9 <http://bisa.ac.uk/index.php?option=com_bisa&task=download_paper&no_html=1&passed_paper_id=137> accessed 5 May 2015. See also L. A. Sullivan and W. Fikentscher, *On the Growth of the Antitrust Idea*, cit. at 2, 212; W. Röpke, *The Moral Foundations of Civil Society* (2002), 49; W. Röpke, *The Social Crisis of Our Time* (1991) 52, 181.

economy.[7] Another reason for connecting economic competition to social, political and legal order was the recognition of how, without sufficient state control over economy, excessive market power prevented the exercise of economic freedom since uncontrolled freedom was considered to have a tendency of misuse. In this view, freedom was effective only as an ordered freedom[8]; and whereas economy in itself cannot maintain this order, the state should work out and protect the freedom and operation of this economic order. Accordingly, the Freiburg School envisioned a strong state that would ensure that market actors kept to the rules and protect individual economic freedom.[9] Furthermore, individual economic freedom should be protected not only from excessive economic power, but also from unreasonable state interventions. The idealized strong state was, therefore, a self-controlled state.[10] Thus, from their point of view, the Freiburg School saw economic freedom and political freedom as interdependent because if the state was unable to protect economic freedom, then this would eventually also endanger the democracy.[11] Since these views obviously challenged those of the traditional liberal economy, the followers of the Freiburg School called themselves "ordoliberals" in order to emphasize the distinction. The phrase "ordoliberal" denoted by the Latin word "ordo" which means "to order" "symbolized the soul of their program".[12]

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7 L. Erhard, *Prosperity Through Competition* (Frederick A. Präger, 1958) 117; Cf. W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, cit. at 6, 15.

8 Cf. W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, cit. at 6, 5, D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 45.

9 Cf. W. Möschel, *The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy*, cit. at 5, 7, W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, cit. at 6, 5-9, D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 49.

10 Cf. W. Bonefeld, *Freedom, Crisis and the Strong State: On German Ordoliberalism*, cit. at 6, 19, V. J. Vanberg, *The Constitution of Markets. Essays in political economy*, cit. at 4, 50-51.

11 L. Lovdahl Gormsen, 'The conflict between economic freedom and consumer freedom in the modernization of Article 82 EC' (2007) European Competition Journal 332.

12 Hero Moeller called first the economic policy of the Freiburg School

With economic freedom at the center of the Freiburg School's economic policy, it also affected its competition policy.[13] Competition, as individuals strived to achieve commercial advantage amongst sellers or buyers within the market[14] was considered to provide freedom of choice and increase efficiency.[15] Since competition was deemed to imply freedom, their theories for competition policy were also based on the idea of economic freedom[16] and competitive liberty. The objectives of competition policy were to protect individual economic freedom and economic competition itself.[17] Accordingly, individual economic freedom should be protected by freedom of contract and competition law should protect the competition. The objective of competition law was, therefore, not the protection of competitors, consumers or individual economic freedom, but the protection of competition itself as an institution and as an operation of the economy. Competition law then should, firstly, struggle against competition restraints and inhibit the development of excessive market power. Secondly, it should compel inevitable excessive market power (e.g. natural monopolies) to act as if there was competition and lastly, it should ensure undertakings' entry and participation in economic competition.[18] To consolidate all these objectives, Erich

ordoliberal. One of the components of this word combination came from the title of the scientific periodical of the Freiburg School, 'ORDO'. D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 58.

13 E. Hoppmann, *Das Konzept der optimalen Wettbewerbsintensität: Rivalität oder Freiheit des Wettbewerbs: Zum Problem eines wettbewerbspolitisch adäquaten Ansatzes der Wettbewerbstheorie*, 179 Jahrbücher für Nationalökonomie und Statistik 4, 124-125 (1966); L. Erhard, *Prosperity Through Competition*, cit. at 7, 117; M. Motta, *Competition Policy. Theory and Practice* (2004), 24.

14 L. A. Sullivan and W. Fikentscher, *On the Growth of the Antitrust Idea*, cit. at 2, 217.

15 E. Hoppmann, *Workable Competition. The Development of an Idea on the Norm for the Policy of Competition*, 13 Antitrust Bulletin 61-62 (1968).

16 The idea of economic freedom was part of private autonomy and included freedom of commerce.

17 E. Hoppmann, *Workable Competition. The Development of an Idea on the Norm for the Policy of Competition*, cit. at 15, 289; Wolfgang Kerber, *Should Competition Laws Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law* (FB Wirtschaftswiss, 2007) 13-14; I. Lianos, *Some Reflections on the Question of Goals of EU Competition Law*, 3 CLES Working Paper Series 24-25 (2013).

18 Cf. D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism,*

Hoppmann, in the 1960's, started using the term "freedom of competition"[19] (*Wettbewerbsfreiheit*) as the primary goal of competition policy.[20] All phenomena threatening these objectives, in particular excessive market power, were identified as dangerous to freedom of competition.

This formalist approach adumbrating aspects of efficiency,[21] and also establishing the concept of *per se* infringement of competition law in Europe, has been strongly criticized during the last decades of the XX century.[22] Although the ordoliberal competition policy placed less emphasis on economic aspects of antitrust law, its legal terminology was complex and coherent.[23] Ordoliberals recognized that the market in itself was not omnipotent, and they accepted necessary state intervention if it aimed at protecting the economic order based on competition.[24] Such intervention had to serve the preservation of competition and thereby (indirectly) the whole economic order, and also to comply with the economic constitution.[25] Since, in this respect, the legal framework protected the competition from unreasonable state intervention as it similarly protected the state from excessive market power,[26] the competition law became the protector of both economic development and political freedom.[27]

Competition Law and the "New" Europe, cit. at 3, 49-53.

19 A. D. Chirita, *The Analysis of Market Dominance and Restrictive Practices Under German antitrust Law in Light of EC Antitrust Law*, European Competition Journal 417-419 (2008).

20 E. Hoppmann, *Workable Competition. The Development of an Idea on the Norm for the Policy of Competition*, cit. at 15, 70.

21 Ioannis Lianos argues that ordoliberal competition policy did not ignore efficiency aspects, but implied them to the social and economic order that the state should protect through competition policy. I. Lianos, *Some Reflections on the Question of Goals of EU Competition Law*, cit. at 17, 26-27.

22 Cf. P. Akman, *Article 82 Reformed? The EC Discussion Paper on Exclusionary Abuses*, Journal of Business Law (2006).

23 R. J. Van Den Bergh and P. D. Camesasca, *European Competition Law and Economics – A Comparative Perspective* (2001), 40.

24 Cf. I. Lianos, *Some Reflections on the Question of Goals of EU Competition Law*, cit. at 17, 25-26; T. Tóth, *The message from the past: The ordoliberal school of competition policy*, cit. at 2, 881; T. Tóth, *Az Európai Unió versenyjoga* (2014), 34.

25 D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 46-48.

26 T. Tóth, *Gazdasági alkotmány - a piac és a verseny védendő értékei*, 32 Pázmány Working Papers 8 (2011).

27 Cf. L. Lovdahl Gormsen, *Article 82 EC: Where are we coming from and where are*

These ordoliberal views became the foundation of the Federal Republic of Germany's restoration after the World War II. Frameworks for a new economic policy were set up by the Potsdam Conference[28] and by the unratified Havana Charter of the United Nations, forming the basis of global decartelization[29], while its content was provided by the ordoliberal mutation of U.S. competition policy.[30] The central pillar of U.S. competition policy[31] was embodied by the Sherman Act that was regarded as a charter for the freedom of commerce[32] and as the Magna Charta of free enterprise.[33] In the U.S. controlled sector of the Federal Republic of Germany, the preparation for the legislation of the new era begun early, and a decree of the local self-government on antitrust rules was adopted in 1947.[34] It was followed by the abolishment of the price regime in 1948.[35] In that year, the US Supreme Court rendered its judgment in the U.S. v. Line Materials Co. case[36], and held that "*Despite possible advantages to a stable economy from efficient cartels with firm or fixed prices for products, it is crystal clear from the legislative history and accepted judicial interpretations of the Sherman Act that competition on prices is the rule of congressional purpose and that, where exceptions are made, Congress should make them. The monopoly granted by the patent laws is a statutory exception to this freedom for competition, and consistently has been construed as limited to the patent grant.*" By this judgment, the Supreme Court went

we going to?, Competition Law Review 10 (2006); P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, 7.

28 Potsdam Agreement of 2 August 1945, art. 12.

29 L. A. Sullivan and W. Fikentscher, *On the Growth of the Antitrust Idea*, cit. at 2, 208-209.

30 P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, 3-4. For a detailed analysis on the relationship between roots of German and US competition law, see D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 62-64.

31 For a detailed analysis on the history of US competition policy, see L. A. Sullivan and W. Fikentscher, *On the Growth of the Antitrust Idea*, cit. at 2, 199-208.

32 288. U.S. 344 (1933) Appalachian Coals Inc. v United States.

33 405. U.S. 596 (1972) United States v Topco Assocs. Inc.

34 J. Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, <http://www.antitrust.de> accessed 5 May 2015.

35 OECD, *OECD reviews of regulatory reform – Regulatory reform in Germany: The role of competition policy in regulatory reform* (OECD, 2004) 9.

36 333. U.S. 287 (1948).

beyond its earlier decision in the Precision Instruments Mfg. Co. v. Auto Maintenance case[37] that declared "*the right to access to a free and open market*" three years before, and apparently identified economic competition as a freedom. Although that later judgment referring to the American legal history and the case law related to the Sherman Act did not define the content of the concept of freedom of competition, this development of the law in the United States provided complete legal terms for the legislation pursuing the ordoliberal competition policy in West Germany's U.S. controlled sector. American and West German competition policy were different,[38] but its ordoliberal approach was very much influenced by the jurisprudence of the U.S.; so much so its concept of freedom of competition was imported from the U.S.

The purpose of the Antitrust Act adopted in 1957[39] was to protect freedom of competition and prevent the evolution of excessive market power that would hinder the effective operation of the market.[40] The Freiburg School always propounded that the foundations of economic freedom should be protected at the highest level of the legal system and should be reflected by the constitution in order to oblige the government to protect the competition.[41] Although freedom of competition as such had not been incorporated in the constitution of West Germany, eventually it grew to be a quasi-constitutional principle as part of the "economic constitution."[42]

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37 324. U.S. 806 (1945).

38 L. Erhard, *Prosperity Through Competition*, cit. at 7, 120-121.

39 The first bill was submitted to the Bundestag in 1950, but it was adopted seven years later. The new Competition Act entered into force in 1 January 1958 and repealed former competition laws. P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, 2; A. Weitbrecht, *From Freiburg to Chicago and Beyond – the First 50 Years of European Competition Law,* European Competition Law Review 82 (2008).

40 J. Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, cit. at 34; P. D. Schapiro, *The German law against competition – Comparative and international aspects*, cit. at 3, 7; A. D. Chirita, *The Analysis of Market Dominance and Restrictive Practices Under German antitrust Law in Light of EC Antitrust Law*, cit. at 19, 415.

41 OECD, cit. at 35, 9; D. J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, cit. at 3, 44-46.

42 OECD, cit. at 35, 5. Although the Grundgesetz does not declare explicitly the concept of freedom of competition, jurisprudence implies it in Article 2 and Article 12. Cf. Peter-Michael Huber, *Konkurrenzschutz im Verwaltungsrecht* (J.C.B.

In the post war period, freedom of competition itself did not acquire constitutional recognition in other European countries, but West European constitutions contained a few articles on protecting competition. The declaration of the freedom of enterprise or the freedom of trade formed the highest level of the framework for competition policy.[43] Only Portugal[44] and Ireland's[45] constitutions contain specific provisions for protecting competition.

On the Eastern side of the iron curtain, within the paradigm of socialism, the economic competition could not be understood as an objective of economic policy. Since the dissolution of the Soviet Union and the termination of the Council for Mutual Economic Assistance, national constitutions of newly freed independent states have been protecting economic competition through specific rights in order to signify and to guarantee market economy. Even though the theories of the Freiburg School on competition policy had been outworn by that time, post-socialist constitutions still took concepts of ordoliberalism and built their economic constitution on such concepts as "social market economy"[46], "freedom of economic activity"[47], or "freedom of (fair) competition."[48]

In this context, it is quite understandable that the concept of freedom of competition was declared by the Hungarian Constitution at a time when the country's political system shifting from socialism to democratic, despite neither the West European

Mohr, 1991) 316-325.

