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INTRODUCTION

The events occurred in the last seven years have shaken the European Union (EU). A multidimensional crisis has exploded, challenging not only the financial sector and the Eurozone, but also the EU as a polity. While impressive and even shocking in many regards, the multidimensional crisis unfolded in Europe has been shaped by and can be understood in relation to more profound forces. Beneath the surface, a number of inter-connected historical processes, such as the neo-liberal turn of Europe in the Seventies, the sustained growth of public debt, the establishment of an asymmetric monetary union and the failure to clarify the nature of the EU as a polity, explain the crisis and illustrate its multidimensional nature[1]. On its turn, the crisis has triggered processes of political and legal mutation, as the ways in which the EU has tackled the financial and public debt crises have reshaped certain fundamental features of the EU polity[2].

[1] See E. Chiti, A.J. Menéndez and P.G. Teixeira, «The European rescue of the European Union», in E. Chiti, A.J. Menéndez and P.G. Teixeira (eds.), *The European rescue of the European Union? The Existential Crisis of the European Political Project*, ARENA Report No. 3/12 and RECON Report No. 19, 2012, 391.

[2] The implications of the European responses to the financial and public debt crisis on the EU constitutional structures are explored by P. Craig, «Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications», in M. Adams, F. Fabbrini and P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints* (Oxford: Hart, 2014) 19; E. Chiti and P.G. Teixeira, «The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis», *Common Market Law Review*, 2013, 683; M. Dawson and F. de Witte, «Constitutional Balance in the EU after the Euro-Crisis», *The Modern Law Review*, 2013, 817; M. Ruffert, «The European debt crisis and European Union law», *Common Market Law Review*, 2011, 1777.

This book focuses on the responses given by the European actors to such a multidimensional crisis. In particular, it explores one specific set of responses, namely those aimed at enhancing financial integration in the EU.

Two different groups of measures have been adopted by the European actors in this regard. The first group is that of the measures reacting to the financial crisis and finding their inspiration in the 2009 de Larosière Report[3]. Such measures, exemplified by the establishment of the new European supervisory authorities (ESAs), have been taken relying on the legal bases provided by the internal market provisions and concern the EU as a whole. The second group is that of the measures contrasting the Eurozone crisis and finding their inspiration in a variety of political documents, such as the 2012 Van Rompuy Report[4] and the 2015 Five Presidents Report[5]. These measures have been adopted within the framework of the Economic and Monetary Union (EMU) provisions and are addressed to the Eurozone countries, although formally open to the participation of all EU Member States.

Considered as a whole, the various measures have given rise to a framework characterized by several elements. First, financial integration is to be realized through the establishment of a new EU regulatory framework, a «single European rule-book» which should replace the current combination

[3] The High Level Group on Financial Supervision in the EU, *Report* (so called De Larosière Report), February 2009, available at http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf.

[4] *Towards a Genuine Economic and Monetary Union*, Report by the President of the European Council in close collaboration with the President of the European Commission, the President of the Euro Group, and the President of the European Central Bank, 5 December 2012, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf.

[5] *Completing Europe's Economic and Monetary Union*, Report by the President of the European Commission in close collaboration with the President of the Euro Summit, the President of the Euro Group, the President of the European Central Bank and the President of European Parliament, available at http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf.

of EU regulations, EU directives, implementing acts and national rules. Crucially, the elaboration of a single European rule-book implies both the adoption of directly applicable EU regulations aiming at the maximum harmonization of the single market rules and an action of administrative rulemaking by the Commission and the ESAs. Second, regulation is accompanied by enhanced financial supervision in the EU, carried out by transnational administrative networks functionally dominated by the new ESAs. Third, within the Eurozone only, both bank supervision and bank resolution have been centralized. Fourth, financial integration has been designed in such a way to include financial stability. A macro-prudential oversight has been envisaged with the objective to safeguard the stability of the financial system and a European Systemic Risk Board (ESRB) has been hence established.

