
33 The role of the state in (and after) the financial crisis: new challenges for administrative law

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1. The economic institutions of the crisis and the two sides of administrative law

Any major financial and economic crisis will have a profound impact on the role of the State and on administrative law rules and institutions. Certainly this was the case at the time of Wall Street crash in 1929. All over the world, the Great Depression precipitated a dramatic expansion in administrative power – perhaps the greatest that history to that point had ever experienced. In the United States, the New Deal represented an extraordinary chance for the expansion of the Regulatory State, both in its economic and social dimensions. In European countries, the government response to the crisis was the nationalization of banks and utilities, as well as the establishment of planning in many economic sectors.

The Great Depression of the 1930s had a deep and long-lasting impact on what could be called the ‘two sides’ of administrative law. The first concerns the role of the State and its prerogatives, giving legitimacy to a wide command and control system and to the direct public provision of goods and services. The second concerns the codes of conduct of administrative agencies and efforts to offer guarantees to citizens. Even after the Great Depression had passed, the economic institutions to which it gave rise were not dismantled, because they were now deeply embedded in political and social life. At the same time, the expanded role of the State generated a new administrative law framework, both institutional and procedural, of which the adoption of the US Administrative Procedure Act in 1946 is the most well-known example.

On both sides of the Atlantic, the economic institutions created during the crisis endured for nearly a half-century, until the deregulation and privatization initiatives of the 1980s and the 1990s. The law and economics movement played an important role in intellectually supporting this process of dismantling and challenge. It pointed out the many instances of State failure, arising from regulatory capture and political rent-seeking. It strongly argued for the primacy of market performance and for a market-like approach to regulation. In this way, law and economics both described and prescribed, after ‘the rise’ of the modern regulatory state, its seemingly inevitable ‘fall’.

This chapter explores the extent to which the 2008–09 financial crisis may ‘resurrect’ the idea of regulation and in so doing radically change existing administrative law systems. It further considers whether these changes are likely to result in either progressive convergence or even rising divergence across countries. As a matter of fact, in the face of a worsening financial and economic crisis, many States have passed acts and statutes designed to stabilize financial institutions and restore trust in the market. The most important effort arose in the United States, where Congress adopted legislation both at the end of Bush administration and at the beginning of Obama administration. In the

meantime, European countries also adopted a variety of plans and laws to confront the economic and financial crisis.

This chapter is organized as follows. Section 2 will detail how, throughout the world, the legislation emerging out of the financial crisis arguably marks the end of a long period of confidence in the market's capacity to regulate itself. Section 3 will turn more specifically to how this legislation enables public bodies to adopt a number of measures aimed at addressing the crisis, focusing in particular on bailout measures, stimulus packages and regulatory reform. Section 4 will take a broader perspective, arguing that the crisis legislation has the potential to create a complex political and institutional infrastructure geared toward guaranteeing the legitimacy and accountability of the State in the economic emergency. Section 5 will then detail how all these transformations challenge existing systems of administrative law both in national and in global perspective.

2. Changing patterns

As Richard Posner recently argued, every political, economic or social crisis may have a 'silver lining' (2009a: 220 ff.). A crisis can certainly be a learning experience, forcing a reconsideration of existing patterns of economic and legal analysis. The 2008–09 financial crisis was no different, revealing the existence of market failures that advocates of a new, more limited economic role of the State over the last several decades had either ignored or forgotten.

2.1. The rediscovery of market failures

All around the world, the last two decades were dominated by the retreat of the State through deregulation (Swann 1988, Strange 1996, Taggart 1997, and Napolitano 2007). Mainstream law and economics strongly argued in favor of market primacy, albeit with some notable exceptions (Rose-Ackerman 1988 and 1992, Mashaw 1996). The movement regarded State failures as worse than market failures, reflecting a widespread feeling of confidence in the capacity of markets to regulate themselves (La Porta et al. 1998: 1113 ff.).