43 See, in particular, article 38 of Spain's constitution, article 41 of Italy's constitution, article 74 of Denmark's constitution, or article 11 of Luxemburg's constitution. On a supranational level, also the European Court of Justice declared the principle of freedom of competition in the Grundig case. Joined Cases 56/64 and 58/64 *Consten/Grundig v Commission* (1966) ECR I-342.

44 See art 81 s F, art 86 para 3 and art 99 s A of the Constitution of the Portuguese Republic.

45 See art 45 paras 2-3 of the Constitution of Ireland.

46 See art 20 of the Constitution of the Republic of Poland and the preamble of the Constitution of the Republic of Hungary.

47 See art 20 of the Constitution of the Republic of Poland, art 46 of the Constitution of the Republic of Lithuania and art 11 s 1 of the Constitution of the Republic of Albania.

48 See art 46 of the Constitution of the Republic of Lithuania, art 9 para 2 of the Constitution of the Republic of Hungary and art 126 para 2 s B of the Constitution of the Republic of Moldova.

models making it necessary, or the competition culture in Hungary being sufficiently developed enough to require this constitutional provision.[49] These two reasons contributed to the fact that freedom of competition has not gained eminent significance in the case law of the Hungarian Constitutional Court.

II. Freedom of Competition as Interpreted by the Constitutional Court of Hungary

After the political transition in 1989 (15 years before Hungary's EU membership), Hungary formally switched over to the social market economy[50], and deployed basic individual rights in pursuing Western European economic systems. At this time basic economic rights were codified into the Hungarian Constitution[51] through a series of amendments to the 40 years old law.[52] According to article 9 of the Constitution amended by Act XXXI of 1989, "*The economy of Hungary is a market economy utilizing also the advantages of planning, in which public property and private property shall receive equal consideration and protection under the law. The Republic of Hungary, on the basis of competitive neutrality, recognizes and supports the right to enterprise and the freedom of competition in the economy that may be limited only by a fundamental act*." This article, however, was effective for only eight months because Act XL of 1990 amended the Constitution again. According to the new wording of article 9, which was in effect for more than two decades, „*The economy of Hungary is a market economy in which public property and private property shall receive equal consideration and protection under the law. The Republic of Hungary recognizes and supports the right to enterprise and the freedom*

49 Although there was a Competition Act in effect since 1984, it could not function perfectly due to the then existing planned economy scheme. As regards the history of Hungarian competition law see in particular Imre Vörös, 'A modern magyar versenyjog kezdetei (1984-1996)' in Pál Szilágyi and Tihamér Tóth (eds), *A magyar versenyjog múltja és jövője* (PPKE, 2011). See also Imre Vörös, *Javaslat a hazai versenyjogi szabályozás továbbfejlesztésére* (MIE, 1989) 11-12 and 19.

50 Substantial changes in commerce have already begun in the early 1980's, but formally, the political shift gave new framework to the economy.

51 Act XX of 1949 on the Constitution of the Republic of Hungary.

52 T. Drinóczi, *Gazdasági alkotmány és gazdasági alapjogok*, in T. Drinóczi (ed), *Gazdasági alapjogok és az új magyar alkotmány* (2007) 150.

of competition in the economy." In respect of this new article, the legislative preamble stated that „*despite the thoroughly considered interests of undertakings, it* [article 9] *does not emphasize the declaration of principle of competitive neutrality, unlike the former provisions*." Thus, for the following two decades, „freedom of competition" without any reference to the "competitive neutrality" was the central concept for the constitutional protection of economic competition in Hungary.

As for the constitutional nature of freedom of competition, according to an interpretation by the Constitutional Court, it was not a fundamental right[53] but a state goal[54] protected by the Constitution. At the beginning, however, the Court had defined it as a constitutional right. In its earlier decision, the Court declared that freedom of enterprise and freedom of competition as a constitutional right were to protect the freedom of contract.[55] In 1991 it laid down that the market economy was "*the economy, in which the structure of ownership is plurally separated, operating in accordance with the constitutionally recognized principle of equality of different forms of ownership and freedom of competition*."[56] One year later the Constitutional Court went further and declared the "*constitutional freedom of economic competition*."[57] The qualification changed again in 1993, when it was defined as a constitutional right, on one hand ("*constitutional right for the freedom of competition*") and, on the other hand, it was considered a constitutionally recognized and protected principle.[58] In a subsequent decision also in 1993, freedom of competition was unambiguously identified as a constitutional principle. In that decision the court set forth that freedom of competition was "*such a constitutional principle whose aim is, inter alia, to promote the colorful and efficient exercise of freedom of enterprise and freedom of profession*."[59] Its final definition as a state goal was outlined in 1994, when the Constitutional Court declared that it "*would assess*

53 Decision nr. 21/1994 (IV. 16.) of the Constitutional Court.
54 The concept of "state goal" as the legal nature of certain articles was introduced by the Constitutional Court in 1993.
55 Decision nr. 32/1991 (VI. 6.) of the Constitutional Court.
56 Decision nr. 59/1991 (XI. 19.) of the Constitutional Court.
57 Decision nr. 46/1992 (IX. 26.) of the Constitutional Court.
58 Decision nr. 33/1993 (V. 28.) of the Constitutional Court.
59 Decision nr. 1105/B/1993 of the Constitutional Court.

the unconstitutional infringement of market economy, freedom of competition and other similar state goals only in exceptional cases."[60] This conceptual change did not get into the spotlight of jurisprudence, even though there was an obvious movement from a "constitutional right" via "principle recognized by the constitution", "constitutional freedom" and "constitutional principle" towards a "state goal". All these were apparently the consequences of that the Constitutional Court having to define the legal nature of the concept in the early 1990's when it also had to distinguish each category of constitutional concepts,[61] whilst its doctrinal terminology was changing from time to time.[62] Although the concept of "state goal" did not originate from the Constitution itself, or any written law, since 1993 the Court defined the legal nature of certain articles of the Constitution (including freedom of competition) as state goals.[63] Nevertheless, the identification of freedom of competition as a constitutional right or a state goal is not only a question of terminology, but also a quality determining the extent of constitutional protection.[64] Protection of a constitutional right is undoubtedly more solid than that of a principle or even of a state goal. State goals, in that respect, were considered as special principled norms that conferred rights and duties on the legislation and the governmental bodies being responsible for the enforcement of the Constitution. Means of that enforcement, unlike constitutional rights, could be freely chosen by the state.[65] It is understandable, in this context, that the Constitutional Court, who admittedly did not want to limit the government's latitude in economic policy,[66] gradually softened the magnitude of freedom of competition, in order to avoid being obliged to base the reasoning of its decisions with economic effect "*on this swampy ground (in respect of its doctrinal terminology)*."[67] Nevertheless, the evolution of the interpretation of freedom of

60 Decision nr. 35/1994 (VI. 24.) of the Constitutional Court.
61 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon* (2001), 131.
62 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 627-628.
63 Decision nr. 33/1993 (V. 28.) of the Constitutional Court.
64 Decisions nr. 28/1994 (V. 20.) and 778/D/2010 of the Constitutional Court.
65 Report nr. OBH 1806/2003 of General Deputy of the Parliamentary Commissioner of Citizens' Rights.
66 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 150-151.
67 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 421.

competition suggests that the Constitutional Court would have been able to construe this concept as a constitutional right that would definitely have had a more concrete and solid content than an oblique state goal.

Yet, in 1991, the Constitutional Court explained the meaning of article 9, paragraph 2 as "*giving protection against also the restriction (through legislation) of economic competition and freedom for enterprise by the state provided that restriction is not complying with establishing market economy.*"[68] Three years later, however, it stated "*it would ascertain an infringement of freedom of competition and other similar state goals only in exceptional cases, when the state intervention is both conceptually and obviously contrary to the state goal*".[69] This decrease in significance was a consequence of the fact that the Constitution, according to the Constitutional Court, was neutral in matters of economic policy and it did not prescribe any particular model of market economy. All these were in relation to the constitutional nature of freedom of competition being softened in the early 1990's as it eventually became a state goal from being a constitutional right, and that the Constitutional Court asserted the infringement of freedom of competition only in few cases, of them being rendered between 1991 and 1997.[70]

Although according to previously settled case laws, freedom of competition was strongly connected to articles of the Constitution about market economy, freedom of enterprise and other basic economic rights, this relationship appeared in different forms in its decisions. In 1993, the Constitutional Court held that freedom of competition was "*a constitutional principle whose aim is, inter alia, to promote the colorful and efficient exercise of freedom of enterprise and freedom of profession.*"[71] In this context, the concept did not appear as an autonomous constitutional value, but only as a device ("*whose aim is, inter alia, to promote*") for enforcing basic economic rights. This materially compares to a decision rendered in the following year, whereby the Constitutional Court confirmed that "*recognition and support of freedom of competition by the state*

68 Decision nr. 19/1991 (IV. 23.) of the Constitutional Court.
69 Decision nr. 35/1994 (VI. 24.) of the Constitutional Court.
70 Decisions nr. 59/1991 (XI. 19.), 33/1993 (V. 28), 21/1994. (IV. 16.), 31/1994 (VI. 2.), 48/1994 (X. 26.), 58/1994 (XII. 14.), 16/1995 (III. 13.) and 5/1997 (II. 7.) of the Constitutional Court.
71 Decision nr. 1105/B/1993 of the Constitutional Court.

requires the set-up of objective institutional protection of fundamental rights concerning trading."[72] It was also declared that freedom of competition was a precondition of market economy that was materialized primarily through the enforcement and protection of basic economic rights. By this decision, the Constitutional Court eventually asserted equality between freedom of competition and enforcement of basic economic rights, since the goal of the former was the exercise of the latter, and as a consequence freedom of competition materialized. This decision had another important addition: it made a direct logical link between the concepts of freedom of competition and the market economy. Therefore, these two constitutional goals were not yet "connected organically"[73] but the performance of the earlier became the precondition of the latter. Due to the Court viewing the entire economic constitution as a protector of market economy, notably in the early 1990's, the only acceptable interpretations were those that complied with the settlement and consolidation of market economy.[74] This led to freedom of competition not becoming an autonomous entity in the practices of the Constitutional Court, but only a device for ensuring market economy through enforcing basic economic rights. In other words, it served to provide the aspects of market economy in the interpretation of basic economic rights.

The relationship between freedom of competition and market economy has never been clarified by the Constitutional Court. According to certain views, from the perspective of constitutional law, the term "market economy" implies freedom of competition and vice versa.[75] In my opinion, however, this relationship was not reciprocal because, although market economy certainly cannot exist without economic competition, competition in itself does not make market economy.[76] Neither the

72 Decisions nr. 21/1994 (IV. 16.) and 31/1994 (VI. 2.) of the Constitutional Court.

73 Decision nr. 1105/B/1993 of the Constitutional Court.

74 Decision nr. 19/1991 (IV. 23.) of the Constitutional Court.

75 According to these views, the only difference between freedom of competition and market economy is that while the former may be restricted for itself, the latter may be restricted to the outermost edge of its concept. T. Drinóczi, *Gazdasági alkotmány és gazdasági alapjogok*, cit. at 52, 155; T. Drinóczi, *A piacgazdaság és a versenyszabadság – alkotmányjogi értelemben*, Jogtudományi Közlöny 281 (2004).

76 Although economic competition is an essential component of market

decisions of the Constitutional court, nor general economic axioms assume that competition postulates market economy.[77] If freedom of competition, for the sake of argument, postulated market economy, then unconstitutional infringement of market economy would necessarily entail the infringement of freedom of competition. The invalidity of this conclusion is proven by the fact that the Constitutional Court has assessed unconstitutional infringement of market economy without mentioning a word about economic competition.[78] On the contrary, in 1991 it declared "*competition is an elemental form of market economy*",[79] meaning that if competition is harmed, the state goal of market economy too is necessarily harmed. Therefore, the relationship between market economy and economic competition is only one way. In this context, freedom of competition appears to be a reflection of market economy in constitutional law.

Although the Constitutional Court set up a conceptually sound and logical connection between freedom of competition, market economy and basic economic rights (regarded as being distinct from freedom of competition), it did not define, comprehensively the concept of freedom of competition. Its hermeneutical function, furthermore, did not involve any normative content since its role was simply to connect the state goal of market economy with basic economic rights. Due to the lack of normative content, the Court was rarely able to assert the charge of substantive infringement. Accordingly, the unconstitutional infringement of freedom of competition was usually assessed together with other articles of the Constitution.[80]

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economy, competition in itself is not sufficient to maintain market economy as it has more requirements. Cf. article 2 paragraph 7 of the Council Regulation 384/96/EC of 22 December 1995 on protection against dumped imports from countries not members of the European Community (1996) OJ L056/39.