The inquiry carried out in this book aims at reconstructing such an emerging framework. The great majority of legal research has been so far concerned with single aspects of the overall framework. For example, much attention has been devoted to the developments internal to the Eurozone, such as the establishment of a banking union through single bank supervision and resolution. Again, several studies have analyzed the structure and functioning of the various ESAs; particularly, in relation to their supervisory activities. This approach is perfectly understandable and has many merits. Yet, it inevitably leads to a limited and partial understanding of the ongoing process of financial integration in the EU. In order to avoid this shortcoming, this book aims at bringing together the various components of the new framework in order to reflect on their connections and interactions. This does not mean, of course, that we assume that the various elements combine between them in a unitary and harmonious construction. Quite on the contrary, the overall construction is characterized by inconsistencies, overlappings and conflicts, with the distinction between non-Euro and Euro-countries operating as a fundamental source of tension. What is important, however, is to take a perspective capable of analyzing both the single components of the new

framework and the thick pattern of their relationships with sufficient accuracy.

Moreover, the inquiry carried out in this volume is essentially one of administrative law. Its purpose is not to reflect on the substantive contents of the single European rule-book or of the decisions taken by the various relevant authorities. Its purpose is rather to reconstruct the administrative arrangements through which the functions of regulation, supervision and resolution are carried out. What is the rationale for envisaging administrative rulemaking as a fundamental element of the new regulatory framework? How does administrative rulemaking work in practice? What are the administrative arrangements through which supervision and resolution are operationalized within the Eurozone? What are the differences between the administrative arrangements for supervision within and outside the Eurozone? How is the way of functioning of the new administrative framework structured and organized? Which powers, for example, have been granted to the new EU administrations? Does the administrative architecture of financial integration reflect the traditional network structure of the EU administrative system? If so, which techniques of administrative integration does it rely upon? Can we consider the overall framework as a stable construct? Or is it characterized by inherent tensions? If so, how are these tensions managed? Which assessment can we make of the current overall framework? And which implications do these sectoral developments have on the structure and functioning of the EU administrative system as a whole?

As often happens in edited collections, it is not possible to identify a unitary and coherent line of reasoning developed throughout the book. The various chapters reflect a plurality of points of view, approaches and sensitivities. This should not be considered as a shortcoming, but rather as a point of strength. This book may indeed be read in different ways.

First, it may be read as an analysis of the administrative arrangements, through which the functions of regulation, supervision and resolution are carried out. The various chapters show that such administrative arrangements bring

about a set of legal and institutional changes. The type of administrative rulemaking envisaged to realize the single European rulebook, for example, differs in many regards from previous regulatory techniques adopted in the field. Supervision and resolution within the Eurozone represent a genuine novelty in the history of financial integration. Supervision for non-Euro countries implies an unprecedented degree of coordination and centralization. The analysis carried out throughout the book also points out the many attempts to make the various actions coherent between them. EU administrative law has been used with a view to linking the developments internal and external to the Eurozone together and to combining regulation, supervision and resolution in a single framework. At the same time, all chapters stress the complexity and instability of the emerging framework for financial integration. Unsurprisingly, a great deal of positive law issues are raised by the new framework, starting from those concerning the exercise of administrative rulemaking by the Commission and the ESAs. Several important aspects of the new institutional design remain underdeveloped: for example, while several accountability mechanisms have been envisaged, it cannot be asserted that these mechanisms give rise to true accountability regimes. Latent and open conflicts characterize the interaction between the various actors, mainly in the non-Euro and Euro divide.

Second, it is possible to read this book as a reconstruction of an administrative process potentially relevant even beyond the financial sector. What is relevant in this regard is the circumstance that the process of administrative reorganization and growth in the financial field does not drive the EU administrative system into a precise direction. The EU actors have made a number of choices that are characterized by several inherent tensions. For example, they have both reinforced the powers of EU satellite administrations and obstructed their effective exercise. They have at the same time refined the administrative capacities of the EU as a whole and established administrative arrangements for the Eurozone only, thus giving place to a variable geometry administrative architecture. They have both strengthened

and limited centralization within implementing mechanisms. While explicitly affirming the need to ensure administrative accountability, they have envisaged a number of arrangements which seem incapable of reaching that objective. Moreover, these tensions are deeply ambivalent. On the one hand, they might operate as «fault lines» of the whole EU administrative machinery, destabilizing its functioning in an important field of EU action. On the other hand, by pointing to a host of unsolved issues in EU administrative law, they provide an opportunity for opening a genuine institutional and scientific discussion on the ways in which the EU administrative system should be adjusted or reformed.