Hence the shock of the financial crisis of 2008, which was, first of all, the consequence of a market failure.¹ The conversion of debt into financial products traded on the market (securitization) may well have produced many benefits. It contributed to the achievement of high levels of growth both in the United States and in developing countries. It also provided investors with more security, increased risk tolerance and, as a consequence, widened the field of those who could benefit from low-cost credit otherwise confined to the more well-off or to large companies. Nevertheless, this system in fact masked

¹ Richard Posner, one of the founders of the Chicago school of economic analysis of law, attributed the basic causes to six factors, all intrinsic to the functioning of the markets (Posner 2009a: 1 ff. and 75 ff.): first, the abundant availability of reduced-cost capital, which encouraged lending at very low interest rates; second, the financial 'bubble' caused by low interest rates and by a particularly aggressive offering of mortgages; third, the creation of new financial instruments considered particularly suited to reducing loan risks and increasing optimal leverage; fourth, the difficulty of selling a conventional business strategy to shareholders against the backdrop of the property 'bubble'; fifth, the impact of the uncertainty surrounding the extent and duration of the 'bubble' and the effectiveness of the financial instruments in avoiding its negative impact; and sixth, the breakdown in company controls within the financial intermediaries.

substantial risks created by these new financial instruments (Rodrik and Subramanian 2008). Indeed, debt securities were issued based on actuarial criteria and not on real security. Rather than commercial banks sustained by traditional forms of savings collection, merchant banks and credit institutions played a key role in the spread of these instruments, engaging in innovative off-balance sheet activities. Insurance companies also played a major role, underwriting the increased risks of insolvency thereby generated.

The failure of the market was not adequately corrected, but, rather, was exacerbated by a failure in the regulatory system. Indeed, the public oversight system allowed the assumption of excessive risk. Focusing on compliance with merely quantitative criteria, it did not pay enough attention to qualitatively assessing the credit risks. The Securities and Exchange Commission generally took a hands-off approach, reflecting faith in the market's capacity for self-regulation. Overconfidence in the market also had an impact on accounting and auditing rules. Finally, the merchant banks enjoyed preferential treatment compared to commercial banks, because the former were often exempt from the controls to which the latter were subject. The watchdog authorities thus proved incapable of effectively responding to the negative externalities inflicted on the entire financial system by weak intermediaries, by problems of agency which had induced financial institutions and investors to undertake excessive risk, and by shortcomings in collective action in areas such as investment in risk management capacity and structures, market infrastructure and the provision of support to the liquidity of financial markets and transparency (Draghi 2008).

The failure of the regulatory system built on failures in the political sphere. The excesses of the high-risk subprime mortgage market resulted, at least in part, from policies designed to promote the American dream of everyone owning their own home. Congress, for example, adopted the American Dream Downpayment Act in 2003, a small subsidy program which allowed certain purchasers to acquire homes almost entirely through loan financing, without the purchaser having to invest any of his/her own money in downpayment. This raised the potential of the most irresponsible buyers entering the housing market. Congress had also earlier instructed the Department of Housing and Urban Development to set affordable-housing goals for Fannie Mae and Freddie Mac, both government-sponsored enterprises. This had the effect of increasing the availability of high-risk loans, thus further distorting the home mortgage market. (Nevertheless, it should be stressed that the private-label securitization market was an even larger financier of reckless home mortgages.) Contributing to the development of this policy approach was the intense lobbying of financial intermediaries that had accumulated home mortgage debts and made significant contributions to the electoral campaigns of many members of Congress. That's why, according to some scholars, the economic and financial unraveling of 2008–09 is fundamentally a political crisis of the American state and gives evidence of its unsustainability.²

It would, however, be a paradox to exonerate the market of all responsibility on the ground that the State had not done enough to regulate it. Of course, it would be even more naïve and misleading to consider the current crisis as a sign of a failure of capitalism now destined to be superseded by a 'new statism'. On the contrary, it could be

² Jacobs and King (2009).

argued, controversially, that with the collapse of the most exposed financial intermediaries, the capitalist system has functioned perfectly, expelling from the market operators who engaged in behavior that was clearly mistaken and irresponsible. Cycles of boom and bust are intrinsic to capitalism: the State, depending on the circumstances, can only exacerbate or alleviate the effects of such processes, as happened with the 1929 crisis. The challenge, today, is to reconceive 'capitalism beyond the crisis' (Sen 2009), taking into account the fact that the movement to deregulate the financial industry went too far by exaggerating the resilience – the self-healing powers – of 'laissez-faire capitalism' (Posner 2009a). What is needed, then, is to define a new economic role for the State.