77 Cf. L. Trócsányi, ed., *A mi alkotmányunk: Vélemények és elemzések Magyarország Alkotmányáról* (2006), 107.

78 Decision nr. 50/1995 (VII. 12.) of the Constitutional Court. It is worth noting here, that the Constitutional Court did not have to examine the conformity of a particular law to each article of the Constitution once its unconstitutional infringement is declared.

79 Decision nr. 19/1991 (IV. 23.) of the Constitutional Court.

80 This was a result of that freedom of competition was considered as a state goal which was not really enforceable before the Court due to the lack of its normative content.

In most cases, infringement was examined in the light of market economy, however, to establish any infringement of the Constitution, a breach of basic economic rights or the principle of anti-discrimination was required.[81] The decisions of the Constitutional Court relating to freedom of competition concerned four major types of market anomalies: monopolies, barriers to market entry, discriminative market conditions and anti-competitive state measures.

The question of monopolies typically emerged in relation to laws providing exclusive rights to certain undertakings that blocking economic competition within a certain market. Freedom of competition would have been construed, in this sense, as an instrument to cease monopolies and exclusive rights, but the Constitutional Court restricted its scope. According to the Court's interpretation, freedom of competition applied only to markets, but frameworks of markets were defined by the state. Article 10 paragraph 2 of the Constitution set out that "*Fields of ownership and economic activity deemed to be the sole domain of the State shall be defined by law.*"[82] Regarding this article together with article 9 paragraph 2, the Constitutional Court asserted that freedom of competition was not infringed when the state reserved exclusive rights concerning specific activities, because the scope of freedom of competition did not extend to that field.[83] Accordingly, the Court held that existence of monopolies in relation to exploitation of state-owned properties[84], strategic economic activities[85] or the

81 Once a legal provision was annulled on the grounds of certain article of the Constitution, the Constitutional Court did not continue to examine that provision at stake also in light of other articles. Thus, when unconstitutional infringement of a basic right was declared, there was no need for examining also the breach of freedom of competition.

82 Article 10 paragraph 2 of the Constitution was interpreted by the Constitutional Court several times. It was considered as a constitutionally legitimate device to keep certain goods in sole ownership of the state, out of scope of freedom of competition. Cf. decisions nr. 981/B/1991 and 71/2009 (VI. 30.) of the Constitutional Court.

83 Decision nr. 1814/B/1991 of the Constitutional Court.

84 In its decision nr. 46/1992 (IX. 26.) the Constitutional Court ruled that the law, having provided the state with exclusive right for exploitation of the right for hunting, was complying with the Constitution. It declared that the harm of competition did not exceed the extent that was necessary for the state to use its rights. In another decision, nr. 101/B/2008, the Court held that the law entitling local governments to prohibit mining in their respective territories was not

performance of statutory duties of local governments[86] was complying with the Constitution. However, when particular exclusive rights had not been reserved by the state on the basis of article 10 paragraph 2, monopolies granted to undertakings owned by the state[87] or by a local government[88] were deemed to be infringing freedom of competition. Thus, from this aspect, freedom of competition was to protect competition within the market, irrespective of competition for the market. In relation to monopolies not granted but awarded through public procurement or tender, the Constitutional Court held that such awarded monopolies were not contrary to freedom of competition since the public procurement[89] or the tender[90] enabled each undertaking to

contrary to freedom of competition since its aim was to harmonize mining activity based on the state monopoly with local governments' regulations.

85 In its decision nr. 981/B/1991 the Constitutional Court ruled that the law stipulating that only a state-owned undertaking was entitled to provide electricity supply to consumers was complying with the Constitution. It declared that the state had the right provided by article 10 paragraph 2 of the Constitution to determine such strategically significant activities that should be controlled directly through the ownership of the state.

86 In its decision nr. 39/1994 (VI. 30.) the Constitutional Court ruled that a decree of a local government that gave a certain undertaking an exclusive right for local refuse collection did not infringe freedom of competition because it aimed at performing a statutory duty of the local government. That decree was deemed to be infringing the laws on a different basis though.

87 In its decision nr. 16/1995 (III. 13.) the Constitutional Court ruled that the decree by which passenger insurance and baggage insurance for public transport companies might be provided only by the state-owned insurance company was unconstitutional. It declared that, although at the time of the adoption of that particular decree, there had been only one insurance company, but since then the insurance market had been liberalized and therefore such exclusive right became unconstitutional as it harmed freedom of competition without constitutionally justifiable reason.

88 In its decision nr. 58/1994 (XII. 14.) the Constitutional Court ruled that a decree entitling only the undertakings owned by local governments to engage in certain chimney sweep activities was unconstitutional. The Court pointed out that chimney sweeping was a purely economic activity not belonging to regulatory conducts and therefore it infringed freedom of competition.

89 In its decision nr. 42/B/2005 the Constitutional Court ruled that the law awarding the exclusive right of manufacturing cow earmark to an undertaking through public procurement was conforming with the Constitution. Although it established an exclusive right, each undertaking in the relevant market had had the right to make a bid, and therefore freedom of competition had been respected in that procurement.

bid for the respective exclusive right. From a broader perspective, it meant that the Court was satisfied with the competition for the market and did not require additionally the competition within the market. Thus, freedom of competition, with a few exceptions, was unable to facilitate dissolving monopolies and exclusive rights, because the Constitutional Court significantly constricted its scope in two ways. Firstly, this freedom applied only to markets defined by the state; secondly, the Court was satisfied with competition either for or on the market and did not require both.

Barriers of market entry were examined in those cases where the law created or upheld obstacles that precluded free market entry. In these markets, compared to monopolistic markets, there were two or more actors who were theoretically able to compete with each other, but a new undertaking could not contest the market. Freedom of competition could have reduced these barriers as the principle of equal opportunities was considered an essential part of it,[91] but the fact that the Constitutional Court applied a test it had worked out for assessing constitutional restriction of basic rights, its impact was restricted. Accordingly, entry barriers established for controlling the distribution of petroleum products[92] or the operation of liquidator

90 In its decision nr. 71/2009 (VI. 30.) the Constitutional Court ruled that the act on radio and television broadcasting was not contrary to freedom of competition despite it allowing the state authority to extend, without a tender, fixed term licences for the use of country wide analogous broadcasting radio frequencies. The Court pointed out that the range of radio frequencies was limited and frequencies were the sole domain of the state based on article 10 paragraph 2 of the Constitution, and therefore freedom of competition was constitutionally restricted. Although each undertaking had had equal opportunity to bid for a country-wide radio frequency, the Court nevertheless declared this an infringement based on the breach of freedom of enterprise and freedom of profession.

91 Decision nr. 31/1994 (VI. 2.) of the Constitutional Court.

92 In its decision nr. 1105/B/1993 the Constitutional Court ruled that the law was conforming to the Constitution despite it restricted entry to the market of distribution of petroleum products by requiring appropriate premises. The Court connected freedom of enterprise to freedom of competition, and declared that restriction of freedom of enterprise was neither arbitrary, nor disproportionate since the legislative intention of the law was to facilitate state control over distribution of products concerned and to restrain black market. Thus, neither freedom of competition, nor freedom of enterprise was

officers,[93] for ensuring comprehensive and profound medical examinations in relation to driving licences,[94] or for ensuring country wide and continuous animal health service[95] were not held to be unconstitutional since the restriction on competition was neither arbitrary, nor disproportionate. This test for proportionality and necessity was what the Court used for appraising restriction of basic rights. Thus, in some cases, the restriction of freedom of competition was treated as if it had been a basic right.

The Court went further and argued, in its decision

unconstitutionally restricted.

93 In its decision nr. 580/B/1997 the Constitutional Court held that the law having required defined form of corporation and other specific conditions from liquidator officers was not unconstitutional despite it restrained market entry. According to its reasoning, those strict regulations were reasonable, necessary and proportionate. Moreover, there was not real competition among liquidator officers since their course of action was different from those of free market actors due to strict regulations.

94 In its decision nr. 990/B/2009 the Constitutional Court ruled that the law precluding doctors within the occupational health service from carrying out medical examinations for civil driving license was not infringing the Constitution. According to the laws, general practitioners were allowed to carry out medical examinations for both the civil driving license and the professional one, but doctors of occupational health were allowed to carry out medical examination only for professional driving license. The Constitutional Court admitted that this regulation precluded a few doctors from entering the market of a specific medical examination, but considering that comprehensive and profound medical examinations for a civil driving licence required the awareness of case history known only by the general practitioners, is was reasonably justifiable, not arbitrary. Notwithstanding, it did not explain why medical examinations for professional driving licences did not require the knowledge of case history.

95 In its decision nr. 602/B/2006 the Constitutional Court ruled that act on the Hungarian Veterinary Chamber and the private veterinary praxis was conforming with the Constitution, despite it restricting freedom of competition to some extent. It declared the fact that although allowing private veterinarians to carry out their praxis in the territory of only one county, and territorial extension requiring the consent of the board of a competent organization was restricting freedom of competition, this restriction was constitutionally justifiable. This justification was based on countrywide public interest and the need for a continuous animal health service supporting food healthy and safety. Nonetheless, Judge Péter Paczolay set out in his concurring opinion that, although he agreed on the merit of the decision, it was not justified that such a restriction of freedom of competition and freedom of enterprise would enable the realization of defined food healthy and safety.

regarding the act on establishment and operation of pharmacies that consistency and security of the distribution of medicines were endangered by free competition. Therefore, setting up considerable barriers to market entry was constitutionally justifiable as it was a necessary and proportional restriction of competition.[96] On the other hand, in respect of the liberalization of the medicine distribution market a decade later, the Court declared that the consistency and security of medicine distribution could be ensured by regulated competition. Therefore, there was no need for high barriers to market entry.[97] Similar reasoning was used for the refusal of a constitutional complaint in relation to the act on organized gaming.[98] The complainant stated that the act allowing certain unauthorized undertakings to organize gift drawing in connection with providing goods or services infringed freedom of competition, because it opened the door to unfair commercial practices. The Court refused this complaint and declared that it was unnecessary to repress such potential infringements by constitutional instruments that could be fairly treated by means of competition law. In another case relating to

96 In its decision nr. 677/B/1995, the Constitutional Court ruled that the act on the establishment and operation of pharmacies was complying with the Constitution despite significant entry barriers being set up and the competition being restricted to a considerable extent. The Court declared that this restriction was necessary and proportional due to the need for the consistency and security of medicine distribution. Since it was deemed to be a constitutionally justifiable basis for the restriction, the Constitution was not infringed.

97 In its decision nr. 1094/B/2006 of the Constitutional Court ruled that liberalization of medicine distribution market was not contrary to the Constitution, because the consistency and security of distribution did not require significant barriers to entry. Since both the consistency and the security could be ensured by also a regulated competition, there was no need for allowing retail distribution only in pharmacies. Consequently, the fact that shops other than pharmacies were allowed to distribute some medicines not requiring prescription, this complied with the Constitution as well as with freedom of competition. With regard to those shops that allegedly gained more favorable market conditions than pharmacies, the Court pointed out that pharmacies and shops acted on different markets since pharmacies were allowed to distribute both prescribed and non-prescribed medicines, while shops were allowed to distribute only the latter. As a consequence, the liberalization of medicine distribution market was deemed to be conforming with the Constitution.

98 Decision nr. 1055/B/1998 of the Constitutional Court.

land survey,[99] the Constitutional Court pointed out that excluding potential market actors from a market of four competitors endangered (not infringed) freedom of competition, because the administrative order concerned favored a few undertakings to the detriment of all other market actors. So was the case with the law that allowed only artificial persons having legal personality to use typographical duplicator and industrial photocopier. According to the Court, this law was contrary to the Constitution since it precluded other undertakings from the market without any constitutionally justifiable reason.[100] Thus, in most cases relating to entry barriers, the Constitutional Court applied the same test it had established for restrictions of basic rights. Unconstitutional entry barriers were declared only in two cases, and none of them were assessed in light of the aforementioned test (necessity and proportionality). As a consequence, freedom of competition was unable to reduce barriers to market entry unless it was apparently arbitrary.

Most of the decisions taken by the Constitutional Court in relation to freedom of competition concerned discriminative market conditions set up by the laws. The conflict was based on the fact that if the state applied different rules to the market actors, then they would get different advantages or disadvantages that might significantly affect their market conditions. In these cases, neither the competition, nor entry into the market was precluded, but any of them had discriminative conditions. Freedom of competition, in this sense, could have been the guarantor for equal opportunity to conduct economic activity[101], but the fact that it was mainly construed together with the basic right of anti-discrimination, significantly lightened the relevance of competition at least in the reasoning. Depending on whether the state participated as a market actor or not, there were two types of decisions of this category.