Third, this book can be read as an analysis showing that the European responses to the crisis have not only set in motion a number of processes which are reshaping certain fundamental features of the EU polity. They have also determined a remarkable transformation of the EU administrative system, meant as the whole of EU, national and mixed structures and processes functionally oriented to implement EU laws and policies. As a matter of fact, the EU and its political actors have rapidly regarded the EU administrative machinery as an instrument of integration and have triggered a process of administrative reorganization and growth within two crucial sectors of the EU. How does this process of administrative reorganization and growth interact with the process of constitutional mutation of the EU polity which has been triggered by the European responses to the crisis? Is the construction of a complex administration for financial integration capable of counterbalancing some of the constitutional tensions which are currently challenging the EU polity? Or is it destined to amplify the magnitude and scope of such tensions?

At a more analytical level, the inquiry carried out throughout the various chapters suggest that the new EU framework for financial integration has five main features.

i) EU bodies have been granted new and more incisive administrative powers. This development is an aspect of what is generally represented by the European legal scholarship as a shift from negative to positive integration, already oc-

curred in other areas of the EU law. This entails, as observed above, the strengthening of the powers of administrative rulemaking and adjudication, the development of resolution and supervision powers, the centralization of a series of administrative powers in the hands of European bodies which affect the functioning and even the existence of credit institutions. The EU responses to the financial crisis, in other terms, imply not only an expansion of principles and rules, but also a centralization of administrative action at the EU level.

ii) New EU administrative bodies[6] are established, often provided with independence, while the relevance of the Commission decreases. Moreover, new organisational solutions are envisaged, such as, amongst others: the setting-up of specific offices within preexisting bodies to carry out new tasks[7]; the establishment of composite offices (which are named, depending on the case, «systems», «mechanisms», etc.); the identification of several regimes within the same system[8]. On their turn, these arrangements determine complex problems, often arising from the relations between the single components of the several composite organisational bodies.

iii) EU law regulates the allocation of tasks and competences. In general terms, the strengthening of the administra-

[6] See E. Chiti, *In The Aftermath Of The Crisis: The EU Administrative System Between Impediments and Momentum*, EUI Working Paper Law 2015/13.

[7] See, e.g., the Supervisory Board, which is established within the ECB with supervisory, other than monetary powers, and is also functional to facilitate the participation of the non-Euro Member States in the decisions taken by the Single Supervisory Mechanism (SSM). See M. Clarich, «Governance of the single supervisory mechanism and non-euro Member States», in E. Barucci and M. Messori (eds.), *The European Banking Union* (Florence: Passigli, 2014), 73.

[8] An example is the distinction between micro and macro prudential functions within the European System of Financial Supervision (ESFS), which are carried out by several public bodies. Another example, is the SSM and the Single Resolution Mechanism (SRM) pillars, upon which the whole banking union is based.

tive tasks granted to EU bodies[9] entails an erosion of the tasks assigned to national administrations, which, however, not only do vary from one regulatory framework to another, but also within the same framework[10]. Moreover, the same functions are carried out jointly by a multiplicity of EU bodies (see, e.g., the procedure for the adoption of a bank resolution scheme), whose mutual relations are organized according to different models[11]. At the same time, the granting to the new supervisory bodies of powers implying the adoption of individual decisions modifies the features of the administrative machinery in two main ways. On the one hand, administrative tasks are transferred from national to EU bodies[12], which are endowed with the power of representing the national ones[13] and are made subject to national law[14]. Furthermore, and this is one of the most innovative aspects of the new discipline, the European Central Bank (ECB) is granted, within the banking union, the power of applying directly not only the relevant EU law, but also the

[9] L. Torchia, «L'Unione bancaria europea: un approccio continentale?», *Giornale di diritto amministrativo*, 2015, 11. See also E. Chiti, *In The Aftermath Of The Crisis: The EU Administrative System Between Impediments and Momentum*, cit.

