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I. National practices concerning law-making procedures in case of urgent and/or exceptional circumstances

1/ Does your national legal order identify urgent and/or exceptional cases as the justification for applying special law-making procedures?

In extraordinary cases of necessity and urgency, the Italian legal order provides for a special procedure that allows the Government to adopt an act with the force of law, named *decreto-legge*. Through this procedure, it is possible to react to urgent circumstances, altering the usual assignment of the legislative power: the executive, under its own responsibility, may introduce a legal act that immediately enters in force, postponing the exam of the content of the measure by the legislative power.

As guarantee of the fundamental control by Parliament, the *decreto-legge* has to be presented on the same day to the two Chambers (*Camera dei deputati* and *Senato della Repubblica*) and, if it is non-converted in law within sixty days, it has to be considered as never adopted and loses its effects *ex tunc* (since its adoption by the Government).

The special law-making procedure is strictly connected to the exceptionality of the urgency and necessity, for that reason it is permitted to the Government to temporarily substitutes the Parliament. The conversion of the *decreto-legge* by the Italian Parliament into law makes the governmental decree ordinary law, after the control over the existence of the legal conditions for the adoption of this special legislative procedure. Parliament can also amend the governmental act: the amended articles enter into force the day after the publication of the conversion law (legge di conversion) on the Official Journal (*Gazzetta Ufficiale*), except if it is differently established.

Are the concepts of "urgency" and "exceptionality" used cumulatively or alternatively as conditions for the special law-making procedures?

According to art. 77 of the Constitution, *decreto-legge* can be adopted only in "extraordinary circumstances of necessity and urgency". According to several Authors, necessity and urgency represents a hendiadys: it is not possible to distinguish between necessity and urgency because the urgency is a *genus* of the necessity, that on the stand represents a *species*[1]. Other Authors plead, on the contrary, that necessity and urgency need to be separately considered and contemporary present. Therefore, the Government should verify the indispensable factual need to regulate and the

[1] See A. PIZZORUSSO, *Delle fonti del diritto. Disposizioni sulla legge in generale artt. 1-9*, in *Comm. Scialoja –Branca*, 1977, p. 262 and P. RESCIGNO, in *Novissimo Digesto italiano*, XII, Utet, Torino, 1965, p. 100.

impossibility to resort to other "normal" instruments, because promptness of intervention is required[2].

Necessity of intervene with urgent measures could also mean that the adoption of a *decreto-legge* is urgent and necessary, but its provisions aim to a result that is not immediately achievable; in this case, it is relevant the necessity and the urgency of regulating[3].The Constitutional Court emphasizes this aspect, clarifying that the urgency is related to the necessity to regulate, even if the achievement of the goals may require more time[4]. There are several examples of *decreti-legge* that contain measures adopted for the necessity of a prompt intervention by the Government, also through action which have a long-time enforcement[5]. However, art. 15 (3) L. 400 1988 states that the *decreto-legge* shall contain measures of immediate application and their content shall be specific, homogenous and correspondent to the title. According to the recent case law, *decreto-legge* shall contain measures that need a prompt application aimed to respond quickly to an urgent and exceptional situation. For that reason the Constitutional Court has considered as unconstitutional a reform of the organization on local authority, as it is an institutional choice that needs a deep academic and political discussion and cannot arise from a circumstance of necessity and urgency[6].

It is also frequent the adoption of *decreti-legge omnibus*, that contains measures related to different subject and areas. This practice is considered an abuse of the instrument, considering that it should include only precise regulation, geared to a single situation[7]. The Constitutional Court, however, saved this practice, by holding their constitutional compatibility at if the various provisions of the *decreto-legge* are homogenous, evaluating the common purpose of the norms or the event from which they are originated.

Are there distinct or common law-making procedures applying in urgent and/or exceptional cases?

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[2] About this opinion see A. CELOTTO, F. DI BENEDETTO, *Art. 77 Cost.*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (edited by), *Commentario alla Costituzione*, Utet, 2006, p. 1516 and seqq and the Authors *ivi* cited.

[3] G. ZAGREBELSKY, *Manuale di diritto costituzionale. Il sistema delle fonti del diritto*, UTET, Torino, 1988, p. 177.

[4] See Const. Court 62/2005. In par. 13 the Court declared that the necessity of introducing a regulation for the realization of the structure for the disposal of nuclear waste, preventing risks for the public heath, is a valid prerequisite for the adoption of a urgent act, even if the completion of the works requires long time.

[5] See G. D'ELIA, L. PANZERI, *Sulla illegittimità costituzionale dei decreti-legge «taglia-leggi»*, in *Giur. cost.,* fasc.1, 2009, pag. 497.

[6] Const. Court 220/2013, declaring unconstitutional artt. 23 (14, 15, 16, 17, 18, 19 and 20) D. L. 201/2011 and artt. 17 e 18 D. L. 95/2012 on the reorganization of provincial administration and introducing Metropolitan area. In par. 12 the Court declared that the organization of the local authority is ruled by a regulation that cannot be influenced by contingencies. Moreover, it is a subject that cannot be discussed by the Parliament in the limited time established by the urgency procedure.

[7] Art. 15 (3) L. 400/1988 rules that *decreti-legge* must contains measures of immediate application and their content should be punctual, homogeneous and related to the title.

The *ratio* of the *decreto-legge* procedure is the introduction of a competence for the "reaction to the unforeseeable"[8], so it is a general tool that allows to rule in case of urgency and necessity. The procedure represents the general instrument that complements the ordinary law-making procedure system with a unique tool. The regulation of necessity is intrinsically a contradictory task, as the necessity by nature appears in different and unpredictable aspects and it cannot be completely dominated by several regulations.

L. 400/1988 has further regulated the instrument by setting the limits to its use (see infra). Note that the failed 2016 Constitutional reform aimed to constitutionalise the limits set in art. 15 of L. 400/1988 (see infra).

2/ Do the eventual special law-making procedures in case of urgent and/or exceptional circumstances derive from de facto practices or are they set out in the Constitution and/or in ordinary legislation?

Art. 77 of the Constitution establishes the procedure for the adoption of the *decreto-legge*[9]. Before the adoption of the Constitution, even if not formally recognised under art. 6 of the Statuto Albertino, the instrument of the *ordinanza d'urgenza* started to be used as decree to be adopted by the King. It was only the fascist law L.100/1926 that posed some constraints to the exercise of this regulatory power: *decreto-legge* could be used only if complying with the general requirements of extraordinary cases of necessity and urgency; the obligation to submit the decree to the Parliament in order convert the *decreto-legge* into a law within the third assembly from the publication; the immediate forfeiture (*ex nunc*) if not converted or after two years from the publication.

Although hesitant, the Constituent Assembly of Italy recognised the need to introduce a constitutional regulation of the instrument, reckoning that its function was considered indispensable in some occasions and a stricter constitutional regulation would have contained the abuse[10].

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[8] See A. CELOTTO, F. DI BENEDETTO, *Art. 77 Cost.,* in R. BIFULCO, A. CELOTTO, M. OLIVETTI (edited by), *Commentario alla Costituzione*, Utet, 2006, p. 1514.

[9] Art. 77 Const establishes that "*Il Governo non può, senza delegazione delle Camere, emanare decreti che abbiano valore di legge ordinaria.*

Quando, in casi straordinari di necessità e di urgenza, il Governo adotta, sotto la sua responsabilità, provvedimenti provvisori con forza di legge, deve il giorno stesso presentarli per la conversione alle Camere che, anche se sciolte, sono appositamente convocate e si riuniscono entro cinque giorni.

I decreti perdono efficacia sin dall'inizio, se non sono convertiti in legge entro sessanta giorni dalla loro pubblicazione. Le Camere possono tuttavia regolare con legge i rapporti giuridici sorti sulla base dei decreti non convertiti". ("Art. 77 The Government may not, without an enabling act from the Houses, issue decrees having the force of ordinary law. When in extraordinary cases of necessity and urgency the Government adopts provisional measures having the force of law, it must on the same day present said measures for confirmation to the Houses which, even if dissolved, shall be summoned especially for this purpose and shall convene within five days. The decrees lose effect from their inception if they are not confirmed within sixty days from their publication. The Houses may however regulate by law legal relationships arising out of not confirmed decrees").

[10] For an historical reconstruction of the *decreto-legge* see A. CELOTTO, F. DI BENEDETTO, *Art. 77 Cost*., cited, p. 1507 and seq.

In 1988, Law no. 400 regulating the powers and the organisation of the Government, specified some limits to the use of the *decreto-legge.* In line with art. 72 (4) Const., art. 15 L. 400/1988 holds that *decreto-legge* cannot rule on constitutional and electoral matters, delegation of legislative powers, authorization and ratification of international treaties, and approval of budget laws. These functional preclusions mean that *decreto-legge* cannot alter the principle of separation of powers, the democratic values and the allocation of powers as set in the Constitution. Moreover, L. 212/2000 on the rights of taxpayers has prohibited the use of the *decreto-legge* for the introduction of new taxes and the extension of the existing ones to new parties.

