Dr. FLAVIA ROLANDO

Research Fellow, University of Naples

ITALY (in coop with Ilaria Anro and Marta Simoncini)

EUROPEAN UNION

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

[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.

need to be separately considered and contemporary present. Therefore, the Government should verify the indispensable factual need to regulate and the 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.

---

[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.

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

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

[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").

indispensable in some occasions and a stricter constitutional regulation would have contained the abuse[10].

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.

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

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

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 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

[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.

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 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

[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.

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 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

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

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

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 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.

---

[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.

[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.

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 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

---

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

[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.

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].

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

---

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

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

[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.

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 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

---

[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.

[35] Const. Court 171/2007.

[36] See footnote n. 33.

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, 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

---

[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.

[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.

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).

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.

---

[44] Const. Court 220/2013.

[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.

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?

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

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

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

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 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].

---

[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.

[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

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 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.

---

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.

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].

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

[53] Const. Court, 22/2012.

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.

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.

---

[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".

[55] See the information appeared in the newspaper: http://www.repubblica.it/economia/2017/02/02/news/il_tweet_di_padoan_nessuna_manovra_

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.

Bibliography of reference:

CELOTTO A. and DI BENEDETTO E., *Art. 77*, in R. BIFULCO, A. CELOTTO AND M. OLIVETTI (eds), *Commentario alla Costituzione* (Utet 2006), vol. II (art. 55-100)

CELOTTO A., *L'«abuso» del decreto-legge* (Cedam 1997)

CELOTTO A., *Uso e abuso della conversione in legge,* in *Federalismi.it*, 1/2014

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

DI COSIMO G., *Tutto ha un limite (la Corte e il Governo legislatore),* in *Forum di Quaderni Costituzionali* 2007,http://www.forumcostituzionale.it/wordpress/images/stories/pdf/nuovi%20pdf/Paper/0038_di_cosimo.pdf

DI MARIA S., *I "nuovi" limiti alla decretazione d'urgenza verso un pieno riconoscimento costituzionale?,* in *Forum di Quaderni Costituzionali* 2015, http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/01/dimaria.pdf

DICKMANN R., *La Corte costituzionale si pronuncia sul modo d'uso del decreto-legge,* in *Giurcost Studi e Commenti* 2013, http://www.giurcost.org/studi/dickmann.pdf

FLICK G. M., *Decreto legge e legge di conversione nella più recente giurisprudenza costituzionale*, in *Federalismi.it*, 1/2014

FRANCO A., *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

GHIRIBELLI A., *Il potere del Presidente della Repubblica in sede di emanazione dei decreti-legge: il "caso Englaro",* in *Giurisprudenza Costituzionale*, http://www.giurcost.org/studi/ghiribelli.htm#_ftnref10.

MORELLI A., *Notazioni sulle novità della riforma costituzionale riguardo alla decretazione d'urgenza e al rinvio presidenziale delle leggi di conversione*, in *Federalismi.it*, 1/2016

PITRUZZELLA G., *La legge di conversione del decreto-legge* (Cedam 1989)

PIZZORUSSO A., *Delle fonti del diritto. Disposizioni sulla legge in generale artt. 1-9*, in *Comm. Scialoja –Branca*, 1977

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

Field Code Changed

estemporanea -157411532/; http://www.ilsole24ore.com/art/notizie/2017-01-27/padoan-procedura-ue-sarebbe-grosso-problema-reputazione-italia--125831.shtml?uuid=AExK4BJ.

RESCIGNO P., in *Novissimo Digesto italiano*, XII, Utet, Torino, 1965, p. 100

SIMONCINI A. AND LONGO E., *Dal decreto-legge alla legge di conversione: dal controllo potenziale al sindacato effettivo di costituzionalità*, in *Rivista AIC 3/2014*

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?

The European Union is faced with new challenges that often require urgent reactions by the European institutions. The improvement of the ability of the EU to take swift and timely actions to respond to unexpected events should be considered as a fundamental part of the European integration process. The conferral of further competences to the EU should be associated with an enhancement of the power to fulfill the tasks, also in urgent and exceptional cases. After the flow of migrants and the economic crisis that have characterized this period, according to public opinion the EU has not a real power of reaction: a general law-making procedure could be considered as a reassuring step forward by European citizens.

