



Solidarity and democracy among EU Member States

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1. Introductory remarks

- Connections between the economic crisis of the Eurozone States and the needs of stability, solidarity and democracy emerging in the European Union as perceived by citizens in the light of the *Anagnostakis v. Commission* case.
- It is not intended to take account of all the anti-crisis measures adopted or the review of the economic governance. According to some scholars, the crisis would be deeper and would concern the inability of the Member States themselves to respect the principles and values underlying the European integration project.
- The economic crisis of some Eurozone States has led to reflect on the connection between the needs of solidarity and economic and financial stability of the Member States and of the Union itself with evident repercussions on the effective democracy of its decision-making processes.

- The measures adopted to face the crisis of the so-called sovereign debt in general (and the Greek economic crisis in particular), including the use of the simplified revision procedure for the modification of the Treaties and the conclusion of the agreement on the European Stability Mechanism (ESM), generated doubts about the democratic legitimacy of these amendments (*Thomas Pringle v. Government of Ireland and others*) also before national courts (BVerfG, 7th September 2011 - 2 BvR 987/10 - paras. 1-142) and BVerfG, 12th September 2012 - 2 BvR 1390/12 - paras. 1-245).
- In this context, the solidarity clause prescribed by art. 222 TFEU with reference to terrorist attacks or natural or man-made disasters allowed a Greek citizen, Mr. Anagnostakis, to ‘also experience’ the violation of this article in the recourse before the General Court for the annulment of the Commission’s refusal decision to register the popular initiative for a "Europe of solidarity“.
- The *Anagnostakis v. Commission* case is the occasion to highlight how, despite the introduction of a specific title on democratic principles (Title II TEU), the measures that we could define as ‘emergency’ and which have as common denominator the solidarity of the Union and the Member States affect the same perception that citizens have of a real democratic Union.

2. Solidarity in economic and financial stability measures (the *Pringle* case)

PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VIII: ECONOMIC AND MONETARY POLICY - Chapter 1: Economic policy

Article 122

(ex Article 100 TEC)

‘1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

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

- This article reproduces, with some modifications, regulatory **provisions already included** in the economic policy of the **TEC** (pursuant to article 100).
- **The Maastricht Treaty introduced article 103A as a residual rule** to be used in the event of economic or exceptional difficulties.
- Article 222 included **three different possibilities** for **intervention** by the Council which, following a proposal from the Commission, could:
 1. acting unanimously, adopt measures appropriate to the economic situation in the event of serious difficulties in the supply of certain products;
 2. again acting unanimously, grant financial assistance to the Member State in difficulty or threatened by serious difficulties due to exceptional circumstances beyond its control;
 3. acting by qualified majority, grant financial assistance when the serious difficulties were due to natural disasters.

- The **Treaty of Nice** already extended the deliberations by qualified majority for both economic measures and financial assistance.
- The **Lisbon Treaty** did not introduce substantial changes in the content of the rule, but only the specification of the serious difficulties in the supply, in particular, of products in the energy sector which emerged in practice.
- The **spirit of solidarity is not mentioned in par. 2** of the same article, relating to financial assistance measures in the event of difficulties due to natural disasters or exceptional circumstances.
- However, the **European Financial Stabilization Mechanism (EFSM)** was adopted under the same principle. The Mechanism allowed the granting of loans in favor of Ireland and Portugal. This was a medium-term financial support mechanism for Eurozone States introduced to face the 2008 financial crisis through the Council Regulation (EU) no. 407/2010 (in OJ L 118 of 12th May 2010), later amended by Regulation (EU) no. 1360/2015 (in OJ L 210 of 7th August 2015).

- During the extraordinary meeting of the Ecofin Council of 9th May 2010, States also decided to establish **the European Financial Stability Fund (EFSF)** as a temporary financial assistance mechanism in the form of a limited liability company under Luxembourg law ‘[g]uaranteed on a *pro-rata basis by participating Member States ... in compliance with national constitutional rules* [...]’.
- In the Resolution of 7th July 2010, the European Parliament complained that, despite the potentially significant impact of this mechanism on the Union budget, the use of article 122, par. 2, TFEU prevented it from having any role in the decision-making process (paragraph 17).
- Thanks to the simplified revision procedure (art. 48, par. 6 TEU), the European Council added a paragraph to article 136 TFEU.