In respect of discriminative market conditions enjoyed by a

99 In its decision nr. 48/1994 (X. 26.) the Constitutional Court held that an administrative order appointing four state-owned companies to carry out official land survey and related record keeping was endangering freedom of competition, because it favored specific undertakings, which was contrary to competitive neutrality implied in the concept of freedom of competition.
100 Decision nr. 19/1991 (IV. 23.) of the Constitutional Court.
101 Decision nr. 133/B/1996 of the Constitutional Court.

state-owned undertaking, the Constitutional Court laid down, as a principle, that the state acting as an owner of an undertaking was a market actor just like any other, and hence it was contrary to the Constitution when the state, by administrative means, created favorable market conditions for itself.[102] Unjustifiable favoritism for the state[103] or the state-owned undertaking[104] in corporate law was, therefore, considered to be infringing the basic right of anti-discrimination. Generally, the Constitutional Court applied the same approach as it applied to monopolistic markets, namely a discriminative regulation was ruled to be conforming to the Constitution only if the favored undertaking was deemed to be outside the market. Accordingly, an undertaking outside the market could not be regarded as a competitor of another undertaking operating in the market, even if they were engaged in economic activities of the same kind. This question emerged when the Constitutional Court had to judge the law defining different rules for concession licensees and state owned undertaking, despite both being gaming organizers.[105] Organized gaming was a state monopoly that was exercised partly by a state owned undertaking, partly by concession licensees. The Court held that since the state monopoly was outside the market, the concession licensee was not its competitor, and thus the different rules that applied to them did not infringe freedom of competition. This decision formed a transition from the concept of "outside the market" to the concept of "lack of competition" and then led to a

102 Decision nr. 469/B/1997 of the Constitutional Court.

103 In its decision nr. 59/1991 (XI. 19.) the Constitutional Court ruled that the law providing unjustifiable advantages to the state was contrary to the Constitution. According to the general rule of corporate laws, the share issuer had the right, in case of oversubscription, to refuse subscriptions. As per the challenged law, however, the subscription of budgetary organizations and banks could not be refused. The Constitutional Court held that this discrimination was unjustifiable. Although it also raised the question of infringement in freedom of competition, this question was left open.

104 In its decision nr. 33/1993 (V. 28.) the Constitutional Court held that the law repealing minority shareholders' right within the operation of the undertaking having managed state-owned assets was contrary to the Constitution. The Court declared that minority shareholders' rights were a manifestation of freedom of competition in the corporate law, and thus discriminative rules in favor of the state as the majority shareholder infringed the freedom of competition.

105 Decision nr. 1814/B/1991 of the Constitutional Court.

state owned monopoly that was regarded lawful due to lack of real competition, despite the fact that the economic activity in question was not within the sole domain of the state. Therefore, the law by which the undertaking managing the state-owned properties enjoyed immunity from corporate tax and excise duty was not held to be infringing freedom of competition since this undertaking was an atypical market actor, not having had real competitors, and thus there was not competition, in effect, that this discrimination would have distorted.[106] As it is evident in the decisions regarding favoritism of the state, the function of freedom of competition was simply to convey market economy aspects to the interpretation of anti-discrimination rules. In other words, it did not add anything to the known principle of anti-discrimination, but a bit restricted its scope by introducing new exculpations, such as the concept of "out of market" and "lack of competition".

In relation to laws establishing discriminatory market conditions without favoring the state-owned undertaking, the Constitutional Court has never assessed any unconstitutional infringement of freedom of competition.[107] Although it declared unconstitutional infringement of the basic right of anti-discrimination in some cases, a breach of freedom of competition was never established. Two local government decrees were ruled to be infringing the prohibition of discrimination due to unreasonable differentiation in charges for the commercial use of public areas, but the Court did not examine their conformity with freedom of competition.[108] The Court, in its decisions relating to

106 In its decision nr. 1339/B/1996 the Constitutional Court, referring to the article 10 paragraph 2 of the Constitution, pointed out that the state had the right to determine the extent of its exclusive rights within the framework of non-discrimination and freedom of competition. According to the Court, however, once the state occupies a particular exclusive activity, it would not be subject to freedom of competition any longer, since it does not apply to sole domains of the state.

107 Cf. T. Tóth, *Gazdasági alkotmány - a piac és a verseny védendő értékei*, cit. at 26, 6

108 In its decision nr. 49/2009 (IV. 24.) and nr. 50/2009 (IV. 24.) the Constitutional Court ruled that local government decrees stipulating differentiated charges for the commercial use of public areas were unconstitutional. The Court, referring to its earlier decision nr. 38/1998 (IX. 23.), pointed out that differentiation in itself would not have been infringing the basic right of anti-discrimination, provided that differentiation was based on

this sort of market anomalies, applied four types of arguments. The first type of argument applied to tax laws, was based on that freedom of competition did not preclude the state from imposing different tax rules on the market actors.[109] In accordance with this approach, the Constitutional Court declared that imposing different tax rules on legal entities did not infringe freedom of competition, provided that differentiation was based on "the logic of taxation system"[110], was within "the discretion of the government in economic policy"[111] was in favor of action protected by the tax policy[112] or did not apply to the relation of undertakings to each other.[113] Likewise, the Constitutional Court

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reasonable cause. Differentiation without reasonable cause, however, was deemed to be infringing the prohibition of discrimination.

109 In its decision nr. 59/1995 (X. 6.) the Constitutional Court ruled that the act on income tax was not infringing freedom of competition although it imposed different tax rules on market actors. The challenged law provided relief for interest on income tax from the sale of public shares but not of private shares. Although the Constitutional Court held that it was unconstitutional on the grounds of infringement of unjustifiable discrimination, it declared that neither competitive neutrality, nor freedom of competition precluded the state from imposing different tax rules on the legal entities.

110 In its decision nr. 133/B/1991 the Constitutional Court held that the provision of the act on value added tax that stipulated different rules on different types of purchase was conforming with the Constitution. It declared that the fact that the law excluded end-user consumption from VAT deduction was not infringing competitive neutrality as it was based on the logic of taxation system.

111 In its decision nr. 137/B/1991 the Constitutional Court held that the law provided different tax relieves to the undertakings owned by foreigners and those owned by domestic persons did not infringe freedom of competition because the determination of the extent of any tax relief was up to the discretion of the government.

112 In its decision nr. 558/B/1994 the Constitutional Court ruled that the provision of the act on corporate income tax was conforming with the Constitution despite some part of the interest of shareholders' loans being an addition to the value of corporate income tax. The Court declared that, although this rule was unfavorable to certain companies, it was not generally and definitely detrimental to market entry or to their chance to compete with competitors. Therefore, it did not create unequal market conditions and did not infringe freedom of competition since it was in favor of those companies who acted in the manner protected by the tax policy.

113 In its decision nr. 252/B/2008 the Constitutional Court held that the act on social security establishing a system of differentiated health care contribution was complying with the Constitution. It declared that the challenged act was not contrary to the freedom of enterprise since the health care contribution was

declared that, in relation to tax immunity[114] and different conditions of excise relief, differentiation between market actors or economic activities in accordance with economic policy priorities did not infringe freedom of competition, since "*fostering, incenting or restricting certain economic activities was not a question of constitutionalism.*"[115]

The second type of arguments in relation to discriminative market conditions was based on the principle that discriminative regulations could be unconstitutional only within a homogeneous group of entities. Therefore, the Constitutional Court did not ascertain unconstitutional infringement of anti-discrimination principles when differentiated regulations applied to advocates and other undertakings[116] or to NGO's and companies in public interest[117], second-hand buyers and other undertakings[118], or to

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differentiated but not discriminative. Neither was freedom of competition infringed, as per the Court, because that act in question did not concern the relationship of undertakings to each other.

114 In its decision nr. 8/2010 (I. 28.) the Constitutional Court ruled that the provision of a tax law allowing immunity to ecclesiastic and local government owned real properties from a specific tax was complying with freedom of competition since the Constitution, in itself, was neutral to economic policy, setting taxes and immunities therefore was within the scope of economic policy. Other provisions of this law were found to be infringing other articles of the Constitution though.

115 In its decisions nr. 1416/D/1996 and nr. 141/B/2003 the Constitutional Court ruled that different conditions of excise relief were not unconstitutional, since freedom of competition could not be infringed by distinctive conditions of excise relief.

116 In its decision nr. 374/B/1998 the Constitutional Court ruled that the law whereby advocates were entitled to have membership of only one territorial bar association and to have their office only within that territory was neither unconstitutionally discriminative, nor infringing the freedom of competition. It declared that the freedom of competition should be construed in relation to the comparison of the advocates, not the advocates and other professionals.

117 In its decision nr. 728/B/1998 the Constitutional Court held that the law allowing certain civil organizations to acquire the ownership of the real properties they had been using freely was conforming with the Constitution. It declared that freedom of competition was not infringed because the challenged law differentiated between companies in the public interest not belonging to the same group of entities.

118 In its decision nr. 887/B/1994 the Constitutional Court ruled that the tax law that imposed different rules on the deduction of input tax to the second-hand buyers and other undertakings was complying with the Constitution. The challenged provisions of the act allowed undertakings generally to deduct

certain types of cultural articles.[119] The Court pointed out, that the fact that certain professions, unlike others, required specific licences did not infringe freedom of competition, because this restriction applied to all of those professionals, and such profession was chosen with awareness of those requirements.[120] Similarly, it also stated that providing certain undertakings with a tax relief or state aid and excluding others from it was not infringing freedom of competition provided that the criteria for the relief or aid was general and equal[121], as well as all undertakings having the opportunity to meet all clearly defined criteria.[122]

The third type of argument was based on that differentiated rules were constitutional to some extent, and only excessive[123]

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input tax at the time of purchase, but second-hand buyers were allowed to do so only at the time of resale and only to the extent of value added tax incurred at the resale. The Constitutional Court declared that these differentiations were not contrary to freedom of competition since the same rules applied to all second-hand buyers within a homogeneous group.

119 In its decision nr. 571/B/1993 the Constitutional Court held that the law imposing cultural tax on the distribution of certain articles did not infringe freedom of competition because the law was equally applicable to all undertakings engaged in the same economic activity.

120 In its decision nr. 573/B/1993 the Constitutional Court ruled that the law setting up certain limitations in relation to carrying out armed professional services, was not infringing freedom of competition because those limitations were known and applied to all professionals concerned. It declared that the fact in itself that some professions require a license, unlike the others, does not constitute an infringement of freedom of competition or freedom enterprise.

121 In its decision nr. 691/B/2001 the Constitutional Court ruled that the act on the subvention for small and medium enterprises was conforming to the Constitution despite the exclusion of large enterprises. It declared that such a subvention scheme did not infringe freedom of competition provided that "*legislature, in establishing its conditions, stipulates achievable and possible requirements on the general level of norms. In the present case, the challenged act meets these criteria, if it stipulates equal and erga omnes conditions in defining the scope of subvented entities. So defined conditions are based on the discretion of legislature under political responsibility.*"

122 In its decision nr. 1005/B/1995 the Constitutional Court ruled that the law providing excise relief to undertakings engaged in the sale of motor vehicles did not, in principle, infringe the Constitution since all undertaking had the opportunity to operate in that specific manner. To the contrary, it was deemed to support freedom of enterprise, therefore freedom of competition was not infringed.

123 While the "proportionality" test was based on the relation between benefits

discrimination would infringe freedom of competition. In this sense, the Constitutional Court declared that freedom of competition did not mean that the state should treat all undertakings the same, provided that discrimination was not excessive. Therefore, differentiated regulations in corporate income tax rules[124], in tax relief rules[125], in natural gas procurement[126], or in corporate forms[127], were not considered to infringe freedom of competition, due to the fact that differentiation in applicable rules did not exceed a certain extent. Although the threshold of acceptable differentiation had not been detailed, in a case about state aid, the effect on competition was used as an argument. The Court declared that since the amount of the aid in question was relatively low, it was not so excessive intervention that it would be capable of having a considerable

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and detriments of restricting a certain right, the "excessive" test was meant to refer to an absolute measure of harm. Nevertheless, the exact meaning of excessive harm was never defined by the Constitutional Court.

124 In its decision nr. 54/1993 (X. 13.) the Constitutional Court ruled that the act on corporate income tax conformed to the Constitution despite it not applying to self-employed undertakings. The Court declared that freedom of competition did not mean that the state should treat all economic activities and all market actors the same. Only excessively discriminative tax rules would infringe freedom of competition, but the tax rules in question were not so differentiated.