The founding Treaties already offer some instruments to solve, in such cases, urgent questions with legislative acts, namely art. 122 TFEU that allows the adoption of appropriate measures in case of severe difficulties or art. 222 TFEU that regulates the solidarity clause, but does not introduce a general legal instrument or a general law-making procedure. Moreover, it is important to point out that these instruments, probably in order to react in a timely fashion to an exceptional need, are adopted by the Council, on a proposal of the Commission or a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. Thus, the European Parliament is not involved at all in the procedure except that, at most, in some cases it is informed of the decision taken, which contradicts the requirement to improve the role of the institution that represents the EU citizens and mitigate the democratic deficit[56].

[56] The European Parliament has carved out its role through several Recommendations, for instance inviting the Commission to bring forward ambitious legislative proposals having regard to artt. 112 and 222 TFEU as in the resolution European disaster response: role of civil protection and humanitarian assistance - European Parliament resolution of 27 September 2011 on "Towards a stronger European disaster response: the role of civil protection and humanitarian assistance" (2011/2023 INI).

Through other resolutions, the European Parliament makes known its political position on relevant subjects as in European Parliament resolution of 22 November 2012 on the EU's mutual defence and solidarity clauses: political and operational dimensions (2012/2223(INI)) or European Union Solidarity Fund, implementation and application - European Parliament resolution of 15 January 2013 on the European Union Solidarity Fund, implementation and application (2012/2075(INI)) or in European Parliament resolution of 12 September 2013 on the maritime dimension of the Common Security and Defence Policy (2012/2318(INI)).

Even if some versatile special procedures are already established, the introduction of a general urgent and/or exceptional law-making procedure could provide the EU with an instrument that will allow it to react to every kind of emergency or urgency with measures appropriate to the real need. In that way, it will no longer be necessary to stress the limits established by Artt. 122 and 222 TFEU.

However, considering that the founding Treaties explicitly define the procedure for the adoption of the EU acts, a new urgent and/or exceptional law-making procedure should be introduced through the revision of the Treaties. The new provision should describe the involvement of the EU institutions, preserving the institutional balance between the actors of this procedure and the system of checks and balances. However, it would be important to evaluate whether it is better to consider this procedure as a kind of special legislative procedure or a "special part" of an already existing legal procedure. In the first case, it is necessary to review the founding Treaties through an ordinary revision procedure, in the second case it is sufficient to modify the relevant articles of the Treaties with the simplified revision procedure.

The qualification of the new procedure as *legal* entails that the Council is obliged to deliberate and vote in public, as established by art. 16 (8) TEU and art. 15 (2) TFEU. In this way, the responsibility of the Member States that will obstruct the adoption of the urgent measures will also be public.

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?

It is important to evaluate, in a non-exhaustive manner, the useful instruments to react to an urgent and/or exceptional circumstance that are already established by the founding Treaties and to understand their correct use and their possible utilization, in order to assess the real need for a new general legal procedure and the relation between this general instrument and the special procedures, starting from art. 122 and 222 TFEU. Among the other instruments previewed in the Treaty, which cannot be discussed at length in this questionnaire, there are specific urgent measures that should be examined as examples of urgent procedure, such as the one established in art. 78 (3) TFEU[57].

[57] According to Art. 78 (3) TFEU "In the event of one or more Member States being confronted by an emergency situation characterised 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". This urgent procedure can be used only when it complies with specific conditions such as a sudden flow of nationals of third countries so it is not possible to broaden its scope of application. Nonetheless, art. 78 (3) represents an important model for introducing new special procedure as we will see in question 1/3 and 3.

On the legal basis established by Art. 78 (3) the Council Decision 2015/1523 of 14 September 2015 has been adopted, establishing provisional measures in the area of international protection for the benefit of Italy and Greece, published in OJ L 239, 15.9.2015, p. 146–156 and the Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, published in OJ L 248, 24.9.2015, p. 80–94.

According to Art. 122 (1) TFEU, if severe difficulties arise in the supply of certain products, notably in the area of energy, the Council, on a proposal of the Commission, may decide upon the measures appropriate to the economic situation in a spirit of solidarity between Member States. The second paragraph, moreover, envisages the same 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". In that case, the Council may grant Union financial assistance to the Member State concerned.