2.2. *The new economic role of the State*

By the time of writing (Fall 2009), the range of measures to address the economic emergency included government assumption of a large number of private losses, State control of certain assets and securities, and the effective nationalization of several banks. The financial system found itself under the penetrating glare of publicity to a level that would have been unthinkable up until only a few months ago. It is unlikely, however, that such measures will define future relations between the State and the economy. Rather, they are necessary but temporary remedies (or at least that is the hope), aimed at mitigating the negative repercussions in the financial markets flowing from the initial crisis, which are very likely to be gradually pulled back over time. Nevertheless, if history is any guide (thinking particularly of the consequences of the 1929 crisis), interventions originally conceived as merely transitory can give rise to profound transformations over time. In the American case, for example, the New Deal established the federal government as regulator and redistributor; in the European case, it prompted the development of the State as planner and entrepreneur.

Regardless of the actual effects of the current crisis, one can suppose that the global spread of the market economy is bound to lead to an increase in certain types of State intervention. In the aftermath of privatization and liberalization, an initial paradox emerged. The openness of markets – at least in the early stages, although the transition period proved longer than expected – gave rise to a need for new and more stringent rules and procedures, precisely to ensure the smooth functioning of competition (Posner 2000). A second paradox, however, also emerged, particularly in the American case. The increase in paperless financial operations and the deregulation of oversight systems has given rise to the State as *savior*, the cornerstone of emergency public measures that were unprecedented during the time of State management of and involvement with the market. This is particularly the case when the need arose to cover the debt exposure of financial intermediaries in order to ensure the stability of the economic system and preserve the value of savings. However, the purpose of the bailout program was not to displace the market but rather to restore its correct functioning. In this context, even nationalization could constitute a means of preserving the free market. The rescue program in the US, as well as those subsequently developed by European countries, thus remind us that the State's economic role is not confined to correcting traditional market failures. A stabilizing role for the State is also fundamental, a fact often overlooked in times of economic and market expansion, but which nevertheless becomes unavoidable in crisis situations, particularly those of a financial nature (Stiglitz 2000: 85 ff.).

A different issue concerns the optimal level of public intervention. Faced with

economic crises afflicting what are now global markets, some calls for multilateral solutions to be developed at an international or supranational level have increased (Eichengreen and Baldwin 2008). In fact, despite efforts at coordination, the measures adopted by individual States have diverged, at least in part. The response has continued to be predominantly national, but this is not solely due to a weakness of international and supranational institutions. On the one hand, the pressure from individuals, families and businesses for rescue and protective measures has focused on electorally accountable national representative bodies. On the other hand, States are the only entities that possess the financial resources necessary to fund rescue packages. Moreover, they are the only ones who have the necessary authorizing powers, as well as the acknowledged legitimacy to exercise them.

3. How governments respond to the crisis

National responses to the current economic crisis developed in three different directions. First, several countries adopted bailout programs that responded specifically to the financial crisis through injections of liquidity into the banking and financial sectors. Second, many countries supplemented these bailouts with stimulus packages that sought to expand demand for goods and services in the real economy, which had been battered by the financial collapse. Third, national and supranational institutions design regulatory reforms to prevent new systemic crisis in the future.

Each of these responses can be analyzed from different perspectives. From a public choice perspective, these measures are just the result of a market exchange in the political process, to the benefit of the most organized pressure groups (Davidoff and Zaring 2009; in this book, for a comparative approach, see chapter by Sandoval). On a positive political theory approach, they are the effect of a rational strategy by political actors aiming to expand their chance of being re-elected. From a law and economics point of view, they can be analyzed to test their capacity to address the existing market and regulatory failures. In each country, the choice of remedies is path-dependent. Existing administrative law traditions are one of the most relevant patterns of path-dependence.

3.1. The bailout programs

The bailout programs pursue three basic objectives: (a) guaranteeing the stability of the financial system; (b) injecting liquidity into the market, including for the purposes of ensuring continuity in the provision of credit to businesses and consumers; (c) restoring confidence among savers. Solutions, anyhow, may differ from country to country and evolve through time. As a matter of fact, bailout strategies comprehend both financial support and nationalization.³

Financial support aims at increasing the liquidity available to intermediary operators and to banks, and at underwriting their debt exposure. The basic idea is that since economic profit is not the short-term objective of the State, it can carry forward financial operations with assets that at the moment do not seem to have a market, thus supporting banks, restoring trust in financial transactions and reassuring savers.

³ For an overview, see Masera and Mazzoni (2009: 105 ff.).