Parliamentary regulations (regolamenti parlamentari) on the functioning of the two Chambers cover the Parliamentary procedure for the conversion of decreti-legge into law: in the Regulation concerning the functioning of the *Camera dei deputati* was introduced a title on the *decreto-legge* in 1981 with the sole art. 96 *bis*, modified in 1997. This article defines the assignments of the exam of the governmental act to a parliamentary Commission, the exam planning and the vote system[11]. In doing so, the Regulation requires that the *decreto-legge* is presented to the *Camera* accompanied by a report on the necessity and urgency requirements that sustain the adoption of the governmental act and on the expected effects by the enforcement on the factual situation and on the regulation already existent.

The Regulation on the functioning of the *Senato* (art. 78) also covers the assignment to the competent Commission and the voting system.

The failed 2016 reform of Italian Constitution aimed at constitutionalise the content of art. 15 L.400/1988, by holding that *decreti-legge* could not be adopted in constitutional and electoral matters, but with the exclusion of the organisation and the execution of the electoral procedure; legislative delegation; laws of conversion of *decreti-legge;* the adoption of international treaties and budget laws. The constitutional reform also specifically provided that a *decreto-legge* cannot reiterate unconverted *decreti-legge* and the regulation of the legal relationships constituted on their basis and cannot restore the effectiveness of acts and rules declared unconstitutional by the Constitutional Court for substantive (not procedural) flaws.

What are the main principles and the concrete proceedings of law-making in urgent and/or exceptional circumstances in your national legal order?

The *decreto-legge* is adopted by the Government through a deliberation of the Council of Ministers as a provisional act with the force of law. This means that the Government is responsible for it in terms of civil, administrative/revenue and even penal liability.

Having this origin and nature, on the very day of its adoption, the *decreto-legge* needs to be presented to the Parliament (both Chambers) to be converted into a law.

If Chambers are dissolved, they must be convened and they shall reassemble within five days. This is because the power to covert *decreti-legge* into law is included within the duty of continuity of public offices (the so-called *prorogatio* regime). Some Authors reckons that the Government that have not yet the confidence of the Parliament or that has received a vote of no confidence cannot adopt *decreti-legge* because can only settle

[11] See also art. 85 Regulation on the functioning of the *Camera dei deputati* for the vote system.

the ordinary administration[12]. However, because of the prorogatio rule, any Government can adopt this kind of act if the conditions of necessity and urgency are met. This instruments should permit to the Government to react to such a situation and act for the common good.

As established by art. 15 L. 400/1988, the governmental act shall be explicitly titled as *decreto-legge* and shall contain in the recitals the conditions of necessity and urgency that support the adoption of this kind of act. Nevertheless, the lack of these elements in the text of the decree entails a sole irregularity and will not invalidate the governmental act.

The *decreto-legge* is issued by the Republic President and is published on the Official Journal immediately after his issuing. It enters directly into force: in that case is not required a *vacatio legis* period.

In the practice, the *decreto-legge* is presented to Parliament to be converted into a law on the same day of its publication, even if Art. 77 Const. seems to refer to the day of the issuing. In any case, the delay of sixty days starts from the publication. In the Chamber of Deputies (since 1997), the conversion bill is accompanied by a report by the Government that motivates necessity and urgency and illustrates the pursued objectives and the legal effects. The bill is submitted to both the competent referring Commission and the Committee for the legislation, which controls the specificity, homogeneity and correspondence to the title of the *decreto-legge* (according to art. 15 L. 400/1988).

Art. 72(3) of the Constitutions allows parliamentary regulations to decide if and how conversion bills can be examined by specialised Commissions. According to art. 72 (3) of the Constitution, this legislative procedure presents some variations introduced by parliamentary regulations, which ensure that the conversion occurs in due time and that the Chambers can control the existence of the requirements of necessity and urgency. In the Senate, the Commission for Constitutional Affairs expresses a mandatory opinion on the existence of the requirements of necessity and urgency.

According to art. 77 (3) of the Constitution, if the *decreto-legge* is not converted within 60 days from the publication, it loses its efficacy from its adoption (*ex tunc*).

The Chambers can rule about the legal relationships derived from unconverted *decreti-legge* within the limits of the Constitution and with particular regard to the principle of equality (*legge di sanatoria*). This law can rule either by crystallising through a standard formula the legal effects produced between the adoption of the *decreto-legge* and its missed conversion or by reproducing retroactively the rules provided in the *decreto-legge* with the effect that it can continue to govern the relations that may subsequently originate but referring to that period of time.

Through the conversion law (*legge di conversione*) Parliament regains the exercise of its legislative power on the matter and gives the assent on the existence of the circumstances of necessity and urgency. *Legge di conversione* replaces the *decreto-legge* and rules on the legal relationships hereinafter. In the practice, it is sufficient that the

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[12] For an analysis of this topic see F. SORRENTINO, cited, p. 201 and seq. and G. BOCCACCINI, *Governo dimissionario e decretazione d'urgenza*, in *Quaderni costituzionali,* 1987, p. 144 and seq.

Assembly adopts the *legge di conversione* within the sixty days, it is not required that in the same terms it is issued and published.

Parliament has also the power to amend the text of the *decreto-legge*. Art. 15 L. 400/1988 establishes that any modification has to be explicitly enumerated in an annex to the act and enters into force the day after the publication of the law, unless differently disposed.

3/ What is the respective role of the legislative and the executive power, and eventually of other institutions, in dealing with urgent and/or exceptional circumstances?

Do the Head of the State, the Parliament and the Government retain a particular role?

In circumstances of necessity and urgency, the Italian Constitution previews a legal procedure that allows the Government to temporary take the place of the Parliament in the exercise of the legislative power. The representative of the executive power can adopt an act that enters immediately into force and has the force of law. This act is valid within sixty days; in this term the Parliament can convert the *decreto-legge* into law. If it is not converted, the governmental act is considered as never adopted and lose its effects *ex tunc*.

There are two different interpretations of the relation between the role of the representative of the executive and of the legislative power in the adoption of a *decreto-legge*. The first[13] considers that the Government has an exceptional power to handle extraordinary cases of necessity and urgency that could not be regulated through the ordinary legislative procedure. Therefore, the *decreto-legge* has to be considered as an act with a validity conditioned to the conversion within the term of sixty days. According to the second interpretation, the Government does not have a legislative power: the *decreto-legge* is an invalid act that, if converted by the Parliament, is retroactively replaced by the conversion law or will lapse his effects if not.

The Government is politically responsible for the fulfilment of the conditions of exceptional necessity and urgency and it is also responsible in terms of civil, administrative/revenue and even penal liability. Through the conversion in law of the governmental act, the Parliament confirms the respect of the conditions required and assumes the responsibility of the correct use the *decreto-legge*[14].

Also the Head of the State plays a relevant role, carrying out a preventive control on the legitimacy and, in some terms, on the opportunity of the *decreto-legge* adopted by the Government[15]. So, the *Presidente della Repubblica* can refuse the issuing of the decree or sand back it to the Government if it does not respect the Constitution or the legal order. The Head of State has an effective power, considering that only after his signing and issuing the *decreto-legge* is published, so enters in force and starts the terms for the

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[13] This first theory is the most widespread and is supported by Authors like F. CRISAFULLI, G. ZAGRABELSKY and F. MODUGNO, the second is supported by F. SORRENTINO and C. ESPOSITO. For a recognition of the different interpretation see F. SORRENTINO, cited, p. 196 and seq.

[14] See *Decreto-legge, in Encicolpedia del diritto*, Milano, 1963, 838 and seq.

[15] See L. PALADIN, *Diritto Costituzionale*, CEDAM, 1998, p. 471.

conversion into law. Generally, there are informal contact between the Head of State and the *Presidente del Consiglio*, that prevent a formal refusal. Furthermore, often the *Presidente della Repubblica* does not express a formal refuse of the signing for the authorization but sands back the decree to the Government, even adding a letter in which explains his objection.

The first case of refusal of signing and issuing a *decreto-legge* happened during the presidency of Sandro Pertini in 1980, for a decree that aimed to assign to the Corte di Appello the control on the respect of the signatures for a *referendum* few days before the term for the collection of the signatures of ten *referendum*. In a statement of the *Presidenza della Repubblica* it was explained that the Head of Stated considered unconstitutional the modification of the rules for the ongoing proceedings. The Council of Ministers abandoned the *decreto-legge* and presented a bill to the Parliament with the same content.

Also in 1993, after a letter of the *Presidente della Repubblica* Scalfaro, the Government headed by Amato renounced to a decree on the party financing and presented a bill to the Parliament. The Head of State pleaded for the institutional fairness, underling that the *decreto-legge* could cancel an ongoing referendum procedure.

Recently, the *Presidente della Repubblica* Napolitano refused the signing the *decreto-legge* of 6th February 2009 forbidding the stop of the feeding of persons in vegetative status, considering that it did not accomplished the circumstances of necessity and urgency. He considered that a *decreto-legge* is an inappropriate solution for ruling this issues and the urgency was founded on a sole case (Eluana Englaro) that was also settled by a judgment (on this topic see also question n. 5).

4/ On what occasions and how frequently have the urgent and/or exceptional law-making procedures been applied in your national legal order?

Have they been activated in abusive ways and has there been a political criticism against their application?

Art. 77 of the Italian Constitution requires strict conditions for the adoption of decreto-legge. It contemporary requires the existence of "extraordinary cases" of "necessity" and "urgency". In addition, the prescriptions of the Law 400/1988 should limit the use of the *decreto-legge*. Nonetheless, this legislative source has been used quite frequently in the history of the Republic of Italy[16], not always in compliance with the legal framework.