125 In its decision nr. 566/H/1994 the Constitutional Court examined a local government decree that allowed the reduction of the debt of local business tax on equity basis only for self-employed undertakings, but not for corporations. It declared that the decree concerned was not infringing freedom of competition since it did not restrict disproportionately the freedom of enterprise.

126 In its decision nr. 358/B/2007 the Constitutional Court held that the act on security stockpiling of natural gas was complying with freedom of competition despite it stipulating different regulations on licensed procurers and non-licensed procurers. Licensed procurers, on the basis of statutory membership to the Hungarian Hydrocarbon Stockpiling Association, had to pay a contribution which increased their operational cost. Although it provided a competitive advantage in the market to the non-licensed procurers, the Court ruled that this differentiation was not so excessive that it would be regarded as contrary to the state goal and consequently the act was considered to be complying with the Constitution.

127 In its decision nr. 65/1997 (XII. 18.) the Constitutional Court ruled that the law allowing patent agents to operate in various corporate forms was not infringing the Constitution. It declared that freedom of competition did not mean that the state had to provide exactly the same corporate forms to all the undertakings engaged in the same economic activity. Freedom of competition might be infringed only in case of excessive discrimination.

effect on competition.[128] From this perspective, the Constitutional Court seemed to have considered differentiation as excessive and unconditional only if it had had considerable[129] effect on competition.

The fourth type of reasoning was based on that differentiated regulation aimed at equalizing different market conditions or was otherwise reasonable. According to the Constitutional Court, the concept of freedom of competition meant that the state should regulate situations that, due to unequal opportunities for market actors, would detrimentally affect the evolvement and the enforcement of economic competition. In other words, the state should equalize different market conditions in order to promote competition. Thus, the Court held that differentiated tax rules applied to school co-operatives and other co-operatives[130], or certain consumer products warehoused before and after tax increase[131], were

128 In its decision nr. 922/B/2000 the Constitutional Court ruled that laws providing state aid to certain actors in the agriculture sector to the exclusion of others was compatible with freedom of competition. It declared that the state had the right to subvent some producers and to exclude others as it was neither excessive intervention, nor capable of having a considerable effect on competition.

129 The meaning of "considerable effect" was never defined by the Constitutional Court.

130 In its decision nr. 19/B/1999 the Constitutional Court ruled that the act providing more favorable conditions in relation to social security tax to school co-operatives than to other undertakings was complying with the Constitution. It declared that since students employed by school co-operatives were not subject to social security tax, unlike those employed by other co-operatives or undertakings, the act equalized their different market conditions. Although the Court also pointed out that differentiation was applied to a heterogeneous group, it exculpated only the charge of discrimination. Thus, in this particular case, anti-discrimination and freedom of competition separated from each other.

131 In its decision nr. 44/B/1996 the Constitutional Court ruled that the act imposing different consumer tax on certain product warehoused before and after the tax increase was complying with the Constitution. It declared that the act aimed at equalizing the different positions of market actors stemming from the fact that some distributors were able to warehouse products before the tax increase, and some were not. Even though this regulation prevented some undertakings from gaining extra profit from the difference in tax, it was adopted within the competence of the government's tax policy and was not a question of constitutionalism.

complying with freedom of competition as the differentiation aimed at promoting competition through equalizing unequal opportunities. On the other hand, however, the Constitutional Court did not accept the argument of equalizing different market conditions when the differentiated rules were not considered to be appropriate instruments for equalization. In a case concerning compensation for the slaughter of livestock, the Court ruled that the system of differentiated compensation was neither an adequate, nor a capable means of equalizing different market conditions. Since there was no other constitutionally justifiable reason for the differentiation, that law infringed the basic right of anti-discrimination.[132]

Reasonability (as distinct from proportionality) was also used as a justification for differentiated regulations. According to the Constitutional Court, the fact that neuropathic doctors had higher entry barriers to the medical market than ordinary doctors had did not infringe freedom of competition, since this differentiation was reasonable.[133] Consumer protection was considered as a reasonable justification for differentiated regulations. The Constitutional Court declared that since economic competition had to also respect the interests of consumers, regulation of the market in terms of consumer protection was not contrary to the Constitution. Therefore, in industries where the interests of consumers were significantly

132 In its decision nr. 44/2007 (VI. 27.) the Constitutional Court ruled that the act providing differentiated compensation schemes to farmers was contrary to the Constitution. The challenged act provided higher compensation per unit for slaughter to farmers having smaller livestock than those having larger livestock. The legislative intention was to balance the inequality stemming from a differentiated buying-in price. According to the Court, the amount of compensation should have reflected the damage caused instead of the market conditions, and thus differentiated compensation was discriminative without any constitutionally justifiable reason. It also declared that since the unconstitutional infringement had already been assessed, there was no need to examine its effect on freedom of competition.

133 In its decision nr. 684/B/1997 the Constitutional Court ruled that laws setting up different entry barriers to the medical market for ordinary doctors and neuropathic doctors were reasonable, and therefore were conforming to the Constitution. This reasonableness stemmed from the fact that required the educational and scientific basis for non-conventional cure was lower than that of ordinary doctors, and therefore, higher requirements were established for doctors practicing neuropathic medicine.

exposed, the regulation allowing economic competition only within the framework of consumer protection was not unconstitutional.[134] Although, involving consumer protection within the scope of freedom of competition was definitely a progressive interpretation in 1992, this argument was invoked in only a few cases.

The fourth type of market anomalies the Court's decisions focused on was about anticompetitive state measures. In these cases, there was a competitive market without exclusive rights, unreasonably high entry barriers, and discriminative market conditions. However, the state or the local government restricted some elements of competition by legislative means. Some of these measures restricted the competition by setting up a price regime; some restricted other elements of competition, such as the number of market actors or business operation.

As for the price regime, the Constitutional Court declared infringement of the Constitution in only one case. In this decision, the Court declared that the law by which fuel clearing had to be based on nominal statutory prices was contrary to the Constitution.[135] It asserted that since fuel clearings had to be based on nominal statutory fuel prices instead of real market prices, laws were setting up a fictitious price regime that was infringing freedom of competition. Nonetheless, the Court did not explain how the general fixed prices in tax clearing might affect the competition on the fuel market; this decision seems to have considered an extremely broad scope of freedom of competition. Apart from this case, price regimes were not considered to be unconstitutional.[136] The Constitutional Court pointed out that, although prices should be, in principle, set by supply and demand on the market and a price regime was theoretically capable of infringing freedom of competition, intervention on prices was

134 In its decision nr. 254/B/1992 the Constitutional Court ruled that the regulation requiring special professional requirements and insurance from travel agencies did not infringe freedom of competition as these requirements ensured the protection of consumers.

135 Decision nr. 5/1997 (II. 7.) of the Constitutional Court

136 In its decision nr. 577/D/2001 the Constitutional Court declared that the law regulating the price of natural gas supply did not infringe the Constitution because there was no considerable constitutional relationship between the base fee fixed by the law and freedom of competition.

accepted in some specific circumstances.[137] According to the preamble of act LXXXVII of 1990 on regulatory price setting, direct state measures on prices were justifiable when the Competition act was unable to prevent the detrimental restriction of competition and the abuse of a dominant position. The Court derived from this principle that price setting would be necessary even in a market economy, if free competition led to conducts detrimental to public interest or if the exceptional state measure aimed at enforcing economic competition.[138] Both arguments were applied in case law, but competition and market economy were slightly confused in the Court's reasoning. Protection of public interest from detrimental competition was referenced in relation to house rental fees being capable of impairing vulnerable consumers. The Constitutional Court ruled that the act and decree maximizing the rental fee of certain real properties in private ownership did not restrict disproportionately the market economy and freedom of competition since it aimed at protecting vulnerable tenants.[139] A decade earlier in a very similar case however, the Court justified the maximization of rental fees by claiming it did not infringe disproportionately or unreasonably the market economy as it then stood.[140] Six years later the Constitutional Court examined a law allowing local governments to maximize taxi fares in their respective territories.[141] The majority of judges ruled that this law

137 See dissenting opinion of Judge László Trócsányi to the decision nr. 813/B/2009 of the Constitutional Court.

138 In its decision nr. 19/2004 (V. 26.) the Constitutional Court ruled that the price regime in medicinal retail distribution did not infringe freedom of competition since that intervention aimed at ensuring consumer protection and protection of the medicine market.

139 Decision nr. 795/B/2000 of the Constitutional Court.

140 Decision nr. 432/B/1992 of the Constitutional Court.

141 In its decision nr. 782/H/1998 the Constitutional Court ruled that the law allowing local governments to maximize taxi fares was conforming with the Constitution because that price regime would apply equally to all undertakings and would support consumer protection. According to the concurring opinion of Judge István Bagi and Judge István Kukorelli, price regime was capable of restricting freedom of competition and therefore primarily it would be justifiable only if competition was insufficient. They also pointed out that consumer protection and competition issues should have been treated by the respective authorities. Nevertheless, since the challenged act was not conceptually and apparently contrary to freedom of competition, it was not deemed to infringe the Constitution.

conformed with the Constitution on the basis that maximized fares would apply to all taxi providers in the territories concerned and would support consumer protection in the public interest. According to two judges, however, it was doubtful whether price maximization was necessary, but it was not conceptually and apparently contrary to freedom of competition, and therefore did not infringe the Constitution.

The enforcement of economic competition was also invoked in the reasoning of the Constitutional Court. It held that raising the contractual interests and installments of certain housing loan contracts complied with the Constitution since it aligned those contracts concluded during the socialism with the conditions of market economy.[142] The Court pointed out that, although shifting planned economy to market economy required the reduction of state interventions, this did not entail the total exclusion of measures. It went further in another case, and declared that the prohibition of pharmacies' competition in price was constitutionally justifiable because the act partially took the pharmaceutical market away from the competition.[143] Freedom of competition, thus, was unable to prevent price regimes, but the Constitutional Court recognized that state measures beyond a certain extent might restrict freedom of competition, and therefore were allowed only in exceptional cases and due to reasonable causes.[144]

There was an outstanding price regime case upheld by the Constitutional Court, but neither public interest, nor the enforcement of competition was invoked in the Court's reasoning. In this case, the Constitutional Court had to judge the law allowing wine villages to set up statutory protective prices for all producers.[145] According to the Court, the objective of that

142 Decision nr. 32/1991 (VI. 6.) of the Constitutional Court.

143 Decision nr. 677/B/1995 of the Constitutional Court.

144 Decision nr. 19/2004 (V. 26.) of the Constitutional Court.

145 Decision nr. 41/1995 (VI. 17.) of the Constitutional Court. The challenged law stipulated statutory membership of the wine village for all producers having significant turnover in their respective territory, and allowed the board of the wine village to set up a protective price for vitivinicultural products. According to this protective price system, had a member sold products below the protective price, he would have had to pay the difference to the wine village. The Court compared this protective price to the price fixing of associations of undertakings, and pointed out that the former, unlike the later,

protective price was to protect the goodwill of the products and applied equally to all producers. Although it admittedly restricted freedom of competition and freedom of enterprise, since this restriction was deemed to be neither unnecessary, nor disproportionate, the Court ruled that law concerned was conforming with the Constitution.

In relation to anti-competitive state measures of other kinds, the starting point of adjudication was the case in which the Constitutional Court examined the act entitling local governments to regulate the number of taxi providers within their respective territories.[146] According to the Court, although the Constitution declared market economy and freedom of competition,[147] it did not define the constitutional framework for intervention on the economy. In addition, neither the extent, nor the type of lawful state measure could be derived. Therefore, only those measures that exceeded a critical extent could be regarded as contrary to the Constitution and thus would "*conceptually and apparently exclude the existence of market economy*", such as general socialization or establishing strict planned economy. In this particular case, the Constitutional Court ruled that the act in question was unconstitutional because defining a closed number of taxi providers would significantly restrict freedom of enterprise that would not be regarded as justifiable. Consequently, the aforementioned conceptual and apparent exclusion of the existence of market economy was, in effect, construed as a significant restriction on a basic right. This interpretation was often used in later cases relating to anti-competitive state measures, such as when the Constitutional Court ruled that regulations imposing value added tax on certain types of money acceptance[148] or the establishing of statutory closing hours on

was not against some market actors and did not aim at direct economic benefits for the stakeholders. Consequently, the restriction of competition was considered to be constitutionally justifiable.

146 Decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

147 According to article 9 of the Constitution, "*The economy of Hungary is a market economy in which public property and private property shall receive equal consideration and protection under the law. The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy*".