The first mover was the Economic Emergency Stabilization Act passed in October 2008 by the US Congress. The statute authorizes the Treasury Secretary to establish a Troubled Asset Relief Program (TARP) for the purpose of purchasing or committing to purchase 'troubled' financial instruments issued before March 14, 2008.⁴

There are two types of troubled assets that can be bought by the State. The first are mortgage-related securities. The second type consists of any other financial instrument in relation to which the Treasury Secretary, subject to notifying Congress, deems it necessary to extend public intervention measures. The public bailout is backed by funding of seven hundred billion dollars, which will be made available gradually over time. Dealings will be conducted in accordance with terms and conditions determined by the Secretary, in line with legal requirements and with intervention guidelines issued and published beforehand. The Secretary is thus called on to exercise any rights attaching to the assets acquired. He may therefore sell, enter into securities loans, repurchase transactions or other financial transactions with respect to the assets.

The Secretary is required to use his/her powers in a manner that will minimize any potential long-term negative impact on taxpayers, taking into account the direct outlays, potential long-term returns on assets purchased and the overall economic benefits of the Program, including those due to improvements in economic activity and the availability of credit, the impact on the savings and pensions of individuals and reductions in losses to the Federal Government. To this end, the Secretary is required to hold the assets till maturity or for resale until such time as the Secretary determines that the market is optimal for selling such assets, so as to maximize the value for taxpayers and the financial return on investment for the government.

While the rescue program is of necessity *dirigiste* in its approach, it is tempered by the adoption of a range of measures. On the one hand, the involvement of the private sector in the implementation of the Program is encouraged. Indeed, the Secretary is required to encourage the private sector to participate in purchases of 'troubled' assets and to invest in financial institutions. On the other hand, public intervention must be carried out using market mechanisms. Each purchase must be made at the lowest price in keeping with the purposes of the rescue program. In addition, in order to maximize efficiency in the use of taxpayer resources, resort to auction procedures is preferred.⁵

Despite the adjustment and honing of these intervention mechanisms, they have been criticized from various points of view. In general, it has been observed that the State rescue program creates a moral hazard problem, in that it encourages future irresponsible behavior by banking institutions and other financial intermediaries once they learn

⁴ The economic argument underlying this project is that the Federal government would thus be able to pay a price equal to the estimated value that the acquired assets would have once the crisis of confidence that had arisen in the market had been overcome. In this way, it would be possible to alleviate the exposure of the banks and other intermediaries by injecting financial liquidity, thereby reducing doubts regarding their solvency and restoring confidence in the market and among investors.

⁵ Indeed, there are various mechanisms which can make vendors and purchasers of assets and securities 'tell the truth' about their value. The auction system can be especially useful if the State does not automatically purchase all securities offered by banks, so that the latter are forced to compete with one another. Moreover, competition can be increased by staggering the auctions over time (Becker 2008b).

that they can, whatever happens, rely on public relief.⁶ More specifically though, there has been criticism regarding the impossibility of fixing a fair price for troubled assets to be purchased or insured. Indeed, the benchmark criteria cannot be the market price given that it is precisely the collapse of the market that has led to the liquidity crisis among financial operators. However, the payment of a price which is necessarily higher than that of the market risks translating into unjust enrichment for financial operators and their executives to the detriment of taxpayers.

To avoid all these problems, European countries have adopted different solutions, like the creation of special funds, the concession of government guarantees and the exchange of government securities, in addition to central bank operations.⁷ In Italy, for example, the Economics and Finance Ministry can offer state guarantees on bank liabilities, on bank refinancing operations, on financing supplied by the Bank of Italy to face the serious crisis in liquidity, and on temporary exchange operations between government securities and financial tools.⁸ At the European level, all public intervention on financial support (because it is State aid) is subject to the limits imposed by Community treaties and control by the European Commission.⁹

A second instrument of the bailout strategy is nationalization. This solution is authorized even by the Emergency Economic Stabilization Act, given the wide definition of 'troubled asset' it contains, which is capable of extending to any financial instrument. The Secretary has taken this approach since the early negative responses from the stock exchange towards plans to purchase only 'troubled' mortgage-related securities and the initial success of the different European model based precisely on the government acquiring equity and stocks in banks.¹⁰ This way, even the US, traditionally against any

⁶ This risk is widely condemned by many economists, including Becker 2008a.

⁷ See Spain, the Real Decreto-Ley, October 10, 2008, n. 6, which creates the 'Fondo para la Adquisición de Activos Financieros', and the Real Decreto-Ley, October 13, 2008, n. 7, on 'Medidas Urgentes en Materia Económico-Financiera', including the issue of public guarantees for banks and the market. In Germany, the Finanzmarktstabilisierungsgesetz, approved on October 17, 2008, created a special Fund for market stabilization managed by the Bundesbank, in conformity with direction from the Finance Minister.