In fact, only in the very first years after the entrance into force of the Constitution the use of the *decreto-legge* was reserved to cases that fully matched the requirements of the Constitution. In the I Legislature (1948-1953), 29 *decreti-legge* were adopted; in the II one (1953-1958), 60; and in the III one (1958-1963), 30 and they were all converted

[16] In the present work, it will be analyzed only the legislation of the Republic of Italy from the Constitution, in force from the 1° January 1948. However, it is possible to recognize forms of urgency legislation also in the era of the monarchy, under the Statuto Albertino (the first decreto-legge was probably adopted in 1853), and during the Fascism, under the law 31 January 1926, n. 100.

in law by the Parliament, except one in the I Legislature[17]. Among these *decreto-legge*, there were also some "*decreti catenaccio",* that are decree, usually related to fiscal matters, to increase duties, taxes, etc., so called because they were issued in such a form as to avoid the run to the stock of goods that would occur if the measure would be known before its entry into force (as it would be if it were issued in the form of a law).

In the IV Legislature (1963-1968), the number of the *decreto-legge* raised to 94 as well as its percentage compared to the total number of the laws: in the same time, it grew the number of missed conversion into law, as well as the criticism and the concern for the use of this kind of act, not complying with the legal framework[18]. In the V Legislature (1968-1972), the number of the *decreto-legge* adopted was 69, with only 3 missed conversion[19].

Progressively, the *decreto-legge,* instead of an exceptional legislative measure for extraordinary cases of necessity and urgency, became an instrument to respond quickly to legislative needs characterized by political urgency. The first *decreto-legge* which was strongly criticized was the so-called 'decretone Colombo', d.l. 621/1970, which contained 70 heterogeneous articles in financial matters (so-called *decreto omnibus*) and which was also reiterated in the absence of conversion.

The growth of *decreto-legge* was also accompanied by their missed conversions into law. The praxis of reiteration occurred: if Parliament failed to convert in law the *decreto-legge* before the expiration of the sixty days, the Government used to re-submit to Parliament an identical *decreto-legge*, just after the expiration, granting the effect of the previous decreto-legge not converted into law. This praxis was adopted for several years and it caused paradoxical situations: for example, a *decreto-legge* was reiterated for 29 times[20]. This has given rise to chains, where the effectiveness of the provisions was renovated every two months, with severe effects on the principle of legal certainty.

In the Seventies, Italy was characterized by a period of political instability of the institutions and it provoked an increase in the use of the *decreto-legge*, often outside the limits of the Constitution: in the VI Legislature, 124 *decreto-legge* were adopted and only 108 were passed into law: therefore, in that period, two *decreto-legge* par month were adopted and it became one-tenth of the total legislative production so that the abusive use of this act was manifest[21].

The doctrine started to highlight the different pathological characters of this use of the *decreto-legge*: the more and more frequent adoption outside the limits of necessity and urgency, the loss of power by the Government in the conversion of the law and the

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[17] A. CELOTTO, *L' "abuso" del decreto-legge*, Padova, 1997, p. 246. The only one *decreto-legge* that was not passed into law was the d.l. 9 April 1951, n. 207, that contained a prorogation of the legislation on the limits to the hospitality sector.

[18] A. CELOTTO, *L' "abuso" del decreto-legge*, cit., p. 248.

[19] *Ibidem*, p. 250.

[20] This is the case of the Decreto milleproroghe: adopted for the first time in 1992, it has been converted only in 1996 and in the meantime, it was repeatedly reiterated.

[21] A. CELOTTO, *L' "abuso" del decreto-legge*, cit., p. 250.

addition of amendments in the *iter* of conversion[22]. For example, the *decreto-legge* was used, in this period, to create the Ministry of Culture[23]. According to Predieri[24], it became a kind of "governmental bill reinforced by the rapid constitutional procedure for adoption". The growth of *decreto-legge* was the response to the crisis of the law as an instrument to rule effectively and in a timely manner.

In the VII Legislature (1976-1979), 167 *decreto-legge* were adopted, five per month, and they represented the 25% of the total legislation.

Despite the growing consciousness of the use of the *decreto-legge* outside its constitutional limits, the Constitutional Court at first avoided scrutinizing the requirements of necessity and urgency, as they were considered political in nature[25]. The control over the existence of the requirements of necessity and urgency was then left to the political sphere. The requirement of extraordinary circumstances was ignored; necessity was interpreted as a social and political situation undetermined and urgency as a subjective requirement of the entire *decreto-legge* and not as an objective characteristic of its single provisions.

In the VIII legislature (1979-1983), 275 *decreti-legge* were adopted, almost 6 per month, amounting at 29% of the legislation, confirming the growth of the phenomenon. The doctrine, unanimously, condemned this misuse of the *decreto-legge*, that became an alarming praxis of the governments[26].

During this legislature, the President of the Republic, Pertini, for the first time refused to sign a *decreto-legge* that it deemed not in line with the Constitutional provisions[27]. All this brought to the reform of Parliamentary regulations aimed at checking the existence of the requirements of necessity and urgency (in 1981 and 1988 the Chamber of Deputies; in 1982 the Senate).

The criticism could not stop the increasing number of the *decreto-legge*: they were 302 in the IX Legislature (1983-1987), 6,2 par month and that represented the 38% of the legislation, and 466 in the X (1987-1992), 9,7 par month, that represented the 44% of the legislation. In the same time, only the 40% of the *decreto-legge* were converted into law[28].

In the '80s, legal scholarship recognized the unique genetic connection between the *decreto-legge* and the conversion law[29].

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[22] See what reported by A. CELOTTO, *L'"abuso" del decreto-legge*, cit., Padova, 1997; A. SIMONCINI, *Le funzioni del decreto-legge*, Milano, 2003.

[23] See *decreto-legge* 14 novembre 1974, n. 657.

[24] A. PREDIERI, *Il Governo colegislatore,* in F. CAZZOLA, A. PREDIERI AND G. PRIULLA (eds), *Il decreto legge fra Governo e Parlamento* (Giuffrè 1975), IX-LI.

[25] See Const. Court 55/1977.

[26] See A. CELOTTO, *L' "abuso" del decreto-legge*, cit., p. 256 and the authors ivi quoted.

[27] It was a decree on the decentralization of the tribunals for the verification of the signature deposited to present the request of an abrogation referendum.

[28] See A. CELOTTO, *L' "abuso" del decreto-legge*, cit., p. 263.

[29] G. PITRUZZELLA, *La legge di conversione del decreto-legge*, 1989.

By the adoption of art. 15 of the Law 400/1988, the legislator tried to limit the misuse of the *decreto-legge.* By the judgement 10 February 1988, n. 302, the Constitutional Court expressed a first censure of the praxis of the reiteration, holding unconstitutional of a *decreto-legge* reiterated several times, underlying the need of a reform. In fact, in the '80s and the '90s this was a widespread practice: in the VII legislature (1976-1979), the 60% of *decreto-legge* were reiterated; in the VIII legislature (1979-1983), the 76,3%; in the IX legislature (1983-1987), the 96,4%; in the X legislature (1987-1992), the 84,8%; in the XI legislature (1992-1994), the 90,3% and in the XII legislature (1994-1996), the 97,8%[30].

Instead, the Constitutional Court still refused to develop a strict scrutiny on the fulfilment of the condition to adopt a *decreto-legge*, focusing only on the manifest absence of the requirements of necessity and urgency in the conversion law. Only in the '90s, the Constitutional Court recognized its competence to ascertain the existence of the requirements of necessity and urgency with the goal of protecting the order of the sources of law[31]: the absence of the requirements in the *decreto-legge* was treated as an *error in procedendo* in the adoption of the conversion law. This could happen because the Court recognised the particular genetic nature of conversion law and denied that conversion law could legitimize the flaws of the *decreto-legge.* The Constitutional Court, therefore, by judgement 29/1995, an exceptional judgement, whose principles where reaffirmed only in 2007, pointed out that if the requirements of necessity and urgency are missing, their lack cannot be cured by conversion into law and this creates an error *in procedendo* in the adoption of the law[32].

In the XI (1992-1994) and XII (1994-1996) Legislature, the number of *decreto-legge* increased again, reaching one per month, becoming a regular way to rule instead of a special measure for extraordinary cases of necessity and urgency. In fact, in the first one, 490 *decreto-legge* were adopted, and in the second one 718. The reaction of the judges was to refuse to apply the *decreto-legge* systematically reiterated in criminal law and to raise in every case the question of constitutionality for the violation of art. 77 Constitution.

In the XIII (1996 – 2001), 458 *decreto-legge* were adopted and only 219 were converted into law. In the XIV (2001- 2006), 226 were adopted and 200 converted into law[33]. In this latter, the government asked for the vote of confidence on the 8,5% of the conversion laws.

The Constitutional Court strongly declared the practice of the reiteration unconstitutional only in 1996[34] , on the ground that the chronic reiteration was against the function pursued by *decreto-legge*. The praxis of the reiteration, in fact, alters the

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[30] A. CELOTTO, E. DI BENEDETTO, Art. 77, in R. BIFULCO, A. CELOTTO AND M. OLIVETTI (eds), *Commentario alla Costituzione*, 2006.

[31] See Const. Court 29/1995.