148 In its decision nr. 274/B/2005 the Constitutional Court ruled that the act on value added tax that considered acceptance of money on non-nominal value to be a supply of goods for tax purposes. It declared that since this did "*not make*

certain catering providers[149] were not contrary to freedom of competition since they did not conceptually and apparently restrict the market economy. In relation to a law entitling the government to freeze wholesale prices of medicines as agreed by suppliers and purchasers, the question of conformity with freedom of competition was surprisingly not raised. Instead of freedom of competition, the Constitutional Court examined that law in light of market economy and freedom of contract. The Court declared that medicine distribution was a regulated sector due to the high public interest in efficient medicine supply. Whereas this sector was regulated, the scope of market economy was necessarily limited, but that was not considered as a basic right and therefore its restriction was not limited. In addition, freedom of contract as a recognized basic economic right, was not infringed as per the Court, and therefore the challenged provision of that law was deemed to be conforming with the Constitution.[150]

As can be seen in the cited case law, freedom of competition was barely able to protect economic competition from the anti-competitive legal environment because it was not considered to imply any specific constitutional substance, serving only as a guideline for the interpretation of basic economic rights. The scope of freedom was very limited due to several reasons; at least three filters can be identified that constricted its influence. Firstly, it could only be invoked – with few exceptions – in relation to existing markets (but the borderline between markets and sole domains of the state was drawn by the state itself). This meant that the legislation had the right to simply take an economic

market economy apparently impossible and the measure was not deemed to be conceptually contrary to freedom of competition", the act complied with the Constitution.

149 In its decision nr. 1448/B/2007 the Constitutional Court ruled that the local government decree on statutory closing hours was not contrary to the Constitution. That decree obliged local catering providers, except restaurants and providers operating within a defined territory of town, to keep closed at night. The Constitutional Court declared that this measure of the local government was not considered as "*conceptually and apparently contrary to market economy and freedom of competition*" and therefore it was not infringing the Constitution.

150 Decision nr. 87/2008 (VI. 16.) of the Constitutional Court. However, other provisions of the challenged law were considered to be unconstitutional on other grounds.

activity away from the market where freedom of competition did not extend. The second filter stemmed from the difference between economic activities and non-economic activities, where the decisive factor was the liberty of undertakings to offer services or products on the market[151] to each other.[152] Consequently, official services[153], public services[154] and other services being provided on a mandatory legal basis[155] were not considered as economic activities. As a result, freedom of competition was not capable of protecting competition within certain markets of services in the public interest. The third filter was based on some sort of *de-minimis* considerations whereby a state measure not having a significant impact on competition, either by its very nature[156] or because of the lack of fierce competition[157], did not

151 According to decision nr. 684/B/1997 of the Constitutional Court, since only those doctors who have private praxis carry out economic activity on the market of ordinary healing – other types of medical services do not form part of the market – competition, in a broader sense, can exist only among these ordinary medical service providers or among non-conventional service providers.

152 In its decision nr. 252/B/2008 the Constitutional Court ruled that freedom of competition applied to the relationship of undertakings to each other, so differentiated health care contribution did not infringe that.

153 In its decision nr. 354/B/1995 the Constitutional Court ruled that laws ensuring exclusive rights for providing official translation services did not infringe freedom of competition since official translating, translation authenticating, or making certified copies thereof were not considered economic activities. It also pointed out that a striking distinction should be drawn between economic activities and official services.

154 According to a constitutional complaint, the company information service provided by the Ministry of Justice, on the basis of the law, was infringing freedom of competition. Information provided by the Ministry allegedly gained unfair competitive advantage by falsely appearing to be official because the official company register was kept by the courts. In its decision nr. 1130/B/1995 the Constitutional Court pointed out that the service of the Ministry of Justice was a legitimate public service that was provided to everyone and therefore could not, by its very nature, infringe freedom of competition.

155 The Constitutional Court pointed out in its decision nr. 784/B/1994 that freedom of competition primarily applies to the economic activities of undertakings. The activities of local governments however, being set out by law, do not constitute competition among local governments.

156 State aid to certain undertakings is not contrary to freedom of competition, provided that the amount of state aid is not capable of significantly affecting the competition. Decision nr. 922/B/2000 of the Constitutional Court.

157 Decision nr. 580/B/1997 of the Constitutional Court.

unconstitutionally breach freedom of competition.

The Constitutional Court declared in 1994 that there was no constitutional canon for freedom of competition.[158] Consequently, whereas it was not considered as a basic right, the limitation of restricting such rights set out in article 8, paragraph 2[159] did not apply to this provision.[160] Freedom of competition, nonetheless, had obvious constitutional limitations. In its decision of 1992, the Constitutional Court upheld that article 10, paragraph 2 of the Constitution formed a limitation to freedom of competition.[161] This provision expressed that "*Fields of ownership and economic activity deemed to be the sole domain of the State shall be defined by law.*" It had to be, therefore, interpreted together with article 9, paragraph 2. Partly on this basis, some authors state that freedom of competition should have been deemed to be the institutional protection of freedom of enterprise instead of a mere state goal.[162] In my opinion, however, this relationship should have been recognized in just the opposite direction, since freedom of enterprise was one of the *sine qua non* preconditions of economic competition.[163] As to the limitations, the Court declared that this

158 Decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

159 "*In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law. However, such law may not restrict the elemental meaning and content of fundamental rights.*" Constitution, art 8 par 2.

160 Decisions nr. 782/B/1998 and 802/B/1999 of the Constitutional Court.

161 Decision nr. 46/1992 (IX. 26.) of the Constitutional Court.

162 G. Nagy, *A piacgazdaság és egyes ezzel összefüggő gazdasági alapjogok, alkotmányos alapelvek értelmezési, továbbfejlesztési lehetőségei az új Alkotmány kapcsán*, in T. Drinóczi, *Gazdasági alapjogok és az új magyar alkotmány* (2007), 101-102. According to decision nr. 54/1993 (X. 13.) of the Constitutional Court, although freedom of enterprise meant unconditionally that one should not be precluded from becoming an entrepreneur, it did not mean that one had the right to engage in whatever economic activity. In addition to constitutionally legitimate restrictions relative to certain businesses, this freedom did not extend to economic activities reserved solely to the state. Freedom of enterprise, in contrast to freedom of competition, was considered as a real fundamental right as per the decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

163 Ensuring freedom of enterprise is a requirement of protecting freedom of competition since economic competition postulates undertakings competing with each other. Freedom of competition, however, is not necessarily required by freedom of enterprise as competition is impossible on certain markets (e.g. the market of a natural monopoly) where freedom of enterprise is respected. Therefore, freedom of enterprise only related to freedom of competition insofar as the entrepreneurship was utilized on a competitive market. In other words,

state goal did not apply to cases where the restriction of freedom of enterprise was imposed as a sanction of unlawful economic conduct.[164] Likewise, the Constitutional Court declared that consciously deceiving consumers through fraudulent actions was not within the scope of freedom of competition, and therefore sanctions of illegal actions were not infringing the Constitution.[165]

Additionally, a misconception arose regarding the limits of this state goal. In 1994, the Court declared that the state had the right to restrain economic competition, provided that that restraint was not discriminative and was adopted in the appropriate legislative form.[166] On this ground, some authors identify the means of competition law as a sort of constitutional restriction of freedom of competition.[167] In my opinion, however, competition law does not restrict the freedom of competition, but only those conducts that would threaten the goals of freedom of competition.[168] Attention must be drawn to the fact that this decision was about the restriction of competition in favor of freedom of competition, and not about the restriction of the constitutional state goal. Competition as such and freedom of competition should not be confused since competition law is just to forestall *laissez faire* competition in compliance with the Constitution. Should freedom of competition protect any sort of unlimited competition, it would be adverse to the paradigm of social market economy, which was also declared by the

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freedom of competition could not, by its very nature, be the institutional protection of freedom of competition, while the latter necessarily postulates the former since there cannot be competition without undertakings.

164 In its decision nr. 1133/B/1998 the Constitutional Court ruled that "*administrative sanctions being imposed upon illegal actions do not constitute infringement of freedom of competition or freedom of enterprise.*" Thus, the law that imposes the compulsory closure of business premises as a sanction to breaching the tax regulations on billing conformed to the Constitution.

165 Decision nr. 1133/B/1998 of the Constitutional Court.

166 Decision nr. 31/1994 (VI. 2.) of the Constitutional Court.

167 G. Nagy, *A piacgazdaság és egyes ezzel összefüggő gazdasági alapjogok, alkotmányos alapelvek értelmezési, továbbfejlesztési lehetőségei az új Alkotmány kapcsán*, cit. at 162, 102. See also G. Nagy, *A magyar gazdasági alkotmányosság alapjai – egyes alkotmányos alapértékek és alapvető jogok fényében*, Közjogi Szemle 43 (2009).

168 In its decision nr. 17/1998 (V. 13.) the Constitutional Court declared that restricting economic competition by laws did not constitute an infringement.

Constitution.[169]

The Constitution itself declared only the recognition and support of freedom of competition. The case law added that the state also had to ensure and protect it.[170] Recognition and support meant, on the one part, that national and local government authorities had to enforce and protect basic economic rights in favor of realizing the state goal.[171] On the other part, the state had to establish the institutional protection of basic economic rights required for the market economy or freedom of enterprise.[172] Hence, the Constitutional Court did not differentiate between support and recognition of freedom of competition; both were construed to serve basic rights.

Ensuring this freedom meant, according to the Constitutional Court, that the state had to secure that each market actor was able to sell its products or services within the market on the same conditions and none of them was able to gain an advantage via regulation.[173] Thus, anti-discrimination appeared to be at the center of ensuring this state goal. Worth of note, the Court emphasized, in relation to this duty, that the state had to stay neutral in relation to basic rights.[174] Although it was never defined how and to what extent the state had to stay neutral, this term presumably referred to the concept of competitive neutrality. Despite the fact that this concept had not been declared by the Constitution itself since its amendment in 1990 (as also the Constitutional Court rightly pointed out in 1994,[175]), competitive neutrality regularly came up as an implicit part of the content of freedom of competition in the reasoning of the Court's decisions

169 Like Lénárd Darázs rightly pointed out, competition law, by prohibiting certain acts on the market, restricts freedom of contract, not freedom of competition. L. Darázs, *A szerződési szabadság és a verseny alkotmányos védelme*, Acta Facultatis Politico-iuridicae Universitatis Budapestiensis XLIV 37-42 (2007).

170 Decision nr. 19/1991 (IV. 23.) and decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

171 Decisions nr. 21/1994 (IV. 16.), 20/1998 (V. 22.) and 802/B/1999 of the Constitutional Court.

172 Decision nr. 21/1994 (IV. 16.) of the Constitutional Court.

173 Decision nr. 684/B/1997 of the Constitutional Court.

174 Decision nr. 31/1994 (VI. 2.) of the Constitutional Court.

175 Decision nr. 566/H/1994 of the Constitutional Court.

until 1996.[176] The duties of the state in respect of protecting freedom of competition were not clearly defined either, but the adoption of the Competition Act and establishment of the competition authority were identified as manifest in protecting the state goal.[177] This interpretation was basically reflected in both the Competition Act[178] and the strategic documents of the Hungarian Competition Authority.[179] As per the principles of its self-assessment, freedom of competition was meant to protect the competitive process from undue restraints such as abuses of dominant position, cartels, and harmful mergers. It also pointed out that freedom of competition did not mean protection of economic freedom or market entry of individual undertakings.[180] All these substantially coincided with the concurring opinion of Judge István Bagi and Judge István Kukorelli to a decision in 1998, in which they expressed that the state in a market economy should ensure the most efficient competition, and should prevent detrimental consequences of imperfect competition such as abuse of dominant position and monopolies.[181]

Although the Constitutional Court has never comprehensively described article 9 paragraph 2 of the Constitution, its outlines can be synthesized now from landmark decisions. It was construed as an obligation and a prohibition relative to the state. It obliged the state to set up institutions for

176 Decisions nr. 1/1991 (I. 29.), 133/B/1991, 353/B/1992, 20/B/1995, 752/B/1995 and 44/B/1996 of the Constitutional Court.

177 Decisions nr. 1211/B/1996 and 183/2010 (X. 28.) of the Constitutional Court.

178 According to the preamble of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, "*The public interest in maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness and the interests of consumers require the state to protect by law fairness and freedom of economic competition.* (...)".

179 The previous set of strategic documents of the Hungarian Competition Authority were replaced by a single strategic document in 2015, which still emphasizes, as its mission, that fairness and freedom of competition shall be guarded for the increase of consumer welfare. Hungarian Competition Authority, *Középtávú Intézményi Stratégia 2015-2018*, 16 (2014).

180 Cf. Hungarian Competition Authority, *A verseny szabadságával kapcsolatos, a GVH által követett alapelvek* 19, 119-120 (2007).