Article 48 TEU

‘1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.

Ordinary revision procedure

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

Simplified revision procedures

6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorizing the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members’.

PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VIII: ECONOMIC AND MONETARY POLICY - Chapter 4: Provisions specific to Member States whose currency is the euro

Article 136

‘1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall adopt measures specific to those Member States whose currency is the euro:

(a) to strengthen the coordination and surveillance of their budgetary discipline;

(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a)’.

- Thus, **the European Council adopted the Decision 2011/199/EU added a further paragraph to article 136 TFEU** as the legal basis for the conclusion of an agreement between the States whose currency is the euro aimed at creating an international financial institution called the European Stability Mechanism (ESM).

Article 1 of the Decision

‘The following paragraph shall be added to Article 136 of the Treaty on the Functioning of the European Union:

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

- This led the heads of State and Government to not resort to article 122, par. 2 TFEU for the adoption of measures aimed at safeguarding the financial stability of the entire Eurozone (Conclusions of the European Council 16th-17th December 2010, EUCO 30/10).

- However, **the ratification of the so-called ESM Treaty was the subject of a preliminary ruling** for alleged violation of various provisions of the Treaties and of the general principles of Union law in the famous Pringle case.
- In particular, Mr. Pringle, Irish Member of Parliament, in addition to the illegitimacy of the amendment of article 136 TFEU, complained that the ratification would have led to the assumption for Ireland of obligations incompatible with the Treaties. The Court of Justice was, therefore, invested by the Irish Supreme Court with a series of preliminary questions concerning both the validity of Decision 2011/199/EU, and the interpretation of several Articles of TEU and TFEU, as well as the general principles of effective judicial protection and legal certainty.
- **To exclude the incompatibility of the ESM Treaty, the Court argued on the solidarity of the Union and in the Union, that is to say between the Member States.**
- Specifically, the Court considered that the object of Article 122 TFEU was only the financial assistance granted by the Union and not that granted by the Member States and that nothing in the article indicated that only the Union was competent to grant financial assistance.
- **Solidarity between States cannot conflict with the solidarity of the Union and cannot be considered incompatible with the Treaties.**

- This idea was reaffirmed in the position taken by Advocate General Kokott, presented on 26 October 2012 in the part relating to article 125 TFEU, i.e. the so-called no-bailout clause.

Article 125 TFEU

‘1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article’.

- The extensive interpretation of the prohibition referred to in article 125 TFEU would come to prohibit Member States to voluntarily provide mutual assistance in case of need within the Union; assistance, conversely, is allowed in favor of any third country (paragraphs 142 and 143).
- The Advocate considered that a duty of assistance, such as that provided for in the ESM, could not result from the principle of solidarity included in the Treaties, but through an amendment that takes place with the use of the simplified revision procedure (Article 48, paragraph 6 TEU) whose entry into force, although subject to compliance with the constitutional rules of the Member States:
 1. It marginalized the role of the European Parliament;
 2. It also introduced into primary law the legal basis justifying the establishment of an extra-Union mechanism to which the provisions of the Charter of Fundamental Rights do not apply. Nevertheless, the Advocate, at par. 176 of its position, stated that: ‘[...] *the Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights*’;
 3. It, similarly, authorized States to conclude an intergovernmental agreement that ends, as well as the other measures previously adopted, in the ‘crosshairs’ of the German Constitutional Court, although this Court stated that any measure affecting the budget were to be approved by the German parliament.

3. The Greek economic crisis and the *Anagnostakis v. Commission* case

- The question of solidarity arises again on the occasion of the Greek economic crisis that led Mr. Alexios Anagnostakis to be the **promoter** of an **Initiative of European Citizens** entitled, in fact, ‘*One million signatures for a Europe of solidarity*’, as required by articles 11, par. 4, TEU and 24, par. 1, TFEU and according to the procedures set out in Regulation no. 211/2011, submitted to the Commission on 13th July 2012.

Title II

PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 11 TEU

‘[...] 4. *Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.*

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union....