[32] see Const. Court 270/1996 and 330/1996.

[33] See the statistics of the Senate:

http://www.senato.it/documenti/repository/relazioni/libreria/raffronto_legislazione_XIII-XVI.pdf and http://www.senato.it/application/xmanager/projects/leg17/file/repository/notizie/2016/Attivit2016_VentaglioLuglio.pdf.

[34] Const. Court 360/1996.

temporary nature of the *decreto-legge,* postponing the limits of the sixty days established by the Constitution for the conversion. It then eliminates the extraordinary feature of the conditions of necessity and urgency, because it prolongs in the time the reasons of urgency of the decreto-legge. It finally weakens the sanction of the loss of efficacity for the lack of conversion, creating the expectation to consolidate the effect of the decree. In addition to that, the praxis of reiteration alters the institutional balance of the powers, because it erodes the legislative function of the Parliament. This ruling ended the practice of reiteration and it also contributed to reducing the adoption of *decreti-legge*.

Therefore, only in 2007 the Court declared art. 7 (1) a) of *decreto legge* n. 80/2004 on local government unconstitutional, as it did not meet the requirements of necessity and urgency and also invested of the same control the conversion law[35]. In fact, the rule concerned the introduction of a new cause of ineligibility for the role of mayor in a regulation of local finance.

In the following years, the number of *decreto-legge* started to decrease: in the XV Legislature (2006-2008), 51 *decreto-legge* were adopted and 32 converted into law, and in XVI legislature (2008-2013), 39 were adopted and 30 converted into law[36].

Another abuse of *decreto-legge* that emerged during the years, is to be identified in the praxis of the Government and of the Parliament to insert in the law of conversion some norms that do are not relevant with the core of the *decreto-legge* and that do not present the feature of necessity and urgency required by the Constitution. In 2010, the Constitutional Court clarified that the conversion law should meet those requirements only where amending or adding rules directly connected to the *decreto-legge* and not where adding further heterogeneous rules[37].

Alongside the introduction of spurious rules in a *decreto-legge*, the practice has offered cases of different regulations combined in a unique *decreto-legge*. The goal is to reduce the number of *decreti-legge* to submit to the Parliament and reduce its workload for the conversion. A particular case is the so-called *decreto milleproroghe*, which has been introduced to extend or solve urgent issues by the end of the current year. It was introduced as an exceptional measure in 2005 and by then it has been adopted every year to solve urgent issues that could not be delayed. These acts may be legal as long as all the various provisions share a homogenous goal: if, for example, they need to postpone urgently expiration dates[38].

The Constitutional Court has finally pointed out that the *decreto-legge* is a contingently founded act that needs to be homogeneous and to contain immediately applicable rules. It also clarified that these requirements should concern not only the *decreto-legge* itself (substantive requirement)[39], but also the conversion law (procedural requirement)[40]. The subject of the *decreto-legge* and the objective pursued should be homogeneous or,

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[35] Const. Court 171/2007.

[36] See footnote n. 33.

[37] Const. Court 355/2010.

[38] Const. Court 22/2012.

[39] Const. Court 171/2007 and 22/2012.

[40] Const. Court 22/2012 and 32/2014.

at least, a predominant subject/objective/ratio should be identified[41]. If this is not clearly identifiable, the conversion law that adds a new content needs to connect it to one of the contents already identified in the *decreto-legge* [42]. This case-law shows that the conversion law is an atypical law, not free to choose its goals, but strictly connected to the conversion process[43]. The judgement 32/2014 clearly declared unconstitutional the norms introduced by heterogeneous amendments.

This case law set aside both case 355/2010 which admitted heterogeneous rules in the conversion law and case 237/2013 which admitted the introduction of delegation rules in the conversion law.

Another abuse that raised criticism, is represented by the the *decreti legge* aimed to introduce general reforms by taking advantage of the accelerated procedure for their approval as a law.

For instance, *decreto-legge* 201/2011 converted into Law 214/2011 (so-called Salva Italia) and *decreto-legge* 95/2012 converted into Law 135/2012 (so-called Spending Review) reformed the systems of Provinces by introducing a complete reform of local government (powers, election, composition of the governmental organs and the relationships with Regions and Municipalities) which affected the entire functioning of these entities within the Constitutional framework.

The Constitutional Court sanctioned this practice by pointing out that a *decreto legge* was not a suitable instrument for such a general reform[44]. According to the Constitutional Court, a *decreto legge* could affect a single function of local governments, single aspects of their electoral systems and specific issues of their composition, but a general reform is 'logically and legally' incompatible with the Constitution as it does not have its origin in an extraordinary case of necessity and urgency. The system of the provinces was thus regulated by Law 56/2014.

After these cases, the Government tried to follow the homogeneity criterion for the adoption of new *decreto-legge*, by supporting *decreto-legge* with legislative bills (e.g., *decreto-legge* 34/2014 on the relaunch of job market and the support to enterprises and the bill on the so-called Jobs act).

However, the Government could not stop the practice to adopt *decreto-legge* with a wide reach (*decreto-legge* 90/2014 for the legal simplification, administrative transparency and the reform of judicial offices; *decreto-legge* 91/2014 on agriculture, protection of the environment and the energetic efficiency of schools and universities, competitiveness, electric fees, the fulfilment of obligations under EU law).

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[41] Const. Court order 34/2013.

[42] Const. Court 32/2014.

[43] See G.M. FLICK, *Decreto legge e legge di conversione nella più recente giurisprudenza costituzionale*, in *Federalismi.it*, 1/2014; A. FRANCO, *La evidente disomogeneità tra decreto-legge e legge di conversione nella recente giurisprudenza della Corte costituzionale (a margine di Corte Cost. n. 32 del 2014),* in *Federalismi.it*, 1/2014, A. CELOTTO, *Uso e abuso della conversione in legge*, in *Federalismi.it*, 1/2014.

[44] Const. Court 220/2013.

In addition, it could not stop the practice of making substantive sectorial reforms through *decreti-legge*. This is the case of *decreto-legge* 132/2014 on the reform of civil process, which introduced inter alia arbitration and a fast-track for divorce.

In the present Legislature, the XVII (2013 – present), 80 *decreto-legge* were adopted (until today) and 65 were converted into law.

Recently, the Government adopted *decreto-legge* for the fight to illegal immigration[45], for the urgent intervention for the citizens involved in the 2016 – 2017 earthquake[46], for the protection of the saving in the credit sector[47].

The failed 2016 Constitutional reform aimed to constitutionalize the limits set in art. 15 of L. 400/1988.

At first, the new art. 77 of the Constitution established that the proposal of the law of conversion should be presented to the Chamber of Deputies, even if it is an act relevant to subject that may be adopted by both the Chambers collectively.

Secondly, the Reform established that, in case the President of the Republic requires a new deliberation on the law proposal, the deadline for the adoption of the law of conversion is postponed for thirty days.

The reform then included in the Constitution some features of the *decreto legge* written in the Law 400/1988, that exclude the possibility to adopt by way of *decreto legge* the norms concerning electoral issues, except for the organization of the voting day. It then prohibited the praxis of the reiteration of *decreto legge* not converted into law or declared unlawful for substantial reasons. In the end, the new article 77 established that the *decreto legge* shall contain immediate enforcement measures, norms specific and homogeneous and coherent with the title, and that the law of conversion could not contain norms not relevant with the title and to the scope of the *decreto legge*.

In addition to that, the reform inserted a procedure to assure a fast approval of the law proposal of the Government considered as priority, because the new version of art. 72 Cons. Stated that they should be approved within seventy days[48].

However, the Constitutional Reform did not pass the constitutional referendum on 4 December 2016, so that the art. 77 of the Constitution remains unchanged.

5/ Are the urgent and/or exceptional regulatory procedures and measures subject to judicial review in your country?

In particular, is this review the task of a constitutional court?

Is the existence of the "urgent" and/or the "exceptional" situation a factual or a legal issue?

Is there a special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure? Are these reasons subject to judicial control, and, if so, to what extend?

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[45] *Decreto-legge* 17 February 2017, n. 13, converted into Law 13 April 2017, n. 46.

[46] *Decreto-legge* 9 February 2017, n. 8, converted into Law 7 April 2017, n. 45.

[47] *Decreto-legge* 23 December 2016, n. 237, converted into law 17 February 2017, n. 17.

[48] On the proposed reform, see E. ROSSI, *Una Costituzione migliore? Contenuti e limiti della riforma costituzionale,* Pisa University Press, 2016, p. 107-112.

The first controls for the adoption *decreti-legge* are political. The *decreto-legge*, in fact, are adopted under the responsibility of the Government, which decides autonomously to issue such a decree in the cases it deems necessary. In the preamble, the Government shall indicate the extraordinary circumstances that justify the adoption of the *decreto-legge* and the previous deliberation in the Council of Ministry[49].

The *decreto-legge* is then submitted to the President of the Republic for its promulgation: only when the *decreto-legge* is signed by the President of the Republic and published on the Gazzetta Ufficiale (Official Journal), it is in force. The President of the Republic has the power to make a preliminary control over the *decreto-legge* and he can refuse to sign it if the Constitutional requirements for its adoption are not met. The President can also require the Government to revise the *decreto-legge*.