⁸ See law no. 185/2008.

⁹ See Communication from the Commission – Temporary Community Framework for state aid measures to support access to finance in the current financial and economic crisis (2009/C 16/01), of January 22, 2009, as modified on February 25, 2009.

¹⁰ In this regard, see the Statement by Secretary H.M. Paulson, Jr. on actions to protect the US economy, October 14, 2008, in which he announced that, given the seriousness of the situation, 'the Treasury will purchase equity stakes in a wide array of banks and thrifts', despite the knowledge that the idea of the 'government owning a stake in a private firm is objectionable to most Americans'. On a theoretical level, this last option has also divided the main proponents of the free market. On one side, there are those who insist that the State becoming a shareholder is 'a bad idea'. This inevitably ends up involving the State in business and company decisions, yet experience shows that public shareholders make their decisions on the basis of political rather than business considerations, with a distorting effect on the functioning and efficiency of the market (Becker 2008b). On the other side, there are those who recognize that the State, on the whole, is not a good shareholder, but that in certain circumstances, like those prevailing today, direct intervention can be positive if it is temporary in nature.

form of direct public intervention in economics, has been induced to experiment with nationalization.¹¹

As a matter of fact, in many European countries, outright acquisition of equity in banks is preferred to the purchase of 'troubled' assets. The United Kingdom, for example, decided to buy equity in eight of the major banks, with a recapitalization plan backed by £50 billion. To this purpose, the Banking Bill contemplates the hypothesis of 'temporary public ownership' through the Treasury release of transfer orders of credits.¹² In Italy, the Ministry of Economics and Finance is authorized to underwrite capital increases, and thus acquire shares devoid of voting rights and with privileges in the distribution of dividends. Public intervention is made subject to the ascertainment of the existence of capital inadequacy. While this requirement addresses appreciable concerns relating to market freedom from intervention, in reality it may provide a disincentive for banks and public authorities to declare the existence of such circumstances so as to avoid causing further damage from the market being judged negatively.¹³

Both in the US and in European countries, nationalization is conceived as an exceptional measure, authorized for a circumscribed period by sunset laws. According to some commentators, anyhow, the banks' nationalization requires a 'survival manual' (Elliot 2009). Among other things, this could set out how to: (a) design a preliminary exit option; (b) create a sound financial base; (c) institute a good bank/bad bank structure; (d) make the necessary managerial changes; (e) announce and implement a new strategic plan; (f) sell the government's stake over time.

3.2. *The stimulus packages: expanding public law and institutions influence*

The financial crisis has pretty quickly deprived the entire economic system of the resources needed to its good function. That way, all countries have not limited their intervention to bailout programs, adopting different stimulus packages. This way, with potential supply exceeding actual demand, due to falling private consumption, the government hopes that it can restore balance in the markets.

The American Recovery and Reinvestment Act and the similar statutes passed on all Western countries facing the crisis focus the stimulus on four areas: tax reductions, aids to specific economic sectors, social welfare expenditures and public works programs. This way, the government responses to crisis, following both monetarist and deficit-spending prescriptions, reveal evidence of the enlargement of the space for pragmatic, apolitical, non-ideological solutions. Each solution has its pros and cons (Posner 2009a: 164 ff.). But, except for the first, all the other measures are going to expand the area of influence of government and of administrative law regulations.

The solution of tax cuts is much more developed in the US than in European countries. The Tax Extenders and Alternative Minimum Tax Relief Act of 2008 reduces taxes or postpone their payment for the unemployed and victims of natural disasters. Measures based on tax cuts do not redistribute wealth and keep government from meddling with the markets. The main problem with tax cuts as a response to the depression is that many people will save rather than spend. Besides that, tax cuts cannot be

¹¹ The point has been stressed, with some malice, in the French literature (Custos 2009).

¹² See section 2 of the Banking Bill.

¹³ See art. 1, legge no. 190/2008.

permanent. Moreover, from an administrative law point of view, tax cuts recipes imply a further reduction of public provision of goods and services in favor of a model of private consumption.