The potential application of the first paragraph is quite broad, even if it can be used without prejudice to any other procedures provided for in the Treaties. On this legal basis, any measure has been taken in order to respond to a particular situation, but Regulation 2016/369 on the provision of emergency support within the Union[58] has been adopted and it lays 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[59].

The second paragraph, even if it apparently has a more limited scope considering that it can be used to accord only financial assistance, has played an important role during the economic crisis and it is the legal basis of the Council Regulation 407/2010 establishing a European financial stabilisation mechanism[60], before the introduction of the new third paragraph of art. 136 TFEU.

---

[58] On the same legal basis have been adopted also the Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, and the Council Decision (EU) 2015/632 of 20 April 2015 repealing Council Decision 77/706/EEC on the setting of a Community target for a reduction in the consumption of primary sources of energy in the event of difficulties in the supply of crude oil and petroleum products and Commission Decision 79/639/EEC laying down detailed rules for the implementation of Council Decision 77/706/EEC.

In the *Pringle* Case, the Court pointed out that "*Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council*". See ECG 27 November 2012, C-370/12, *Pringle*, par. 116.

Moreover, in the European Parliament resolution of 22 November 2012 on the EU's mutual defence and solidarity clauses: political and operational dimensions (2012/2223(INI)), the European Parliament stressed the importance of considering this provision as part of a comprehensive Union solidarity toolbox for addressing new major security challenges, such as those in the area of energy security and security of supply of other critical products, especially in cases of politically motivated blockades, see point 31 of the resolution cited above in note 1.

[59] According to Art. 1 of the Regulation 2016/369, this support, however, can only be provided where the exceptional scale and impact of the disaster is such that it gives rises to severe wide-ranging humanitarian consequences in one or more Member States and only in exceptional circumstances where no other instrument available to Member States and to the Union is sufficient.

[60] About the ESM mechanism, the ECJ in the Pringle case has established that "*under Article 122(2) TFEU, the Council of the European Union may grant, under certain conditions, such assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. The exercise by the Union*

Art. 222 TFEU introduces the solidarity clause and it regulates the possible joint action by Union and its Member States when one of them is the object of a terrorist attack or the victim of a natural or man-made disaster. With Decision 2014/415 on the arrangements for the implementation of the solidarity clause by the Union, the Council has laid down rules and procedures for the implementation of Article 222 TFEU by the Union[61], establishing the involvement of the European institutions and the possible responses to Member State's needs. These instruments seem to be widely applicable, considering that the European Union or Member States individually can have recourse to all the instruments at its disposal to respond to a terrorist offence or a natural or man-made disaster, i.e. any situation which has or may have a severe impact on people, the environment or property, including cultural heritage. Nonetheless, this instrument is fundamentally conceived to react to an urgent and/or exceptional situation by operational measures and not through stable legislative measures. So, the need for a general law making procedure that allows the EU to adopt legislative acts to settle an urgent and/or exceptional situation still remains.

As a general fast instrument, the possible use of delegated acts should also be examined. However, Art. 290 TFEU provides that delegated acts can only supplement or amend certain non-essential elements of a legislative act. Furthermore, the Commission does not have a general power of adoption of delegated acts: the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative act from which it derives.

Several legislative acts provide for an urgency procedure, according to which if imperative grounds of urgency so require, it is possible to adopt delegated acts that shall enter into force without delay and shall apply as long as no objection is expressed by the European Parliament or the Council.

Actually, several acts of secondary law establish such urgency procedures[62]. Many directives, indeed, include articles that allow the Commission to adopt acts that shall

---

of the competence conferred on it by that provision of the FEU Treaty is not affected by the establishment of a stability mechanism such as the ESM". See the Pringle case, cited above, par. 118 and 119.

[61] According to Article 5 of the Decision 2014/415, the Council shall ensure the political and strategic direction of the Union response to the invocation of the solidarity clause, taking full account of the Commission's and the HR's competences. To this end, the Commission and the HR shall (a) identify all relevant Union instruments that can best contribute to the response to the crisis, including sector-specific, operational, policy or financial instruments and structures and take all necessary measures provided under those instruments; (b) identify military capabilities that can best contribute to the response to the crisis with the support of the EU Military Staff; (c) identify and propose the use of instruments and resources falling within the remit of Union agencies that can best contribute to the response to the crisis (…).