The first time that a Present of the Republic refused to sign a *decreto-legge* was in 1980, when Pertini refused to issue a decree that charged the Courts of Appeal, instead that the Court of Cassazione, of the task to verify the authentication of the signatures for a referendum, presented by the Government only few days after the closure of the signatures collection. In the opinion of the President, this decree should have altered a procedure already in progress and the balance between the direct democracy and the representative one[50]. In this case, President Pertini refused to sign for reasons of opportunity, not explicitly because of the lack of the criteria of necessity and urgency.

It should be observed that in some occasions also the President of the Republic refused to sign some *decreto-legge*, because they were not in line with the constitutional *ratio* of the instrument: President Scalfaro on the decriminalization of the offence of illicit financing of parties (1993) and President Napolitano on the ban to the interruption to feed and hydrate non-self-sufficient persons in the Englaro case (2009). In this latter occasion, the President strongly underlined that such an issue should have to be deal with by the Parliament and that there was not a case of necessity and urgency. This was controversial because this decree was proposed by the Government to prevent the death of Eluana Englaro, that was on a vegetative coma since many years, and her father wanted to stop the nourishment and the hydration of her daughter.

After the issuance of a *decreto-legge*, the control on the compliance with the constitutional requirements of necessity and urgency is made by the Parliament in the conversion procedure.

The Rules of the Senate and of the Camera contain specific norms on the control of the requirements of necessity and urgency. As far as the first one is concerned, Rule 78 states that the enacting bill submitted by the Government shall be referred to an appropriate committee. If the Committee issue a negative opinion, on the ground that the bill fails to meet the requirements provided in article 77(2) of the Constitution or in current legislation, the opinion shall be immediately forwarded both to the appropriate committee and to the President of the Senate, who shall put it to the vote in the Senate within five days. The Senate shall vote on the negative opinion of the 1st Standing Committee by simultaneous roll-call vote. If the Senate decides that the requirements under Article 77(2) of the Constitution or current legislation are not met, the enacting

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[49] See Law 400/1988, art. 15.

[50] See A. GHIRIBELLI, *Il potere del presidente della repubblica in sede di emanazione dei decreti-legge: il "caso Englaro",* in *Giurisprudenza Costituzionale*, www.giurcost.it.

bill shall be rejected. If, however, the vote only applies to parts or individual provisions of the decree-law or the enacting bill, the effects of the vote shall only apply to those parts or provisions, which shall be deleted accordingly[51].

As the Chamber is concerned, the Rules have a complex filter: the appropriate commission analyzes the *decreto-legge* and the motivation given by the Government. The commission can also ask to the Government to complete the motivations for the adoption of the *decreto-legge*, also with reference to specific provision of the *decreto-legge.*

Then, it is submitted also to the Committee for the legislation, that within five days gives its opinion to the competent commissions, also indicating the norms to be deleted because not compliant with the Constitution and the Law 400/1988[52].

In both the Chambers, anyway, this is a political control.

The legal control of the *decreti-legge* is then the task of the Constitutional Court.

Decreto-legge are acts with the force of law which are subject to the control of constitutionality. However, the practice had to face the reality that if not converted, the *decreto-legge* expires after sixty days. The scrutiny of the Constitutional Court had therefore to be delivered within sixty days, otherwise the question could not be admissible. The Constitutional Court has therefore intervened on the conversion laws with significant, but sporadic rulings which contributed to bring the instrument back to its constitutional limits.

The Constitutional Court, with the judgement 29/1995, has affirmed that the preliminary existence of a factual situation characterized by necessity and urgency to

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[51] See Rules of the Senate, Rule 78, Bills enacting decree-laws «1. When the President receives a bill enacting a decree-law from the Government under Article 77 of the Constitution, if the Senate has been dissolved or adjourned, the Senate shall be immediately convened to sit within five days. 2. The enacting bill submitted by the government or transmitted by the Chamber of Deputies to the Senate shall, as a rule, be referred to the appropriate committee on the day of submission or transmission. When referring such bill to a committee, the President shall appraise the circumstances and accordingly set the date for consideration of the bill. 3. Within the deadline indicated in paragraph 2 above, the enacting bill shall also be referred to the 1st Standing Committee, which shall submit its opinion to the appropriate committee within five days of referral. Should the 1st Standing Committee issue a contrary opinion, on the ground that the bill fails to meet the requirements provided in article 77(2) of the Constitution or in current legislation, the opinion shall be immediately forwarded both to the appropriate committee and to the President of the Senate, who shall put it to the vote in the Senate within five days. The President shall also put the committee's opinion to the vote in the Senate within five days, if so requested by one-tenth of the members of the Senate within one day after the date on which the opinion has been expressed. No more than one speaker for each parliamentary group may take part in the debate, and for a maximum of ten minutes each. The Senate shall vote on the negative opinion of the 1st Standing Committee by simultaneous roll-call vote. 4. If the Senate decides that the requirements under Article 77(2) of the Constitution or current legislation are not met, the enacting bill shall be rejected. If, however, the vote only applies to parts or individual provisions of the decree-law or the enacting bill, the effects of the vote shall only apply to those parts or provisions, which shall be deleted accordingly. 5. The enacting bill introduced by the Government in the Senate shall at all events be put on the Senate agenda in time to ensure that the final vote takes place by no later than the thirtieth day from the date of referral. 6. All amendments submitted to the committee and those endorsed by the whole committee shall be submitted as such to the Senate and shall be printed and distributed before the beginning of the general debate». https://www.senato.it/documenti/repository/istituzione/reg.%20ing.pdf.

[52] http://www.camera.it/leg17/437?conoscerelacamera=237.

be faced with a *decreto-legge* is a condition of the adoption of the act, so that the lack of that factual situation implies the unconstitutionality of the *decreto-legge* as well as an *error in procedendo* of the law of conversion, because this one has erroneously supposed the existence of the conditions required by the Constitution. The Constitutional Court therefore declared to have the full scrutiny of the compliance with the conditions of necessity and urgency and that its control was to be considered different from the one of the Parliament, for its task to preserve the constitutional order and the sources of legislation of the State.

The Court has then specified that the existence of the conditions for the adoption of a *decreto-legge* can emerge from 1) the preamble; 2) the normative context; and 3) the governmental report that accompanies the bill for conversion.

By the judgement 390/1996, the Constitutional Court condemned the praxis of the reiteration. The Court in fact declared that the *decreto-legge* has to be used by the Government only in exceptional cases of urgency and necessity, and that if it is not passed by law within the limit of sixty days by the Parliament, it cannot be reiterated by the Government whit the same content. The praxis of the reiteration, in fact, alters the temporary nature of the *decreto-legge,* postponing the limits of the sixty days established by the Constitution for the conversion. It then eliminates the extraordinary feature of the conditions of necessity and urgency, because it prolongs in the time the reasons of urgency of the *decreto-legge*. It finally weakens the sanction of the loss of efficacy for the lack of conversion, creating the expectation to consolidate the effect of the decree. In addition to that, the praxis of reiteration alters the institutional balance of the powers, because it erodes the legislative function of the Parliament.

In 2007, the Constitutional Court declared for the first time the unconstitutionality of a *decreto-legge* for the manifest lack of the conditions of necessity and urgency. In that case, the Government had adopted a *decreto-legge* on the ground of the necessity to deal with some problems of the Municipality for financial reasons and for the governance, but it also inserted a norm on the ineligibility for the role of mayor. The Court recalled the importance for the Government to use the *decreto-legge* only in extraordinary cases, to avoid to infringe the principle of the separation of powers. The control of the Constitutional Court also invested the conversion law.

The following year, the Court confirmed its previous statements in cases 29/1995 and 127/2007 by the judgement 128/2008.

In its case law, the Court also underlined the link between the existence of the factual conditions established by art. 77, 2° c., Const., and the intrinsic coherence of the norms included in a *decreto-legge*, from a material and objective point of view or from the scope and the functionality. The urgent necessity to intervene by a legislative urgent measure can originated by the same goal to face situations extraordinary, complex and heterogeneous. Instead, the insertion, in the *decreto-legge,* of norms not coherent with the scope and the goal of the act, breaks the legal and logic link between the estimation of the urgency to intervene made by the Government and the legislative urgent measures adopted[53].

[53] Const. Court, 22/2012.

As already explained under question n. 4, the Constitutional Court has also condemned the use of the *decreto-legge* to adopt general reforms.

6/ Do you think that any general or particular feature of your national special law-making procedures could be used at a European level for the management of urgent and/or exceptional circumstances?

Which criteria could be apt to guide this transposition?

Despite the abuse of the *decreto-legge*, it has revealed to be useful to deal with situation of exceptional emergency. The conditions posed by the Constitution, that is extraordinary cases of necessity and urgency, underline the peculiarity of this power of the Government in the context of the framework of the legislative sources and of the separation of powers. The norms of the Constitution provide for general clauses that can be used in a huge variety of cases.

The Constitution and the Law 400/1988 also provide for a procedure to assure the conversion of the *decreto-legge* into a proper law by the Parliament, within sixty days from the adoption of the decree.

While it could be difficult to adopt at an EU level a general clause enabling the executive power to adopt legislative measures to faces extraordinary cases of urgency and necessity that lose their validity in sixty days, the Italian model may serve as an example to give the European Parliament the power to convert into a regulation or another legislative act the urgency decision that could be taken by the European Commission (in hypothesis).