[10] See G.L. Tosato, «The governance of the banking sector in the EU – A dual system», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 23, 29: «The status of the NCAs belonging to the BU's States vary within the ESFS according to whether a specific matter falls within or outside the scope of the BU».

[11] These models are discussed by S. Cassese, «La nuova architettura europea», *Giornale di diritto amministrativo*, 2014, 79.

[12] For example, the ECB is responsible for supervision, but the national offices participate in the exercise of various powers. Moreover, the exclusive competences of the ECB are limited and some involve national authorities.

[13] This happens, for example, when the banking union bodies operate within the ESFS representing the participating countries.

[14] As established by the (12) Recital in Regulation 1022/2013: «In view of the supervisory tasks conferred on the ECB by Regulation (EU) No. 1024/2013, EBA should be able to carry out its tasks also in relation to the ECB in the same manner as in relation to the other competent offices. In particular, existing mechanisms for settlement of disagreements and actions in emergency situations should be adjusted accordingly to remain effective».

national legislation implementing the EU directives and the national legislation exercising the discretion explicitly granted to the Member States by EU regulations. In this way, the traditional model of indirect execution is reversed. On the other hand, the scope for cooperation and integration between national and EU administrations is extended: a variety of organizational arrangements having an associative nature have been established[15]; new criteria for the allocation of competences have been envisaged[16]; new composite proceedings have been regulated[17]; consultation is often used as a procedural technique[18]; national authorities are called to carry out legal and material activities governed by national law instrumentally to EU bodies; the principle of cooperation is strengthened and implemented in many ways.

iv) The new EU framework for financial integration combines fragmentation and boundary mobility. On the

[15] A first example is that of the ESFS, made up of a plurality of bodies: the European Systemic Risk Board (ESRB), the European Banking Authority (EBA), the European Securities and Markets Authorities (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA), the Joint Committee of the European Supervisory Authorities, the supervision authorities of the Member States. Another example is provided by the SSM, composed of the ECB and of national authorities. Furthermore, the European system of central banks (ESCB) is governed by the ECB bodies whose governing council is composed, apart from the members of the executive board, of the governors of national central banks of the Eurozone states.

[16] For example, the allocation of supervisory powers between the ECB and national authorities within the SSM is based both on the type of administrative tasks involved and on the features of entities which are subject to supervision; see S. Lugaresi, «The relationship between the European Central Bank and national competent offices», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 81.

[17] See for example the administrative proceedings disciplined by Regulation (EU) No. 468/2014 of the European Central Bank establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), OJ 2014 L 141; see also the three-step resolution procedure disciplined by the SRM Regulation.

[18] See M. Clarich, «Governance of the single supervisory mechanism and non-euro Member States», cit.

one hand, the overall framework is articulated in several regimes, each of which requiring a specific reconstruction and identifiable on the basis of the bodies that are part of them and of the interests at stake. For example, the European System of Financial Supervision (ESFS) and the European banking union differ in relation to the objectives and independence of the European bodies responsible for supervision in each of the two regimes. On the other hand, the boundaries between the single functions (for instance, rulemaking and supervision[19]) are not fixed. The same applies to the administrations involved (a plurality of EU and national authorities contribute to exercise those powers in a variety of ways) and to the addressees of administrative action (which may operate within and outside the Eurozone, and may be significant/non-significant intermediaries). Such mobility may counterbalance the risk of functional dispersion. Furthermore, it represents the effect of the combination of several legal regimes. For example, when necessary to ensure consistent application of high supervisory standards, the ECB may, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more less significant intermediaries. A second example is the «close cooperation» which may be established between the Single Supervisory Mechanism (SSM) and non-Euro countries through the complex procedure laid down in Article 7 of the SSM Regulation. Unsurprisingly, overlappings and conflicts are ordinary phenomena in the new framework.

v) Finally, the new framework for financial integration is partially different from the administrative models at work in other areas of EU law. One can share Fabio Giglioni's suggestion: «Each of the three systems or mechanisms (EFSF,

[19] According to M.P. Chiti, «The transition from banking supervision to banking resolution. Players, competences, guarantees», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 89, «it is self-evident that the two functions of supervision and resolution are strictly inter-connected», 91.