[62] See, for instance, Art. 4 of Regulation 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits and repealing Council Decisions 2001/76/EC and 2001/77/EC, in OJ L 326, 8.12.2011, p. 45–112; Art. 6 of Regulation 2016/793 of the European Parliament and of the Council of 11 May 2016 to avoid trade diversion into the European Union of certain key medicines, in OJ L 135, 24.5.2016, p. 39–52; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain

enter into force without delay and shall apply as long as no objection is expressed by the European Parliament or by the Council within a well-defined period since the notification of the act. The notification of the act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure. These acts, therefore, enter immediately into force. Conversely, delegated acts adopted by the procedure established in the secondary law normally enter into force only where no objection has been expressed either by the European Parliament nor by the Council within a well-defined period since the notification of the act or, before the expiry of that period, when both the institutions inform the Commission that they will not object. However, it is important to point out that the Commission can adopt only delegated acts through this procedure and, through the same method, it can modify only particular technical aspects or previous delegated acts adopted on the basis of the same legal act. For this reason, we must assume that it is not a general power and it is not a general application instrument. Therefore, through urgent delegated acts it is possible to adapt normative acts more quickly and effectively to the development of scientific technology or to unexpected changes in market behavior but it is not possible to broaden their scope of application considering that a delegated act is subordinate to the Treaties or to the secondary legislation like a directive or a regulation.

Moreover, Art. 8 of Regulation 182/2011 laying down the rules and general principles concerning mechanisms of Member States' control on the Commission's exercise of implementing powers[63], allows the Commission to adopt an implementing act which shall apply immediately and shall remain in force for a period not exceeding 6 months unless the basic act provides otherwise on duly justified imperative grounds of urgency. In that case, at the latest 14 days after its adoption, the chair of the Commission shall submit the act referred to the relevant committee in order to obtain its opinion and, in

works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, in OJ L 216, 20.8.2009, p. 76–136; Art. 49 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, in OJ L 94, 28.3.2014, p. 1–64; Art. 88 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, in OJ L 94, 28.3.2014, p. 65–242; Art. 104 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, in OJ L 94, 28.3.2014, p. 243–374.

[63] Regulation 2011/182 has repealed Decision 1999/468/EC. According to article 7, Regulation 2011/182 establishes also the adoption of implementing acts in exceptional cases: *"(...) 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 such a case, the Commission shall immediately submit the adopted implementing act to the appeal committee. Where the appeal committee delivers a negative opinion on the adopted implementing act, the Commission shall repeal that act immediately. Where the appeal committee delivers a positive opinion or no opinion is delivered, the implementing act shall remain in force*".

the event of a negative opinion, the Commission shall immediately repeal the implementing act adopted. Several secondary law acts refer to this procedure[64].

Also concerning implementing measures, we have to consider that urgent implementing acts are non legislative acts and shall be adopted only if specifically provided by the Treaties or by a secondary legislation, so they are not a general tool. Moreover, the model of the procedure established for urgent implementing acts, such as the one introduced for urgent delegated acts, is not useful for an urgent legislative procedure because the European Parliament and the Council should be involved as co-legislators.

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?

There are several examples of acts of secondary law that introduce urgency procedures. However, as explained in the previous answer, these acts may only establish a special procedure to adopt urgent delegated acts or urgent implementing acts in accordance with art. 290 and 291 TFEU. Therefore, through these procedures it is only possible to supplement or amend certain non-essential elements of the legislative act.

For this reason, even if the urgent procedure introduced by secondary law permits quick reaction to cases of duly substantiated urgency, its employment is limited to regulate non-essential elements of the regulation, so it can be used to react to any urgent and/or exceptional circumstance but cannot reach every goal. Otherwise, the secondary act could infringe the Treaties, namely the articles that explicitly establish the procedure that must be used for ruling the subject, in observance of the principle of conferral.

Depending on the kind of urgent and/or exceptional law-making procedure that we aim to introduce, it will be necessary to proceed to an ordinary or simplified revision of the Treaties.

As explained *sub* question n. 3, it is possible to imagine the adoption of urgent acts through a "special part" of an already existing legal procedure or a special legislative procedure that we will call "urgent legislative procedure".