An important criterion that could be used is the principle of homogeneity of the conversion law with the urgent provision: this could be usefully transposed at an European level, in case it will create a system for adoption of urgency legislative measures like the Italian one, in order to guarantee the correct use of the legislative sources and procedures and to avoid the insertion of norms not in line with urgent act.

7/ Do you think that under the current circumstances your national Government would be willing to grant competence for urgent and/or exceptional legislation to the EU?

The Italian membership of the EU is based on art. 11 of Constitution, which states that Italy allows, on equal terms with other states, the limitations of sovereignty necessary for an order that ensures peace and justice between the nations[54]. Italy then, has a constitutional base to limit its sovereignty if this is necessary to assure peace and stability.

Currently, the Italian Government has a positive attitude towards the European Union and it clearly supports the Italian participation to the European policies: at the same time, there are some parties, like *Movimento 5 stelle* and Lega Nord, which have a critical approach to the EU and support the exit (especially, from the Eurozone) or, in any case, aim to contrast some EU policies.

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[54] In 2001, art. 117, par.1, Const. has been inserted to add a new legal basis to the EU membership: "Art. 117 Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations".

However, the Government has also had tensions with the EU concerning in particular the Italian economy and the compliance with the Stability and Growth Pack. The Ministry of Economy, Pier Carlo Padoan, has recently expressed his opposition to the communication sent by the EU warning Italy to adopt remedies for the high public debt and the excessive debt[55] and the Commission prospected an infringement procedure.

However, it is possible that if the emergency procedure is limited to certain areas, like immigration and fight to the terrorism, Italy would be willing to accept the urgent and/or exceptional procedure to allow the intervention of the EU institutions in extraordinary cases.

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[55] See the information appeared in the newspaper: http://www.repubblica.it/economia/2017/02/02/news/il_tweet_di_padoan_nessuna_manovra_estemporanea_-157411532/; http://www.ilsole24ore.com/art/notizie/2017-01-27/padoan-procedura-ue-sarebbe-grosso-problema-reputazione-italia--125831.shtml?uuid=AExK4BJ.

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II. Potentialities of an urgent and/or exceptional law-making procedure at the European level

1/ How could an urgent and/or exceptional law-making procedure be established at the EU level?

In particular, could one use the current EU rules by broadening their scope of the application or is it necessary to introduce new provisions, exclusively destined to address urgent and/or exceptional circumstances?

Is a revision of the Treaties necessary or is it possible to reach a solution by means of secondary law? In the former case, would it be sufficient a simplified procedure according to the article 48 TEU?

1. Introduction

While the Treaty on the Functioning of the European Union does not provide a general urgent legislative procedure, it includes some examples of urgent and/or exceptional law making procedure for identified and limited areas, which appear as an exception to the ordinary rules[56]. In addition to that, it is possible to find out some hypothesis of urgent decisional procedures, aimed to adopt executive measures, in the secondary legislation.

It is then to be analyzed if the urgent and/or exceptional law making procedures in the Treaty are sufficient to guarantee the EU institutions intervention in case of necessity and urgency, within the scope of the EU competencies, or if it is necessary to insert a new urgent legislation procedure by the amending of the Treaty. Should this be the case, the already existing urgent procedures, also at the level of secondary law, may

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[56] See the *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, in OJ C 202, 7.07.2016, p. 1. The Treaty of the European Union, instead, does not provide for urgent procedures to be activated by the EU institutions. The only articles that can be remembered for the scope of the present research are art. 28, par. 4 and art. 42, par. 7, TEU. The first one, in the context of the Common foreign and security policy, states that «*In cases of imperative need arising from changes in the situation and failing a review of the Council decision as referred to in paragraph 1, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision. The Member State concerned shall inform the Council immediately of any such measures*». Art. 42, par. 7, affirms the obligation for Member States to help each other in case of armed aggression: «*If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States».* Both norms refer to an intergovernmental approach, without the implication of the EU institutions.

serve as an example to imagine the new one, consistent with the existing legal framework and the system of checks and balances. Moreover, it would be necessary to coordinate the new procedure with the existing ones, in case they may be overlapping.

2. Urgency and/or emergency procedures in the Treaty.

2.1 Art. 78, par. 3, TFEU

One first example is represented by Art. 78 TFEU, *Asylum and immigration policy,* which states, at par. 3, that *«In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament».* The article, then, states that the Council may adopt "provisional measures" for the benefit of the Member States concerned, in case of an "emergency situation", created by the sudden inflow of immigrants. It establishes a procedure which starts from the proposal of the European Commission and implies only the consultation of the European Parliament before the decision is taken by the Council, while the Parliament normally acts as a joint decision-making power about other asylum legislation[57]. The Council votes by qualified majority, as prescribed by the general rule of art. 16, par. 3, TEU. As already underlined, the scope of this clause has been intentionally limited to asylum measures by the Treaty of Lisbon, while the previous version of this was applicable to all immigration and asylum issues[58].

This article has served as a legal basis for the Council Decision n. 2015/1523 of 14 September 2015, establishing an infra-EU relocation scheme for 40.000 asylum seekers in favor of Greece and Italy[59] and for Council Decision n. 2015/1601 of 22 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece[60]. These provisions are temporary and provisional, because they should be in force for only two years, but the European Commission has issued a proposal to make permanent these measures, stating that «the triggering of the emergency response system under Article 78(3) TFEU will be the precursor of a lasting solution»[61].

As pointed out by the first commentators, to understand the correct use of the powers of the Council, «several terms in Article 78(3) have to be defined: an 'emergency situation', a 'sudden inflow', a 'provisional measure' and the 'benefit' of Member States. The idea of an 'emergency' suggests a situation which Member States find particularly

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[57] See S. PEERS, *Relocation of Asylum-Seekers in the EU: Law and Policy*, http://eulawanalysis.blogspot.it/2015/09/relocation-of-asylum-seekers-in-eu-law.html.

[58] *Ibidem.*

[59] OJ L, 239/146.

[60] OJ L, 248/80.

[61] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, Brussels, 9.9.2015, COM(2015)450 final.

difficult to handle, and the current crisis certainly qualifies for that»[62]. For the notion of provisional measures, it is easy to conclude that they shall be temporary: the previous version of this clause limited the duration to six months, but the Lisbon Treaty removed this limit. It has finally been questioned if such temporary measures could amend existing legislation: as the first paragraph of art. 78 TFEU mentions the common asylum policy, it would be inconsistent to deem that the Council has not this power under paragraph 3[63].

Against Decision 1601/2015 it has been lodged two actions for annulment, respectively by the Slovak Republic[64] and by Hungary[65].

In its application, the Slovakia contested that Decision 2015/1601 of 22 September 2015 could not be adopted on the basis of Article 78, par.3, TFEU. In the opinion of the applicant, in the light of its content, the contested decision has the character of a legislative act, and should therefore have been adopted by the legislative process, which is not however provided for in Article 78, par. 3, TFEU. By adopting the contested decision, the Council then infringed that provision and encroached on the rights of national parliaments and the European Parliament. Hungary has developed a similar argument in its own application. The first commentators have already criticized a formal approach and a narrow interpretation that would lead to establish the misuse of art. 78, par. 3, TFEU for the adoption of the decisions on the relocation schemes: in fact, this would lead to the paradoxical situation that the Council cannot establish a legislative act by art. 78, par. 3, TFEU, while it can under art. 23, par. 2, TFEU, while the procedure established by both norms is the same[66].

This shows that the Court of justice will have the opportunity to interpret the conditions established by art. 78 TFEU, its use to adopt legislative or non legislative act and its suitability to amend previous legislative acts. Also, the notions of "emergency situation" and "sudden inflow" may be clarified[67].

2.2 Art. 122 TFEU

One other example of legal basis enabling intervention by the EU in case of emergency, is represented by Art. 122 TFUE, which, at par. 1, states that: *« without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy»,* while, at par. 2, that: *«*

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[62] S. PEERS, *Relocation of Asylum-Seekers in the EU: Law and Policy*, cit.

[63] *Ibidem.*

[64] Action brought on 2 December 2015 — Slovak Republic v Council of the European Union, Case C-643/15.

[65] Action brought on 3 December 2015 — Hungary v Council of the European Union, Case C-647/15.

66 Z. VIKARSKA, *The Slovak Challenge to the Asylum-Seekers' Relocation Decision: A Balancing Act*, http://eulawanalysis.blogspot.it/2015/12/the-slovak-challenge-to-asylum-seekers.html.

[67] On the process before the ECJ see A. DI PASCALE, *Il ricollocamento: appena nato è già finito?,* 16.02.2016 and M. DI FILIPPO, *The strange procedural fate of the actions for annulment of the EU relocation scheme*, 4.03.2017, www.eurojus.it. This latter author also criticizes the choice of the ECJ to use the ordinary preliminary ruling procedure and not the expedited procedure.

where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken».

The first paragraph has a wide scope, which allows the intervention by the Council for general economic crisis that appear to be serious, as the hypothesis mentioned in the wording of the article are to be considered only as examples and not as a closed list[68]. This paragraph is anyway to be interpreted strictly, providing for an intervention of the Council outside the common policies and in exceptional cases. The second paragraph rules the cases where the situation of difficulty is limited to a single State and allows the Council to give financial assistance to the State in question. Both paragraphs are to be interpreted in the light of the principle of solidarity, expressly mentioned in the first one.