Both in the US and in Europe, State aids were introduced in favor of specific economic sectors, the most relevant example being the benefits conferred upon automakers. The US initiative was justified with the argument that the peculiarities and the dimensions of the industry would have made bankruptcy likely to exacerbate the nation's miserable economic condition.¹⁴ In a globalized market, the US initiative stimulated also the European one. Member States were induced to adopt similar measures not to misplace the competitive position of their national industries.¹⁵ On both sides of the Atlantic, State aids were conditioned on the use of specific green technologies. More generally, many countries decided to support the development of new networks, like broadband, capable of producing positive externalities on the environment, information and high quality services.

An indirect way to give aid to business is to link State underwriting of bonds in banks and other financial institutions to the way in which they are managed and the credit supplied to third parties. The objective, in this highly uncertain macroeconomic context, is to avoid a perverse spiral being set off between the emergence of debt and the restriction of credit. In exchange for public financial contributions, subsidized operators assume commitments both regarding their internal organization and their corporate functioning modalities. These commitments were created in the United States under the ethical and moral auspices of a ceiling on management remuneration.¹⁶ Now, the Financial Stability Plan obliges operators who receive credit to demonstrate how public support is to extend loans to businesses and families and obliges the Treasury Secretary to publish data and reports on the subject.¹⁷ In some European countries, like France and Italy, financial institutions aided by the State must guarantee an adequate credit flow to the economic operators and to the families affected by unemployment.¹⁸ State officials operating at local level are charged with enforcing these commitments, through administrative law powers and soft law tools.

¹⁴ Auto Industry Financing and Restructuring Act of 2008; on the topic, see Posner (2009a: 153 ff.).

¹⁵ In Germany, Gesetz zur Neuregelung der Kraftfahrzeugsteuer und Änderung anderer Gesetze, approved on, May 29, 2009; in Spain, Plan Integral de Automoción, approved on, February 13, 2009.

¹⁶ Art. 111 of the Economic Emergency Stabilization Act, in particular, foresees the setting of limits for payments and compensation that motivates administrations to assume unnecessary and excessive risks that threaten the value of credits or that are based on profits that are proven groundless or that are attributed to 'any golden parachute payment'.

¹⁷ See 'The Financial Stability Plan: Deploying our Full Arsenal to Attack the Credit Crisis on All Fronts', by Treasury Secretary Tim Geithner, February 10, 2009. For an initial implementation through the involvement of private companies as well, see the Public-Private Investment Program, March 23, 2009.

¹⁸ See France, art. 6 of the Loi de finance rectificative pour le financement de l'économie, no. 2008-1061, by which credit operators, in exchange for guarantees and public underwriting, stipulate an agreement with the state regarding the financing of single parties, businesses, and local collectives and adopt ethical rules in conformity with the national interest; similarly, in Italy, see art. 12, legge no. 2/2009.

The economic crisis following the financial one has obliged many countries to adopt programs to transfer wealth and other social welfare expenditures.

All over the world, protection against poverty and unemployment was strengthened. The UK developed a comprehensive plan to help people and small businesses.¹⁹ France and Italy introduced mechanisms of money transfers in favor of the poorest.²⁰ The US were the first to enlarge the coverage of public subsidies in case of unemployment.²¹ At the beginning of 2009, Germany and Spain approved the more comprehensive statute in the field of welfare services.²²

Many countries have introduced new provisions about housing. The US scored the record on the topic. On the one hand, the Federal Housing Finance Regulatory Reform Act of 2008 established a new Federal Housing Finance Agency, holding regulatory and oversight powers over Fannie Mae, Freddie Mac and the Federal Home Loan Banks. On the other, the Emergency Economic Stabilization Act of 2008 and the Helping Families Save their Homes Act of 2009 gave assistance to homeowners.

Finally, in the US, the Congress, with the strong support of the Obama administration, is going to introduce a radical reformation of the health care system, aiming to extend public protection to all citizens. The justification for such a change is not only political, but also economic: expanding the demand for health services may have a positive stimulus effect on the market.

All these measures have the great advantage of putting money in the hands of more people who are too poor to save much and who will therefore spend money. By doing so, they will increase demand for goods and services, which is the aim of deficit spending in a depression. The transfer programs are perhaps the more relevant from an administrative law perspective. They create new entitlements especially in the field of social security and enlarge the scope of administrative agencies. Moreover, these programs determine a ratchet effect: even when the crisis is over, they will be difficult to abolish because interest groups form about them.