In the first case, it is possible to introduce the new "enabling clause" for adopting urgent and/or exceptional acts for the different policies. As will be explained in question 3, according to the proposed model the Commission shall submit to the European Parliament and to the Council (or only to the Council if the policy is ruled by a special legislative procedure) a proposal with provisional effects that shall enter into force after

[64] Among the acts that remand to Regulation 2011/182 and, in particular, to art. 8 see Regulation 2017/355 on certain procedures for applying the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo of the other part, OJ L 57, 3.3.2017, p. 59–62; Regulation 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 55–91 or Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–13.

the signing of the Presidents of both the institutions involved. The adoption of the final act shall follow the legal procedure established by the article conferring the competence. So, in this hypothesis, it is sufficient to intervene by modifying the single article of Part three of the TFEU and it should be possible to have recourse to the simplified revision procedure as established in art 48 TFEU.

Otherwise, if we aim at introducing a general urgent and/or exceptional law-making procedure, considering that the founding Treaties explicitly define the legal procedures for the adoption of the EU acts, it will be necessary to add a new article in the TFEU. The new provision should be placed in Section two of chapter two on legal acts of the Union, adoption procedures and other provisions of part IV of the TFEU, relating to the procedures for the adoption of acts and other provisions (art. 293 and seq.). So, the article dedicated to this special legislative procedure should specify the condition for having recourse to this procedure, the role of the EU institution involved, the different phases of the procedure and the effect of the urgent act.

In that case, if we consider the urgent legislative procedure as a general tool, allowing the use of that special procedure for every area conferred to the EU, a single article could be sufficient, that should also specify that the adoption of urgent acts is not possible in well-defined subjects.

It could be possible to introduce, in a first phase, the urgency procedure as a "special part" of the legislative procedure already established in the Treaties for the policies that require a prompt reaction by the EU and that do not benefit from a special procedure. Then, in a second phase, considering also the use of that instrument and the praxis realized, it could be transformed into a general tool, as a kind of legislative procedure.

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?

The article of the treaty that should define a special law-making procedure or a "special part" of the legislative procedure for a policy that is already established should specify the conditions for the use of such a procedure. It should be specified that the provisional effects of the Commission proposal – if we adhere to the model proposed sub question 3 – or of the other kind of urgent acts should be accorded only in urgent and exceptional cases.

"Urgent" should be considered a situation that needs a prompt reaction in the EU legal order and requires a legal act that enters into force immediately. To check if this condition is respected, it will be important that the institution requiring the recourse to the urgent procedure demonstrate that there is a *periculum in mora*, i.e. the risk of dangers due to the time that is required by the ordinary or special legislative procedure.

It could also be established that urgent acts should be adopted in exceptional circumstances. The exceptionality should be referred to the circumstances that lead to the decision to ask for an urgent procedure because the existent legislation cannot be applied to the object of the new legal act and it is not possible to follow the procedure ordinarily established in the Treaty. For the accomplishment of this condition, the

institution should demonstrate that imperative grounds require having recourse to the urgent procedure because the circumstances entail the need of an *ad hoc* discipline and no other instruments at EU level or at national level could be considered as equally effective.

Therefore, there is a difference between urgency and exceptionality and it is important that in the recital of the legal act, or in the explanatory memorandum joint to the proposal, that respect of both conditions is well justified. Nonetheless, in several cases the justifications advanced for recurring to this procedure could partially coincide.

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

The application of the urgent procedure should be excluded in some circumstances and in some domains.

It will be important to exclude recourse to the urgent procedure when the same object has been already ruled by a precedent urgent act and has not received a final regulation by the other institutions involved in the urgent legislative procedure[65]. Especially if we imagine a model in which the urgent act has provisional effects, the entering into force of provisional effects for the second time could entail an infringement of the legal certainty principle. Moreover, the new introduction of an act with temporary effect will probably be an abuse of law, aiming at ruling a situation that has not been regulated in a definitive way in the established time–limit by the precedent urgent procedure. For that reason, it will be important to verify that the request for the adoption of an urgent act is based on new urgent and exceptional circumstances.

For the same reason, the urgent act should not regulate the effect arisen from a precedent urgent act if the procedure establishes that the regulation of these effects is the competence of other institutions. The possibility of adopting urgent acts should be also excluded if the European Court of Justice has ruled that there is an absolute lack of the condition for requiring an urgent procedure.