SSM, SRM) establishes its own balance between EU bodies and national authorities»[20]. Several models of administrative integration may be identified, such as separation, supremacy, coordination/cooperation, and collaboration. At the same time, however, the «SSM and the SRM include different models of integration, without any of them prevailing over the others. Thus, the "mechanism" cannot be reduced to a single definition». Each model, instead, «coexist[s] within a single framework which is in turn a model of integration itself. The EBU is a new model of integration whose main feature is the composition of different models of integration forming a multi-structured, composite administration»[21]. With this caveat, it is possible to observe that the banking union is the most interesting mechanism, given the innovations it introduces in EU administrative law and in the principles concerning the relations between EU national administrations. As it has been already said, the SSM represents a model of integration far more advanced than those implemented by European networks of national regulators in other sectors of EU action. The ECB is in charge of the primary objective of safety and soundness of the banking system, while national authorities act, in principle, as executive branches of the ECB itself. Although pertaining to the family of composite arrangements[22], therefore, the SSM cannot be considered as a simple coordination mechanism[23]. It pursues the objective of ensuring a uniform application of a unitary body of rules. The granting of remarkable powers to the ECB is justified by considering the European structure of the banking market and the impact that the failure of credit institutions may have on Member States, on the basis of the principle of proportionality. The banking union differs from the network model which has been already experimented in other sectors of EU action and has

[20] *Infra*, chapter 4, § 4.
[21] *Ibidem*.
[22] See S. Cassese, «La nuova architettura europea», cit.
[23] M. Clarich, «I poteri di vigilanza della Banca Centrale Europea», *Diritto pubblico*, 2013, 975.

been used as a source of inspiration for the establishment of the ESFS. The network model relies on a multiplicity of functionally inter-connected national and European bodies, often co-ordinated by a European agency or another European administration[24]. It is therefore characterized by horizontal and vertical relations between national administrations and between national and European administrations. By linking together the administrations of the Member States and the national and EU administrations, it does not weaken the relevance of domestic administrations[25]. So far, the most advanced form of administrative integration has been established in the field of competition. In this sector, however, administrative integration has taken the form of cooperation between national antitrust authorities and the European Commission, rather than the form of a unitary mechanism aimed at ensuring the decentralized application of EU antitrust law. The administrative integration realized within the banking union is more similar to that which takes place in the monetary union. Similarly to the SSM, the European system of central banks (ESCB), responsible for the monetary policy of the EU, may be described as a unitary mechanism: under the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, the national central banks «are an integral part of the ESCB», which is therefore conceived as a unitary system, and «shall act in accordance with the guidelines and instructions of the ECB» (Article 14/3). The main difference with the SSM lies in the fact that the monetary functions, although requiring the exercise of powers and material activities, «do not imply a widespread presence in the Member States by means of a structure quantitatively equivalent to the one which is necessary for the supervision

[24] S. Cassese, «Le reti come figura organizzativa della collaborazione», in A. Predieri and M. Morisi (eds.), *L'Europa delle reti* (Giappichelli: Torino, 2001) 43, 44.

[25] See M. Clarich, «Governance of the single supervisory mechanism and non-euro Member States», cit.; L. Torchia, «L'Unione bancaria europea: un approccio continentale?», cit.

of more than six thousand European banks». In order to be effective, «the supervisory activity should be exercised more on the territory, in direct contact with each credit institution, than on a central level, even though the rules applied, the methods and the supervisory styles must be harmonized as much as possible»[26].

[26] M. Clarich, «Governance of the single supervisory mechanism and non-euro Member States», cit., 26.