Finally, most countries adopted public-works programs.²³ Undoubtedly, they are the best suited to reducing unemployment and fostering economic growth. From a law and economic perspective, the main issue is to identify worthwhile public projects in the sense of those that create real value, in terms of positive externalities for market exchange and social welfare. From a public choice perspective, the problem is to choose the right projects to fund rather than those projects favored by elected officials on political instead of economic grounds. On both perspectives, it must be considered that public works and

¹⁹ See Department for Business, Enterprise and Regulatory Reform, 'Real Help Now for People, for Businesses', February, 2009.

²⁰ See, in France, 'Décret n° 1351-2008 du 19 décembre 2008 instituant une prime de solidarité active'; in Italy, 'decreto legge n. 112/2008', art. 81, co. 29 ss.

²¹ See Unemployment Compensation Extension Act of 2008.

²² See, in Germany, 'Gesetz zur Sicherung von Beschäftigung und Stabilität in Deutschland' (approved on March 2, 2009); in Spain, 'Real Decreto-ley 2/2009, de medidas urgentes para el mantenimiento y el fomento del empleo y la protección de las personas desempleadas' (approved on March 6, 2009).

²³ See, in France, 'Décret n° 1355-2008 du 19 décembre 2008 de mise en œuvre du plan de relance économique dans les marchés publics'; 'Loi n° 2009-179 du 17 février 2009 pour l'accélération des programmes de construction et d'investissement publics et privés'.

infrastructures are very different from one another. The best investments in a middle to long-term period, such as those in high-tech, are not necessarily the best-equipped to address the current depression.

Anyhow, from a macroeconomic point of view, the big problem with the public-works approach is the inevitable delays in beginning to spend project funds. Normally, months will be spent identifying and designing each project and signing necessary contracts before a project actually gets under way. The problem of delay may be reduced in two ways. The more empiric approach is to concentrate resources on projects that have been interrupted by the economic downturn and can be resumed at short notice. The conferral of special prerogatives on extraordinary public officials to make the execution of contracts faster may be consistent with this recipe. The second option is to derogate to ordinary rules on adjudication, allowing direct negotiating. In European countries, this solution may be too difficult, considering the existing regulatory framework on public contracts. Some countries, like France, have tried to do anyway that.²⁴

3.3. Strategies of regulatory reform

In contrast with bailout programs and stimulus packages, which no doubt can entail fundamental reforms but are often of an ephemeral nature, regulatory reforms have sought to change fundamentally the scope and efficacy of supervision of markets, particularly in the banking and financial sectors (Acharya and Richardson 2009). Of course, given the extensive economic and financial innovation as well as the global market integration of the last several decades, the choice of proper rules is a major challenge. What is needed are more complex and targeted regulatory mechanisms that rely on both incentives and public intervention (Cudahy 2009). From this point of view, three different kinds of measures appear indispensable.

The first entails intensified public oversight of banks and financial institutions, particularly as to minimum capital requirements, the limitation of leverage, and the obligatory amount of reserves. This oversight should also extend to particular financial instruments, such as credit-default swaps, whose use greatly contributed to the increase in systemic risks. But it must be recognized that key players in the current crisis are financial institutions like commercial banks that were already subject to extensive public supervision. This suggests problems both with regulatory capture as well as with pressures and distortions coming from the political process. Consequently, greater institutional independence for regulators, whether from private individuals or elected officials, is essential. Furthermore, the introduction of automatic mechanisms could also be useful. For example, rules could constrain the size of intermediaries, thus reducing the risks of a systemic crisis flowing from actors that are 'too big to fail'.

The second set of measures focuses on increasing the level of cooperation and integration between supervisory authorities. The goal is to reduce transaction costs that prejudice the timeliness and appropriateness of public risk intervention. In many countries, the problem arises at the national level where responsibilities are divided among several sectoral regulators (in banking, insurance, or real estate), or at the sub-governmental

²⁴ 'Décret n° 1356-2008 du 19 décembre 2008 relatif au relèvement de certains seuils du code des marchés publics'.

level (for example, in the US case, where each state also has sectoral regulators). The problem also exists at the international level, whether within macroregional organizations like the European Union or globally. Given the scope of the current crisis, pressures exist to improve cooperation and coordination both at the rule-defining phase and in enforcement.²⁵

The third group of measures concerns the development of a more stringent and effective set of global regulatory standards for the banking and financial sectors. The purpose would be twofold: on the one hand, to prevent a regulatory race to the bottom among competing legal orders; and, on the other, to reduce the ability of market actors to engage in regulatory arbitrage. Diverse areas of international trade (including finance) entail multiple standards, often based in soft law instruments providing for limited and generally ineffective enforcement. Any initiative aimed at redefining global financial rules and standards must overcome these limits and defects.