Areas in which the Member States consider that it is necessary to have a full examination by the European institution should also be excluded from the application of an urgent procedure and from the adoption of provisional effects. Moreover, through an urgent procedure that involves only some of the institutions, it should be possible only to adopt measures in the areas for which the Treaty establishes the competence of the same institution.

Considering the model proposed sub question 3, the first phase of the urgent procedure shall involve the European Commission, the President of the European Parliament and the President of the Council; in a second phase, the content of the urgent measure will be approved by the European Parliament and the Council. According to that model, through the urgent procedure it shall not be possible to adopt acts that are normally adopted by

[65] If we consider the model proposed sub question 3, the provisional effect of a European Commission proposal shall be forbidden when the same or similar content has been the object of a precedent proposal with provisional effect that has not been adopted by the European Parliament and the Council in a legal act.

the European Council or by other European Institutions that are not involved in the urgent procedure. In that case, in fact, the competent European Institution could not have control of the adopted measure.

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

It is important to consider that a possible model for urgent and/or exceptional EU law-making procedure shall, first of all, provide for the involvement of the three principal EU institutions – Council, European Parliament and Commission – and ensure control through an adequate system of checks and balances and should also be inspired by the essential characteristics of the already existing law-making procedure and by the common traditions of the Member States.

In my opinion, it is possible to take a leaf out of the urgency procedure already previewed in the EU for the delegated acts and of the Italian, Greek and French urgency procedure for the adoption of governmental acts that have the force of law and draw elements from both the sources. So, the model will be innovatory insofar as it will introduce a new fast-track procedure, adequate to respond to urgent and exceptional circumstances, and at the same time familiar to the EU and national law making procedures.

In order to guarantee the speed of the measures, it could be important that the Commission is the principal actor of the procedures and could adopt a proposal with provisional effects before the adoption of the subsequent legal act.

At the same time, it is fundamental that the Council and the European Parliament will be adequately involved in the procedure: The Council represents the Member States, so it is important that the Member States' governments representatives give their approval to the recourse of an urgent procedure and to the content of the measures. For the purpose of introducing an effective procedure, the assessment of the content of the measure should be postponed to a following phase, after the adoption of the Commission's proposal with provisional effect or of the urgent act. The postponed assessment will permit an immediate reaction to an urgent and/or exceptional situation and, at the same time, the forthcoming examination of the content and the possible revision of the measure will permit political control by the institutions that normally have the legislative powers in a short period so as to guarantee respect of the legal certainty principle and legitimate expectations.

The European Parliament should have the same role and the same powers as the Council, even if the Treaties establish a special legislative procedure, with the sole exception of the hypothesis where the European Parliament is not involved at all. This equal position will guarantee democratic participation, assuring the full involvement of the institution representative of European citizens[66].

[66] Jean-Paul Jacqué, The Principle of Institutional Balance, Common Market Law Review, 2004, 41, p. 383–391.

It could be important that the European Parliament and Council could give their approval to the decision to adopt an urgent measure at the beginning of the urgent law making procedure, especially to the Commission's proposal with provisional effects, to introduce an act whose creation has been shared by, and which is accepted by, both institutions. Considering that the involvement of these institutions in their entirety will require too much time, it could be sufficient that in the first case the approval could be given by the President of the European Parliament and by the President of the European Council.

The European Parliament and the Council should be able to repeal the provisional effects of the measure at any moment of the law-making procedure with *ex tunc* or *ex nunc* effects. The subsequent legislative law making procedure can lead, of course, to the adoption of a legal act with different content. In that case, the Commission proposal will lose their provisional effect *ex tunc*. In particular cases, in adherence to the legitimate expectation principle and to the legal certainty principle, the definitive act can establish a different time limit of validity of the effects.

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?

As for the ordinary legislative procedure, the Commission shall submit a proposal to the European Parliament and the Council. The peculiarity of the model for urgent and/or exceptional EU law-making procedures that we put forward lies in awarding provisional effect to the Commission proposal or to several articles of the Commission proposal.

In particular, if the Commission reckons that an urgent and/or an exceptional situation requires that the proposal or some articles of the proposal should enter into force immediately, it can submit a request for provisional effects contemporaneously to the President of the European Parliament and to the President of the Council of Ministers. The request shall be submitted to both the Presidents except for the cases in which the procedure for the adoption of the related definitive act established in the Treaty provides for the act being adopted only by the Council.