It is very interesting to note that art. 122, par. 2, TFEU is the basis for Council Regulation 407/2010 on European Financial Stabilization Mechanism (EFSM)[69] and art. 122, par. 1, is the basis for Council Regulation (EU) 2016/369 on the provision of emergency support within the Union[70].

Regulation 407/2010 is based on the assumption that the economic and financial crisis started in 2008 is an exceptional situation, outside the control of the Member States. In this context, the EFSM has been created as an exceptional measure to let the EU intervene to help the Member States in serious difficulties for the crisis. The regulation defines the procedure to give the assistance to the State as a loan or a credit line, upon a decision of the Council, on the Commission proposal. Afterwards, the Commission with the ECB has to specify the conditions laid down by the Council. On the basis of Regulation 407/2010, the EU has granted a loan to Ireland[71] and Portugal[72]. Before the institution of the EFSM, the Member States reacted to the crisis by the decision taken in May 2010 to provide bilateral loans to Greece to the amount of 80 billion euros[73].

The EFSM has then been substituted by the European Stability Mechanism (ESM), created by an international Treaty by the Member States, on the basis of art. 136 TFEU, amended to let the States use this instrument, by a simplified procedure under art. 48, par. 6, TEU[74]. This has been interpreted as *«the emergence of a new EU method of action.*

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[68] F. SCIAUDONE, *Art. 122*, in A. TIZZANO (a cura di), *Trattati dell'Unione europea*, Milano, 2015, p. 1311 ss.

[69] OJ L 118, 12.05.2010, p. 1 ss.

[70] OJ L 70, 16.03.2016, p. 1 ss.

[71] COUNCIL IMPLEMENTING DECISION of 7 December 2010 on granting Union financial assistance to Ireland, OJ L 30, 4.2.2011, p. 34–39.

[72] 2011/344/EU: Council Implementing Decision of 30 May 2011 on granting Union financial assistance to Portugal, OJ L 159, 17.6.2011, p. 88–92.

[73] See the Statement by the Heads of State or Government of the Euro Area, 7 May 2010.

[74] The legitimacy of the use of the simplified procedure has been validated by the Court of justice, by the judgement Pringle, C-370/12, 27.11.2012. See P. CRAIG, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, *in European Law Review,* 2013, p. 263 ss.

In their attempts to organize a response to the crisis, the EU political actors have gradually set aside the Union method, formalized by the Treaty of Lisbon, and have begun to develop a different EU method of action»[75].

Council Regulation (EU) 2016/369 is aimed to lay down the framework within which Union emergency support may be awarded through specific measures appropriate to the economic situation in the event of an ongoing or potential natural or man-made disaster, as stated in art. 1. It also specifies that emergency support can be provided only "where no other instrument available to Member States and to the Union is sufficient", so that it shows that this extraordinary intervention should respect the principle of subsidiarity and the existing legal framework. The decision to activate the emergency support is adopted by the Council on the proposal of the Commission, without any intervention of the Parliament.

2.3 Art. 222 TFEU

The Treaty provides for special rules in case of terrorist attacks or natural or man-made disaster at article 222 TFEU. This is the solidarity clause, that provides for the joint action of the Member States and the European Union under the conditions defined by a Council decision, on a joint proposal by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Parliament is only informed, but it does not have consultative powers. This clause has never been activated, even if the terrorist attack in France in 2015 would have been a suitable occasion, but the President Holland choose to invoke the provisions of art. 42, par. 7, TEU which provide for the mutual assistance of the Member States, outside the EU institutional legal framework.

2.4 Art. 290 TFEU

The Treaty, as reformed by Lisbon, provides for a new category of acts: the delegated acts, described at art. 290 TFEU. They are non-legislative acts issued by the Commission, aimed at supplement or amend certain non-essential elements of the legislative act which contains the delegation to the Commission itself. The Treaty also specifies that «*The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power»*. The delegation, therefore, establishes a function that is similar to the legislative one, from a material point of view: the delegates acts are directed to a general category of persons and cannot contain individual measures. Also, they cannot contain only executive measures[76]. Art. 290 TFEU, in fact, specifies that: *« (a) the European Parliament or the Council may decide to revoke the delegation;(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act»*. Even if the norm does not say it explicitly, the revocation from the Parliament or of the Council abrogates the delegation *ex nunc*, without any prejudice to the validity of the delegated norms previously

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[75] E. CHITI, P. TEXEIRA, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in *CMLR* 2013, p. 683 ss.

[76] R. BARATTA, *Art. 290 TFEU*, in A. TIZZANO, *Trattati dell'Unione europea*, cit., p. 2277 ss.

adopted[77]. The objection instead only avoids the entry into force of the act proposed by the Commission.

In the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts, annexed to the Interinstitutional agreement between the European Parliament, the Council of the European Union and the European Commission on better law-making[78], it is reported an urgency procedure that *«should be reserved for exceptional cases, such as security and safety matters, the protection of health and safety, or external relations, including humanitarian crises. The European Parliament and the Council should justify the choice of an urgency procedure in the basic act. The basic act shall specify the cases in which the urgency procedure is to be used»*[79].

The Common Understanding then specifies that *«a delegated act adopted under the urgency procedure shall enter into force without delay and shall apply as long as no objection is expressed within the period provided for in the basic act. If an objection is expressed by the European Parliament or by the Council, the Commission shall repeal the act immediately following notification by the European Parliament or the Council of the decision to object»*[80]. Therefore, it is possible to have an urgent delegated act in some exceptional cases, such as security and safety matters, the protection of health and safety, or external relations, including humanitarian crises, if this is specified by the legislative act, and it remain in force as long as no objection is expressed. It is to be underlined that the delegated act is not a legislative act and that it always needs a legislative act as a legal base, so that this would unavoidably imply a certain timing in reacting by the EU institutions.

2.5 Protocol 2 on the application of the principles of subsidiarity and proportionality

One last example of urgent procedure may be read in art. 2 of Protocol 2 on the application of the principles of subsidiarity and proportionality, where it is stated that generally, before proposing legislative acts, the Commission shall consult widely, but «in cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal». This means that the Protocol provides for a way to fasten the legislative procedure in case of "exceptional urgency", without defining them.

3. Urgent procedures in the secondary legislation

Other hypothesis of urgency decisional powers are to be found in the secondary legislation.

In the Comitology regulation[81], laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, at art. 7 provides for some rules for the adoption of

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[77] *Ibidem*, spec. p. 2279.

[78] 13 April 2016, OJ L 123, 12.05.2016, p. 1 ss.

[79] *Ibidem,* p. 20.

[80] *Ibidem*, p. 23.

[81] Regulation (EU) no 182/2011 of the European Parliament and of the council of 16 February 2011, OJ L 55, 28.02.2011, p. 13 ss.

implementing acts in exceptional cases: *«By way of derogation from Article 5(3) and the second subparagraph of Article 5(4), the Commission may adopt a draft implementing act where it needs to be adopted without delay in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU».* In addition to that, art. 8, *Immediately applicable implementing acts*, allows the Commission to adopt «on duly justified imperative grounds of urgency», *«an implementing act which shall apply immediately, without its prior submission to a committee, and shall remain in force for a period not exceeding 6 months unless the basic act provides otherwise».* It is interesting to note that the Regulation provides for a procedure to control the adopted act, stating that «*the latest 14 days after its adoption, the chair shall submit the act referred to in paragraph 2 to the relevant committee in order to obtain its opinion. […] Where the examination procedure applies, in the event of the committee delivering a negative opinion, the Commission shall immediately repeal the implementing act adopted in accordance with paragraph 2».*

In the end, it is to be remembered Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, II pillar of the Banking Union[82]. At its art. 18, par. 7, it provides for a fast procedure for the resolution of a bank, whose scheme has to be adopted in 24 hours.

4. Conclusion

In the light of the above, one may consider that the current EU legal framework contains rules that allow the fast intervention of the EU in some exceptional situation like emergency situation characterized by a sudden inflow of nationals of third countries (art. 78, par. 3 TFEU), natural or man-made disaster, economic exceptional circumstances (art. 122 TFEU), terrorist attack (art. 222 TFEU).

The procedures established by the Treaty give to the Council the power to adopt the relevant decision by qualified majority (as this is the rule in case it is not specified the need of the unanimity, according to art. 16, par. 3, TEU). The proposal is always left to the Commission (in the case of art. 222 TFEU, with the High Representative of the Union for Foreign Affairs and Security Policy). The Parliament is generally only informed: it is instead consulted before the adoption of the decision, according to art. 78, par. 3, TFEU.

Also, the EU Commission can adopt some delegated acts in exceptional cases through an urgent procedure, such as security and safety matters, the protection of health and safety, or external relations, including humanitarian crises, which remains in force as long as no objection is raised.

It would be possible to conclude that it would be sufficient to broaden the scope of these norms, for example, extending art. 78, par.3, TFEU to all the area of immigration and asylum policy, or to fasten the relevant procedures to let the EU intervene in case of exceptional need and urgency.

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[82] OJ L 225, 30.07.2014, p. 1 ss.