181 See concurring opinion of Judge István Bagi and Judge István Kukorelli to the decision nr. 782/H/1998 of the Constitutional Court.

protecting competition from anti-competitive actions of market actors. It also prohibited the state from adopting a law that would significantly and unjustifiably hamper basic economic rights in relation to offering goods or services within the market. It did not mean, however, that the state was to establish a pro-competitive legal environment, liberalize any market, or ease market entry. Furthermore, it did not prevail over basic rights or other state goals.

III. Concluding remarks

It is visible in the foregoing cited cases that freedom of competition, as interpreted by the Constitutional Court, was to support basic economic rights and to protect competitive process on the market. From this perspective, it complied with the ordoliberal origins of the concept since it focused on protecting competition through competition law and ensuring economic freedom through basic economic rights. What it did not seem to achieve was the protection of competition from legislative interventions. In other words, it concerned competition within a particular actual legal framework, and barely dared to challenge the law establishing anti-competitive legal environment. As per the interpretation of the Constitutional Court, competition law had to protect the competitive process from the restrictive practices of undertakings, and freedom of competition was partly to ensure this protection existed, and partly to support basic economic rights. It focused on the competition process within the paradigms that had political power set up, but was at the same time vulnerable to the political power. It was the same dilemma the Freiburg School had had; to how to protect competition on the constitutional level.[182]

The relative weakness of freedom of competition within Hungarian constitutionalism stems basically from two factors: a historical and a political one. Firstly, the wording of article 9 paragraph 2 was unclear as it codified an unprecedented and immature principle that implied a variety of possible

182 V. J. Vanberg, *The Constitution of Markets. Essays in political economy*, cit. at 4, 50-51. See also V. J. Vanberg, *Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy*, 9 Walter Eucken Institut (2009).

interpretations on a constitutional level. If the Constitution had been about the recognition and support of the competition itself instead of its freedom, it would have fitted better the constitutional meaning of market economy and would have made it clearer what the state should do in respect of competition. Even though article 9 paragraph 2 was ahead of its time in the region, severe and inherent uncertainty was the price it paid.

The second reason is rather a theoretical one. The Constitutional Court tried not to deal directly with matters belonging to economic policy so as not to limit the government's latitude in forming economic policy.[183] Its legal justification was based on a decision in 1993 in which the Court ruled that beyond declaring market economy[184], the Constitution was neutral in respect of economic policy, and therefore several aspects of state intervention could not be subject to the supervision of the Court.[185] The practical basis of this approach was that the Court wanted to avoid being obliged to base reasoning of its decisions in matters of economic policy "*on this swampy ground (in respect of its doctrinal terminology)*" of the economic constitution.[186] This was what the first president of the Constitutional Court called the "*danger of unelaborated concepts*."[187] Nevertheless, declaring competition as an autonomous and protectable legal substance would have been safe in that regard, and at the same time, established a sound constitutional pillar for the market economy.[188] If competition itself had been a clear constitutional value, the state would still have had the power to adopt anti-competitive laws or interventions, but only upon a constitutional justification. In such a case, the question in a constitutional assessment of a law would not be what prohibits the anti-competitive measure, but what justifies it. Consequently, there have been opportunities for the state to strengthen the concept of

183 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 150-151.

184 The German Constitutional Court had a similar decision in 1959. See BVerfGE 50, 338.

185 Decision nr. 33/1993 (V. 28.) of the Constitutional Court.

186 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 421.

187 L. Sólyom, *Az alkotmánybírósákodás kezdetei Magyarországon,* cit. at 61, 150-151.

188 Cf. T. Tóth, *Gazdasági alkotmány - a piac és a verseny védendő értékei*, cit. at 26, 2.

freedom of competition without interfering with legislation or the government.

After two decades of debate on the need for a new constitution, the Hungarian Parliament adopted the new Fundamental Law in 2011 to replace the old Constitution. This new ground law, with a new structure and new content, entered into force in 2012. Although the majority of the changes were driven by rather political and theoretical motivations than those of jurisprudence,[189] articles of the Fundamental Law formed the new basis for the whole legal system including competition law, and set up a new framework for economic policy. It did not take over the provision on competition in the old Constitution, but in some sense went beyond it. According to Article M paragraph 2, "*Hungary shall ensure the conditions of fair economic competition. Hungary shall act against any abuse of dominant position, and shall protect the right of consumers.*" By eliminating the word "freedom", the range of interpretation was tighter since it can hardly be understood as an article setting out a fundamental right. Rather, it appears to refer to some sort of obligation of the state, but the new reference to "conditions" undoubtedly constricts the extent of obligations implied therein.

The Constitutional Court has already interpreted article M of the Fundamental Law a few times. Firstly, it declared that article M paragraph 2 is an essential principle of market economy so, in that respect, the Court maintained the special relationship between market economy and the constitutional protection of competition.[190] Secondly, it pointed out that enforcement of "fair competition", as part of general public interest, extended to the prohibition of cartels, the regulation of criminal and private enforcement, and the protection of procedural rights of the

189 Cf. A. Arató, G. Halmai, J. Kis (eds.), *Vélemény Magyarország Alaptörvényéről,* 1 Fundamentum 61-62 (2011). See also Opinion no. 621/2011 (11) of the European Commission for Democracy Through Law (Venice Commission), B. Molnár, M. Németh and P. Tóth (eds), *Mérlegen az Alaptörvény. Interjúkötet hazánk új alkotmányáról* (2013), 19-20.

190 Decision nr. 30/2014 (IX. 30.) of the Constitutional Court. In this decision, the Constitutional Court refused a constitutional complaint submitted in relation to the judgement of the Curia of Hungary whereby the Curia had upheld the decision of the competition authority that had imposed cartel fines on the complainant.

competition authority.[191] Thirdly, the Court defined "fair competition" as competition in which market actors follow, besides the law, "*requirements of moral economy and fair business.*"[192] In addition to these definitions, the Court upheld that certain economic activities could be reserved for the State,[193] and also that article M on ensuring the conditions of fair economic competition did not form a basic right.[194]

The dilemma about freedom of competition seemingly ceased to exist in 2012 as the legal basis changed. However, the Constitutional Court in a decision of July 2012 interpreted article M paragraph 2 of the Fundamental Law as a protection for freedom of competition again and thereby brought back the basis for the problematic interpretation of the concept examined in this paper. In this recent decision the court declared that "*freedom of contract is protected by the Fundamental Law since it is a crucial condition of market economy and therefore of the operation of freedom of enterprise and of competition protected by Article M of the Fundamental Law.*"[195] Given the lack of detailed reasoning in this particular decision, the connection between freedom of competition and the new article is not really set out clearly. Since there have only been

191 Ibid. It was reconfirmed by the Constitutional Court in decision nr. 3100/2015 (V. 26.) whereby a constitutional complaint submitted in relation to the judgement of the Curia of Hungary and the Competition Act was refused. The Court pointed out in the reasoning that the competition authority had had the right to impose cartel fines on the complainant, and the Competition Act as the legal basis of the fines was conforming to the Fundamental Law.

192 Concurring opinion of Judge Barnabás Lenkovics to the decision nr. 8/2014 (III. 20.) of the Constitutional Court.

193 In its decision nr. 3194/2014 (VII. 15.), the Constitutional Court stated that the law reserving retail distribution of tobacco products for the state was conforming to the Fundamental Law because the state had the right, on the basis of article 38 of the Fundamental Law, to reserve certain economic activities for itself.

194 In its decision nr 3024/2015 (II. 9.), the Constitutional Court examined the law that restricted the publishing of school books. It declared that since article M paragraph 2 of the Fundamental Law did not constitute a basic right, constitutional complaints could not rely on it. Therefore, the Court could examine the challenged law in particular in the light of freedom of enterprise, and concluded that the challenged law was conforming to the Fundamental Law because freedom of enterprise was not infringed.

195 Decision nr. 3192/2012 (VII. 26.) of the Constitutional Court. This argument was upheld in concurring opinion of Judge Barnabás Lenkovics to the decision nr. 8/2014 (III. 20.).

a few Court decisions regarding article M so far, it cannot be confidently claimed that the new article really implies freedom of competition or not. The Constitutional Court, however, will undoubtedly have the opportunity to define the constitutional substance of the new article and its connection to the old concept. Otherwise, freedom of competition will only be part of the history of Hungary's constitutional law.

BOOK REVIEW

VLADIMIR TOCHILOVSKY, *THE LAW AND JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNALS AND COURTS. PROCEDURE AND HUMAN RIGHT ASPECTS*, CAMBRIDGE-ANTWERP, INTERSENTIA, 2014, 2 ND ED., PP. 1371.

*Giacinto della Cananea**

Recent years have seen a dramatic increase – in both their number and typology – of international tribunal and courts at work across the globe. The United Nations have established special international criminal tribunals in order to prosecute those responsible for atrocities during times of (civil) war in Rwanda and Yugoslavia. Subsequently, the International Criminal Court (2003) has been established in 2003. More recently, other special tribunals have been set up in order to deal with crimes committed in Sierra Leone, Cambodia and East Timor. Students of these courts and tribunals often ponder over the following type of questions: Can these bodies be regarded as courts of law in the proper sense; that is, possessing distinct institutional characters differentiating them from other institutions, such as ombudsmen and amnesty and truth commissions? Is criminal justice – apart from the two international courts set up at the end of the second World War – no longer an exclusive prerogatives of the States? Does this mean that retributive justice is preferred to revenge or amnesia; that is, to restorative justice? Or does it imply, in case of a failure of legal institutions aiming at ensuring retributive justice, that crimes (both war crimes and crimes against humanity) are left without punishment, thus undermining the credibility of justice as such?

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Only some of these questions are considered in this book about international criminal courts and tribunals, which looks at these bodies as institutions of government which are entrusted with the task to achieve certain social goals. While the book does not deal extensively with a traditional distinctive feature of courts and tribunals, namely their independence (some cases concerning judicial impartiality are, however, analyzed in ch. 4), it focuses on the ways in which they perform their task, on the basis of pre-existing legal rules and after adversary procedures. In other words, this book focuses on procedure. For sure, human rights aspects are not neglected, but are considered from such viewpoint. Nor are theoretical issues neglected, though the main thrust of the book is descriptive. Another feature which makes this book readily distinguishable from other books in this field is its scope. Several lawyers focus their attention on the impact of courts and tribunals from the viewpoint of the effects of their action upon the litigants and those who may be in similar situations. The author's perspective is different, first and foremost, because he seeks to provide "the most comprehensive overview of the law and jurisprudence of [both] the *ad hoc* criminal tribunals and courts" and the ICC, with a view also to the relevant judgments of the European Court of Human Rights;

Tochilovsky studies a high number of recent cases that can be put in two main groups. The first concerns the proceedings that must be followed in order to achieve a decision about the culpability of the accused person(s) (chapters 1-14, roughly corresponding to two thirds of the book). The second group regards the decisions taken by international criminal courts and tribunals, the appeals against them and other issues (chapters 15-24, corresponding to another third of the book).

The first part of the book examines in detail all salient aspects of the proceedings that must be followed by international criminal courts and tribunals, beginning with the right to be informed of the nature and cause of the charge (ch. 1, with more than one-hundred pages) and including both the accused persons' access to the evidence brought against them (ch. 2) and the protection of victims and witnesses (ch. 8). In this context, specific attention is devoted throughout more than three-hundred pages to trial proceedings (ch. 11). The leading judgments taken by a variety of judicial authorities in this field are analyzed in some

detail and show what sorts of arguments are relied on by the judges in order to ensure some sort of procedural justice. Tochilovsky first of all puts the issue of the principle of equality of arms, in the light of the jurisprudence of the ECHR Court; he then examines more specific aspects, such as the role of the prosecutor, the number or witnesses who can be admitted, the accused's right to be tried in his presence (not excluding recent technological devices, such as video-links), and cross-examination. Adequate attention is also devoted to the admissibility of evidence, which is sometimes particularly controversial, for example when most, if not all, documents have been destroyed and the credibility of witnesses is contested. A closely connected aspect is that of the assessment of evidence (ch. 15), which is governed by the "beyond reasonable doubt" standard of proof.

The second group of cases deals with what happens after a decision has been taken by the relevant international criminal court or tribunal. This includes both the right to appeal (ch. 16), the referral of the case to another court (ch. 17) and other remedies (ch. 23). It includes also the actions that must be taken in order to ensure that the decision is enforced, such as arrest and detention (ch. 19), provisional release (ch. 20). Finally, other procedural issues, including *amicus curiae* briefs and public filings, are considered (ch. 24).