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come’.

- The **aim** was to **recognize** in the Union legislation the **principle of the state of necessity**, according to which, when the financial and political existence of a State is threatened by the repayment of an onerous debt ('ignominious debt'), the refusal of paying this debt is necessary and justified.
- By decision of 6th September 2012, the Commission denied the registration of the beforementioned promoted proposal, believing that it clearly did not fall within its competence according to article 4, par. 2, lett. b) of the Regulation.
- Hence Mr Anagnostakis submit an **action** for the **annulment** of Commission **decision** C (2012) 6289 final of 6th September 2012 to the General Court, alleged infringement of article 122, para. 1 and 2, TFEU, of article 136, par. 1, letter b), TFEU and the rules of international law.
- He also referred to the Court **article 222 TFEU**. In his view, the limited measures that the Council could adopt would have given rise to a conflict also with article 222 TFEU which provides, *inter alia*, for joint action by Member States '*in the event of a man-made disaster, as happened in Greece*' (paragraphs 53 and 54).
- However, the **General Court rejected** the appeal by a judgment of 30th September 2015, arguing that the Solidarity Clause does not manifestly concern economic and monetary policy, nor the economic situation or the budgetary difficulties of the Member States.
- In other words, article 222 TFEU concerns **other areas of competence**.

- This decision was practically **confirmed by the Court of Justice**, which rejected the appeal and excluded that the General Court erred in the interpretation of articles 122 and 136 TFEU.

Reflection no. 1: the **concept of man-made catastrophe** in article 222 TFEU, in the absence of its precise regulatory definition both in the treaty and in the Implementing Decision, can lead to **misunderstandings**.

Reflection no. 2: the **initiative of European Citizens** undergoes **further ‘limitations’** in terms of its application.

- In particular, the General Court emphasized the necessary connection between the content of the proposal and the specific provisions of the Treaties, considering that "the Commission cannot be criticized for not having analyzed in detail in the contested decision the various provisions of the TFEU invoked in the ICE proposal" (par. 31).
- In addition, the Court of Justice specified that: although the Commission's website only allowed to make a bulk selection of the heading 'Economic and monetary policy 119-144 TFEU', in accordance to Annex II of Regulation no. 211/2011, the organizers could however provided more detailed information on the relevance of these articles in relation to the content of the ICE proposal and they did not (para. 37 and 38).

- Furthermore, the **General Court**, in the time of **addressing its refusal decision towards the Commission, must take into account its impact** on the effective right of initiative enshrined in the Treaty, considered the obligation to State reasons satisfied by communicating the reasons to the organizers of the refusal (para. 23-25).
- Nevertheless, the Court specifies the **conditions** that the Commission and the ICE **proposal must satisfy** recalling the **principle of good administration** that informs the ICE and the role of the Commission in facilitating and encouraging its **accessibility**.
- **Advocate General Mengozzi** in the **Conclusions** of 7th March 2017 argued that the establishment of the principle of a state of necessity goes further ‘[...] *in so far as it is much more precise than mere guidelines and prescribes the introduction of a specific mechanism and bearing in mind that EU law does not confer a power of life or death over the debts of the Member States*’ (par. 54).
- The needs of the Union's **economic-political solidity**, therefore, **end up affecting the democratic nature of its decision-making processes**, moving them to the level of ‘bargaining’ between States where the

4. Conclusions

- The relationship between solidarity, stability and democracy in the European Union is not so easy.
- The Union's needs for economic and political stability have led to resorting to solidarity between States, although the negative perception of public opinion.
- Formation of other 'extra-systems' (or regimes) at the limits of the democratic model laboriously introduced with the Lisbon Treaty
- The democratic nature of decision-making processes when adopting 'emergency' measures is very difficult to figure out.
- The ICE proposal in the case of the Greek economic crisis highlighted the distances between EMU and European citizens.
- Nevertheless, it is believed that we cannot share this defeatist attitude which demeans the entire process of European integration. We have to think that the necessary adjustments can be made during the review and in-depth analysis of EMU.
- The combination of all the components, albeit difficult, is not entirely impossible.

Thanks for your attention!

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