It is, in any case, to be underlined that the wording of the Treaty underlines the exceptional feature of the intervention of the EU, while the urgency of the intervention is left behind. It is also to be questioned if the procedures laid down by the Treaty are fast enough to face real urgency. The system of the urgent delegated acts may be quite useful to react in case of urgency, but it always presupposes a legislative act to allow the Commission to adopt measures in case of urgency, providing a suitable motivation for this.

The secondary law also let the EU to make immediately applicable implementing acts or some urgent decision in specific sectors, but this is not a remedy to situations where legislative measures are needed. Also, it is important that the possibility to intervene for the EU is provided in the EU Treaties, and not in some external agreement made by the Member State or in the secondary legislation.

Despite the existence of some sectorial procedure for exceptional case in the Treaties, it would be useful to insert *de jure condendo* a new general fast procedure to let the EU to intervene in case of necessity and urgency, within the limits of the principles of attribution of competence, subsidiarity and proportionality. In would be also possible to limit this procedure to certain sensitive areas, where it is more likely to have a matter of urgency, like immigration, fight against terrorism, economic crises, natural or man-made disasters. In this case, the new procedure should be coordinate with the existing ones, or it may substitute them.

To create such a new general procedure, it would be necessary to amend the Treaties through the ordinary procedure established by art. 48 TEU, because this would be another form of legislative procedure and not only a modification of Part Three of the TFEU or a simply modification that does not require the organization of an *ad hoc* convention. It would be possible to imagine a modification by a simplified procedure according to art. 48, par. 6, TEU, only if instead of a new general procedure, it would be decided to insert sectorial, limited urgent procedures for the main policy of Part Three of the Treaty, on the model of the modification adopted to art. 136 TFEU to allow the creation of the ESM.

2/ Which cases are to be considered as "urgent" and/or "exceptional" in the EU legal order?

Is it necessary to distinguish between "urgent" and/or "exceptional" cases?

Are there any sensitive domains that should be excluded from the application of urgent and/or exceptional EU law-making procedures?

From the wording of the already existing norms in the Treaty, it is possible to see that some general clauses are used like "emergency situation" (art. 78, par. 3, TFEU), or "Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control" (art. 122, par. 2, TFEU). In the clause of solidarity, the features of emergency and urgency are less evident, while the norm indicate some specific circumstances, as art. 222 TFEU says that «The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster».

The word "urgency" in the TFEU appears only once, in art. 218, par. 6, to allow the fastening of the procedure to conclude an international agreement.

The idea of an "emergency" suggests a situation which Member States find particularly difficult to handle, and the concept of "urgency" is linked to the need to have a fast intervention.

In case it would be opted for a new general urgent procedure, it would be preferable to have a general clause, covering the cases of urgency and necessity, instead of a list that would be in any case only illustrative. The general clause should apt to cover situations like terrorist attack, natural or mad man disaster, risk of economic default of the Member States.

In case it would be preferred to insert some limited, sectorial, urgent procedures, the features of exceptionality and urgency will have to be coordinate with the identification of the area of intervention. For example, in case it would be chosen to allow an urgent intervention of the EU in case of exceptional difficulties in the supply of energy, it would be insert the urgent procedure in art. 194 TFEU, specifying the limits of the EU intervention and coordinating it with art. 122 TFEU.

In the Italian experience, the concepts of necessity and emergency are used in a cumulative way as factual requirement to let the intervention by the Government through the *decreto-legge:* it is not necessary to distinguish between urgent and exceptional cases, because if there is the need to have a fast legislative intervention, this means that the situation is extraordinary, that it has not been ruled before and that there is no time to complete the ordinary legislative procedure.

If the European institutions will act within the limits of their competences and in full compliance with the principles of subsidiarity and proportionality, there are no reasons to exclude some sensitive domains from the fast-track legislative procedure to be created. It is instead necessary to coordinate the existing procedures under articles 78, par. 3; 122 and 222 TFEU and with the power of the Commission to adopt delegated urgent acts, with the new, general, one, because they may be overlapping.

3/ Can you suggest a possible model for urgent and/or exceptional EU law-making procedures?

In particular, what would be the different phases of such procedures, the institutions involved and their respective roles as well as the applicable timetable for the issuing of an urgent and/or exceptional EU regulatory measure?

A possible model for an urgent and exceptional EU law-making procedure may be as follows.

The Treaty should insert a general clause enabling the Council to adopt legislative measures to face an emergency situation, that is when the urgent EU intervention is required in compliance with the principle of subsidiarity and proportionality, and there are not other suitable means provided by the EU legal framework to assure the same timing and efficacy of the EU intervention. The intervention of the EU should be directed to help the Member States in serious difficulty, when they wouldn't have the means or the competences to react properly.

The proposal should be submitted to the Council by the Commission, which has to first evaluate the existence of an emergency situation that requires the urgent intervention by the EU. In this task, the European Commission should be supported by a special Committee composed by appointed experts by the Member States.

The Council should vote by simple majority, in order to save time.

The European Parliament should be only informed.

The legislative act adopted by the Council should be preferably a decision or a regulation, in order to have norms with direct effect and directly applicable, and avoid problems of transposition to the national legal order.

The legislative measures adopted by the Council should be temporary[83], with a term of validity not exceeding one year. The Court of justice should have the competence to rule on the validity of this norms (see question 4). After this term, the norms are no longer valid and in force, but they loss their validity only ex *nunc.*

On the same day of the adoption of the Council decision, the Commission should present the proposal for an ordinary legislative act, in case it deems that it is necessary/useful to make the temporary measures definitive or to rule the issue for the time that the norms of the urgent act will be no longer valid and in force[84]. In this way, the Parliament will be fully involved and also the national parliaments will have the opportunity to verify the respect of the principle of subsidiarity. If the legislative procedure for the adoption of an act to make the norms permanent does not succeed, the Council cannot adopt other provisional measures of the same kind, unless there are other exceptional situation to be faced.

4/ What kind of control is to be provided for the eventual urgent and/or exceptional EU law-making procedures and measures?

Would you consider a system of judicial review or rather a system of political accountability?

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[83] On the model of what is already stated in art. 78, par. 3, TFEU.

[84] This is what happened after the adoption of the Council Decisions n. 2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015, with the proposal of a regulation establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person. The Commission, in the Explanatory Memorandum, stated that: «The proposal establishing a crisis relocation mechanism has to be distinguished from the proposals adopted by the Commission on the basis of Article 78(3) TFEU for the benefit of certain Member States confronted with a sudden inflow of third country nationals on their territories. While the measures proposed by the Commission on the basis of Article 78(3) TFEU are provisional, the proposal establishing a crisis relocation mechanism introduces a method for determining for a temporary period in crisis situations which Member State is responsible for examining applications for international protection made in a Member State confronted with a crisis situation, with a view to ensure a fairer distribution of applicants between Member States in such situations and thereby facilitate the functioning of the Dublin system even in times of crisis. This proposal sets strict conditions for triggering the crisis relocation mechanism in relation to a given Member State, in particular the fact that the Member State is confronted with a crisis situation jeopardising the application of the Dublin Regulation due to extreme pressure characterized by a large and disproportionate inflow of third-country nationals or stateless persons, which places significant demands on its asylum system. The establishment of a crisis relocation mechanism is without prejudice to the possibility for the Council to adopt, on a proposal from the Commission, provisional measures for the benefit of a Member State confronted by an emergency situation as characterized by Article 78(3) TFEU. The adoption of emergency measures on the basis of Article 78(3) TFEU will remain relevant in exceptional situations where an emergency response, possibly encompassing a wider migratory support, is needed, should the conditions for using the crisis relocation mechanism not be met».

In what terms should either system operate?

The urgent and/or exceptional EU law-making general procedure should be subject to both political and judicial control.

The political control should be enacted in the legislative phase of the procedure, that is in case the Commission aims at making permanent the temporary norms adopted or to rule anyway on the issue for the time when the urgent acts will be no longer in force: by passing through the legislative procedure, the European Parliament will have the opportunity to examine the Commission proposal and evaluate the measures adopted. Moreover, during the legislative procedure, the Commission proposal will also be sent to the national parliaments for the control on the compliance with the principle of subsidiarity, according to Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

It may assume also a great importance the judicial control, after the entry into force of the urgent legislative measure, made by the Court of Justice.

As the urgent legislative procedure, with the specification of all the requirements, should be inserted in the Treaties, the Court of Justice will have the competence, ex art. 263 TFEU, to review the legality of such legislative acts. To guarantee that this action for annulment should be treated in the fastest way, in order to avoid that illegal act are the source for urgent measures in the European Union, it should be modified the Rules of procedure of the Court of justice, to let the Court judge by the urgent preliminary ruling at art. 107 TFEU. This would let the Court to sentence the case within around two months[85]. In case the Court states for the invalidity of the act, this would be declared void *ex nunc*. However, applying art. 264 TFEU, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive. In this case, therefore, the Court may safeguard the effects already produced, but, at the same time, avoid the risk of maintaining illegal acts in the EU legal framework. Moreover, the Court has already this competence, so that this would not alter the system of check and balances. It is to be underlined that the Court, in sentencing such cases, should have regard to the marge of appreciation of the Commission and of the Council in opting for the adoption of the contested act: the control of the Court, then will be only from a legality point of view and not on the merit of the discretionary power of the two institutions involved.

[85] According to the Report on the Judicial Activity 2016, p. 82, the duration of the preliminary ruling procedures is around 2,7 months.