The author's choice to focus on rights from the viewpoint of procedure has some implications that are worth discussing. First of all, in contrast with theories of rights that emphasize their 'absolute' nature, the author argues that this is not always the case. An important example is that of the right to cross-examine witnesses. This right, he observes, can be limited, provided that other interests so require. He then goes on to say that tribunals "have a wide discretion in admitting hearsay evidence" (p. 545). This example can also shed some light on the author's broader view of the principle of equality of arms. This principle, he notes, is not simply guaranteed by Article 6 ECHR, but must be interpreted in the light of the Preamble, which declared the rule of law to be part of the common heritage of the States (p. 444). What the rule of law means and implies are obviously controversial questions. Nevertheless, in my opinion, Tochilovsky is right in referring not only to the rules agreed by the States, but also to the underlying shared values. His conceptualization of equality of

arms in the context of fair trial is also convincing, although in my opinion this does not necessarily imply that criminal proceedings must always be adversarial, at least not in the way which typical of some legal cultures. Equally important is another requirement of fair trial, that is giving reasons. Interestingly, the author does not consider only the why in which this requirement is fulfilled, but also the way in which judges actually reason in their opinions. In particular, reasons must be given for all relevant factors of the case (p. 1036), though this does not imply that a trial chamber is obliged to justify its findings in relation to every submission made during the trial. It would be interesting more in detail the kinds of legal justification that courts and tribunals provide, in order to see whether national and international criminal judges reason more or less in the same way. This is an aspect that might be developed, if a new edition is to come.

That said, there is much to be welcomed in this book. It is high time that more attention was devoted by not only by specialists, but also by students of legal globalizations to the ways in which international criminal proceedings are structured and managed.

DOMENICO SICLARI, *THE EUROPEAN COURT OF AUDITORS. THE EFFECTIVENESS OF ITS FUNCTIONS IN THE PRESENT FINANCIAL CRISIS*, EUROPEAN PUBLIC LAW SERIES - BIBLIOTHÈQUE DE DROIT PUBLIC EUROPÉEN. VOLUME CVIII. EPLO (EUROPEAN PUBLIC LAW ORGANIZATION) – OSSERVATORIO DELLE POLITICHE PUBBLICHE PER LE AUTONOMIE. UNIVERSITÀ MEDITERRANEA DI REGGIO CALABRIA, 2013, PP. 168.

*Giuseppe Cogliandro**

> "Give an account of thy stewardship,
> for thy mayest no longer be steward"
> (Luke XVI.2)

This essay by Prof. Domenico Siclari has two objectives. The first is to demonstrate that, according to the European Treaties, "control of financial management[1] must be carried out by a structure external to the controlled entities" (p. 18). This statement refers to the difference between internal control and external control, which I shall discuss later.

The second is to highlight that *accountability*, i.e., the obligation to "give an account" of public funds by individuals who have used them, "is of fundamental importance for a democratic government" (p. 19).

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[1] On this topic, G. Cogliandro, *The assessment and control system in Italy*, in L. Vandelli (ed.), *The administrative reforms in Italy: experience and perspectives*, (2000), 181.

The principle of *accountability*, as I have already had occasion to note[2], finds its most solemn formulation in the Gospel's *redde rationem* (Luke XVI. 2) in art. XV of the *Déclaration des droits de l'homme et du citoyen* of 26 August 1789, which established that "*La société a le droit de demander compte à tout agent public de son administration*".

This legal institution, already known to Roman law, which imposed on the *quaestores* and the *provinciales* the duty to *rationes referre* (give account), through the accounts (*rationes relatae*) of the state of the treasury and administration, is now enshrined in Art. 81 of the Italian Constitution[3] and is usually found also in other contemporary legal orders.

The first chapter of Domenico Siclari's book concludes with the identification of four categories of "Supreme Audit Institutions" (p. 37):

1. Courts (of Auditors) in charge of administrative controls holding judicial office
2. Collective bodies devoid of judicial office
3. Auditing offices independent of the Government and headed by a Comptroller (Auditor) General
4. Models of control directed by centralized entities, holders of operational functions on a territorial basis.

The expression "Supreme Audit Institutions" (hereafter: SAI) used by Siclari is now in consolidated use in international practice.

In my opinion, this term is inappropriate, however, as these institutions do not have a higher rank than other control structures, as, however, one might infer from the use of the term "Supreme."

In fact there is no hierarchical relationship between the internal auditing body and the external auditing body[4].

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[2] G. Cogliandro, *Gestione [Conto di]*, *Digesto*, IV edizione, vol. VII Pubblicistico, (1992), 1.

[3] An essential work on this issue, despite the amendment due to Constitutional Law, 1/1202 is an analysis of by S. Bartole, in *Commentario della Costituzione,* G. Branca, (ed.) *Art. 78-82, La formazione delle leggi*, volume II, (1979) 197.

[4] G. Cogliandro (ed), *I rapporti tra controllo interno e controllo esterno*, in *Corte dei conti e Servizi di controllo interno: i rispettivi ruoli, Atti dell'incontro di studio organizzato dalla Corte dei conti e dalla Conferenza dei Servizi di controllo interno delle Amministrazioni dello Stato* (2000) 17.

Legislative decree 286 of 1999 on internal auditing (as amended by Legislative Decree 150 of 2009) provides - in addition to ascertaining the lawfulness, regularity and appropriacy of administrative action - two internal auditing structures: one appointed to verify the effectiveness, efficiency and cost-effectiveness of administrative action (*management control*); the other with the authority to assess the adequacy of the choices made when implementing plans, programmes and means of implementing policy (*strategic control*). Management control is established by the executive at the head of an organizational unit to whom it responds and reports; strategic control is established by the political and administrative decision-maker to which, symmetrically with management control, it responds and reports.

On the other hand, external auditing is carried out by institutions, governed by rules which must have constitutional relevance, answering and reporting to Parliament.

Consequently, the appropriate expression is not Supreme Audit Institutions, but "External Auditing Institutions."

After this long digression, it is time to return to the work by Prof. Siclari, who notes that within the framework of the European institutions "the constant factor is the provision of subsequent auditing of the management of administrations from the dual points of view of financial control and performance monitoring." Hence the conclusion that, taking into account their distribution into geographical areas, "the two auditing models constitute a constant given, apart from performance monitoring in Greece" (p. 38).

Naturally, the focal point of the examination of the Supreme Audit Institutions concerns their functions. However, a specific problem arises regarding the exercise of judicial functions in respect of the responsibility of public agents. In this regard, it is obvious that SAIs, set up as auditing bodies, *never* hold judicial office. The converse is not true, however. It is not true that all external auditing institutions going by the name of Court or Tribunal (*Cours des Comptes*, the *Tribunal de cuentas*, *Bundesrechnungshof*, etc.) *always* exercise judicial functions. This is true for some Courts, but not for all. And in any case, this is not

true and will not be true in the future, contrary to what has been said [5]concerning the European Court of Auditors[6].

Another important aspect of Siclari's analysis regards the European parameters of control[7], namely, (besides lawfulness and compliance, subject to further analysis) the principles of effectiveness, efficiency and economy (p. 85).

This matter is now regulated by art. 30 of Financial Regulation no. 966/2012 of the European Parliament and Council of 25 October 2012, which lays down as follows:

"1. Appropriations shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness.[8]

2. The principle of economy requires that the resources used by the institution in the pursuit of its activities shall be made available in due time, in appropriate quantity and quality and at the best price.

The principle of efficiency concerns the best relationship between resources employed and results achieved.

The principle of effectiveness concerns the attainment of the specific objectives set and the achievement of the intended results."

Italian legislation also obliges public authorities to comply with the criteria of sound financial management. There are, however, some incongruities within the legislative framework.

Art. 7, paragraph 7, of Law 131 of 2003 states that the "Regional Sections of the Court of Auditors ascertain ... the *pursuit of the goals* set by the State or Regional laws from the perspectives of both principle and programme, according to their respective areas of jurisdiction, *as well as the sound financial management* of local authorities and the execution of internal controls, reporting

[5] C. Astraldi De Zorzi, *Le Corti dei conti europee: esperienze a confronto*, Amm. Cont. St. enti pubbl. (1998), 441.

[6] G. Cogliandro, *I controlli nel sistema comunitario*, in M.P. Chiti, G. Greco (eds.), *Trattato di diritto comunitario europeo*, II (2007), 2nd ed., 539.

[7] G. Cogliandro, *Il controllo in Italia e nell'Unione europea*, 2 Riv. trim. sc. amm. scolastica (2007), 12.

[8] G. Cogliandro, *Verso la terza "riforma" del controllo interno?* in A. Cerri, G. Galeotti (eds), *Efficienza ed efficacia dell'azione pubblica*, Quaderno n. 3/2008 Nova Juris Interpretatio, (2010), 12.

on the results of audits only to the boards of the controlled entities."

The terminology used by the legislature is tautological: "the pursuit of goals," in fact means the same as "administrative effectiveness", a concept already included, as we have seen, in the phrase "sound financial management".

The expressions "lawfulness and regularity"[9] and "sound financial management" diverge both at regulatory and conceptual levels.

Both the European legislation[10], and the Italian Court of Auditors consider the two notions to be distinct. The European text is very clear in this regard: "The Court of Auditors shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether financial management has been sound (Art. 287 Treaty on the Functioning of the European Union- TFEU). The Italian rule is equally unequivocal on this point (even if formulated in non-technical language). Article 3, paragraph 4, of Law 20/1994 states that "The Court of Auditors carries out [...] the examination of the management of the accounts [...] verifying the legality and regularity of the management [...] (*and*) [...] a comparative evaluation of the costs, methods and time employed in the performance of administrative activities".

Also on the theoretical level, there are major differences between the concepts of legality/regularity and sound financial management.

The *first* difference is that legitimacy is an absolute concept: an act is either lawful or unlawful; it cannot be a little lawful or too unlawful. On the other hand, efficiency is a relative concept, a notion involving quantity, a ratio between values or quantities. Management can be totally efficient or inefficient, but usually it is slightly or very efficient (30%, 50%, 70% etc.). It follows that efficiency is measured (and the same goes for effectiveness), whereas legality is affirmed or denied.

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[9] G. Cogliandro, *Legittimità: variazioni su tema tra sinonimia e polisemia*, in Atti del LIII Convegno di Studi di Scienza dell'Amministrazione, *Il principio di legalità nel diritto amministrativo che cambia*, (2008), 569, and at www.giustamm.it.

[10] G. Cogliandro, *Corte dei conti delle Comunità europee*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, II (2006), 1578.

The *second* regards parameters: rules for the ascertainment of lawfulness ("compliance with the law"); these are not legal, but quantitative criteria from the world of business in the assessment of efficiency and effectiveness.

The *third* regards the subject. Lawfulness can only regard an act, whereas efficiency and effectiveness involve the completion of an activity or management (to be understood as the set of actions geared towards the acquisition of revenue and the payment of expenses), given that the result cannot be achieved before the relevant activities begin.

Consequently, unlawfulness and efficiency (similar considerations apply to effectiveness) are autonomous and compatible ideas, but on different planes: one does not presuppose or necessarily exclude the other. A decision, an initiative, or an action can in fact be lawful *and* efficient; and they can also be lawful *but not* efficient or, conversely, efficient *but not* legitimate. Lastly, they may be, alas, *neither* lawful *nor* efficient.

The last chapter of Siclari's book concerns relations between the European Court of Auditors and the national Supreme Audit Institutions[11]. The European Court has the power to ascertain the proper use of EU funds in line with the principles of subsidiarity and proportionality. The main relationship between the European Court and the national Courts is founded, however, on the principles of partnership and co-administration and on the need to respect loyal cooperation.

To conclude this review of Domenico Siclari's fine book, I would like to quote from a contribution presented at the 59th Varenna Conference in September 2013 by Vitor Caldeira, President of the European Court of Auditors on the purpose of the audit of public finances in the Union: "public finances represent an important 'bond' between citizens and the government. Ultimately, governments are responsible for making use of public funds to meet the needs of the citizens. For this reason, citizens must be kept reliably informed on compliance with the democratically decided laws and that the expected results of public policies have been met. I feel I can say that one of the

[11] On this subject, see also M.A. Rucireta, *La collaborazione tra istituzioni nazionali di controllo e Corte dei conti europea nella forma dei "controlli cooperativi*", 1-2 Rivista della Corte dei conti (2014), 552.

primary functions of the auditing of public finances is to help meet that need for transparency"[12].

[12] V. Caldeira, *Il coordinamento del controllo sulle finanze pubbliche nell'Unione europea*, 1-2 Rivista della Corte dei conti (2014), 343.