The Presidents of both the institutions have a time-limit of ten days to decide whether or not to sign the provisional effects request. If both the Presidents sign the provisional effects request, the proposal or the selected articles of the proposal will be published in the Official Journal and will enter into force immediately. If both the President or one of the Presidents of the institution involved refuse to sign the provisional effects requests, the Commission proposal follows the legislative procedure established in the Treaty.

The President of the European Parliament and the President of the Council of Ministers should also have the possibility to ask for an amendment of the part of the proposal that could have provisional effects. In that case, the Commission can amend the proposal or decide to renounce the submission of provisional effects. In that case, the proposal will follow the legislative procedure without any provisional effect.

After assessment of the provisional effects requests, the proposal is submitted to the European Parliament and to the Council, depending on the procedure established in the

treaty. It will be more appropriate, in the case of provisional effects, in order to comply with the legal certainty principle, that examination of the content of the measure be faster.

The European Parliament and the Council should have, during the whole examination procedure, the power to repeal the provisional effects. In that case, the Commission proposal would lose its provisional effects *ex tunc*. However, the European Parliament and the Council can state which of the effects of the proposal shall be considered as definitive. The examination of the proposal will run its own course regularly.

Through the legislative law-making procedure, the European Parliament and the Council can of course adopt an act with a different content compared to the Commission proposal. In that case, the Commission proposal will lose its provisional effect *ex tunc*. In particular cases, in accordance with the legitimate expectation principle and the legal certainty principle, in the definitive act the European Parliament and the Council can establish a different time limit for the validity of the effects.

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

It is important that the correct use of the urgent procedure should be assured by political and judicial review. Both kinds of control are necessary in order to obtain the adoption of an act that is shared by the different institutional actors and that is in line with the provisions of the Treaty.

The political scrutiny requires that several institutions are involved in the procedure. In this way, the different actors will be able to check the conditions required to have recourse to the urgent procedure have been respected. This kind of control is important to ward off possible abuse of the procedure. The involvement of the different representative ensures that all the institutions agree on the urgency and exceptionality of the circumstances and on the need of adopting an urgent act. Moreover, the political scrutiny is faster than the judicial review and it is effectuated *ex ante*, whereas the judicial review normally intervenes ex post.

The involvement of the various institutions entails that the act is the expression of the several interests represented and it is assured that the content of the measure adopted is shared to the greatest degree possible between the representatives of the EU (European Commission), EU citizens (European Parliament) and the Governments of the Member States (Council of Ministers).

Also, the judicial review is fundamental. It is carried out by a fair and impartial institution and it assures respect for the Treaty provisions.

In order to respect the principle of separation of powers, political scrutiny of whether the condition required by the Treaty for the recourse to the urgent procedure has been respected should not be assessed through judicial review. For that reason, the European Court of Justice should limit its competence and declare invalid only urgent acts that have been adopted in the absolute lack of the condition of urgency and exceptionality.

Would you consider a system of judicial review or rather a system of political accountability? In what terms should either system operate?

Also in the proposed model, it should be important to guarantee both a political scrutiny and a judicial review. The political scrutiny should be made by the President of the European Parliament and the President of the Council, before the signing of the Commission proposal with provisional effects. The involvement of the representative of the two institutions that hold the legislative power should prevent abuse of the procedure. Furthermore, it will assure that the representative of both institutions generally agree on the content of the act.

For the adoption of the definitive act, in the proposed model it will be necessary to respect the ordinary legislative procedure or the special legislative procedure that is already established in the Treaty for the policy concerned. The complete involvement of the institutions that hold legislative power will assure a full political assessment also of the content of the act. Moreover, the same institutions will have the power to regulate the rights acquired by the provisional effects of the urgent act that could be not converted into law.

The judicial review should be effectuated by the European Court of Justice through an action for annulment ex Art. 263 TFEU both to the proposal that will assume provisional effects, considering that is not only a procedural act but also an act that has legal effects, and to the definitive act. In both cases, in order to respect the principle of separation of powers, the European judge should declare as invalid only proposals of provisional effects or acts that have been adopted in the absolute lack of the condition of urgency and exceptionality.