This is a highly complex undertaking, involving single states and their particular national schemes, existing international organizations, and perhaps the creation of new supranational institutions. It will also entail significant consultation with diverse interests, both the objects of regulation and, perhaps more importantly, regulatory beneficiaries in order to balance the ability of regulated interests to influence and capture the regulatory process. Enforcement must be rethought, mixing incentives and controls. Almost certainly this will require reliance on national authorities, although national bodies must be given the tools to effectively enforce standards defined at the international level.²⁶

What are the prospects for developing such global regulatory standards? The United States and Europe must be central players in their formulation, although at this point they may pursue different strategies of regulatory reform at national and supranational level.

In the United States, the Financial Regulatory Reform program sets five different objectives (Department of the Treasury 2009). The first is to promote robust supervision and regulation of financial firms, ensuring that similar financial institutions face the same supervisory and regulatory standards, with no gaps, loopholes, or opportunities for arbitrage. The second is to establish comprehensive regulation of financial markets,

²⁵ See, for example, the de Larosière report on financial supervision and stability in the European Union (published on January 21, 2009), which, in the EU context, calls for more direct involvement by the European Central Bank and for converting the Financial Stability Forum into a permanent Board (thereby strengthening the level of institutionalization).

²⁶ And yet, even where there is clearly a need for global standards, this ought not to entail a pervasive and homogeneous system of worldwide regulation (Rodrik 2009). Such an approach would be destined to fail for three reasons. First, as a matter of political-institutional realism, it is extremely difficult to force states to cede sovereignty even on questions of trade and financial practices. Second, there are obvious benefits to a plurality of regulatory models, particularly from the standpoint of regulatory innovation. Third, there is a great variety of preferences amongst political, economic and social communities, leading to different forms of financial regulation from country to country, reflecting both different levels of development and different social models. The fundamental challenge is to develop adequate global standards that are both sensitive to these realities yet prevent countries from adopting regulatory approaches with significant negative externalities (that is, risky practices that imperil the stability of the financial system beyond national borders).

most importantly by bringing the markets for all over-the-counter derivatives and asset-backed securities into a coherent and coordinated regulatory framework (Litan 2009). The third is to protect consumers and investors from financial abuse, and to this end the Obama administration proposes the creation of the Consumer Financial Protection Agency with the authority and accountability to make sure that consumer protection regulations are ‘written fairly and enforced vigorously’. The fourth is to provide government with the tools to manage financial crises, most importantly those that can address the potential failure of a bank holding company or a financial firm whose stability is at risk. The fifth is to raise international regulatory standards and improve international cooperation, focusing on reaching international consensus on four core issues: regulatory capital standards; oversight of global financial markets; supervision of internationally active financial firms; and crisis prevention and management.

The current European proposals for regulatory reform are less ambitious (see for example, European Commission 2009). They call for the establishment of a European financial supervision system based on two pillars. The first is a new European Systemic Risk Council that will monitor and assess potential threats to financial stability that arise from macroeconomic developments and from developments within the financial system as a whole (‘macro-prudential supervision’). The second is the European System of Financial Supervisors (ESFS), which consists of a robust network of national financial supervisors working in tandem with new European Supervisory Authorities to safeguard financial soundness at the level of individual financial firms and protect consumers (‘micro-prudential supervision’).

Asymmetries between US and European strategies are due to the different institutional context. The US proposal, in order to gain political consensus in the Congress and among citizens, aims to strengthen consumer protection and reveals the US purpose to lead the worldwide process of regulatory reform. The EU proposal, on the contrary, is much more concerned about the problem of institutional cooperation at European level between national authorities. It’s progress, compared with the present situation, but it runs the risk of being not courageous enough to reduce the transaction costs arising from a system of multilevel governance.

4. The economic emergency and stabilization constitution

An economic emergency may change not only the role of the State in relation to the market, but also the internal organization of the State and the constitutional balance among different branches of government. On one side, lawmakers, faced with the need to act quickly, are likely to confer wide discretionary power on the Executive. On the other, they will try to limit the opportunistic behavior of the executive branch of government. Strategies to balance these factors may differ according to the different institutional settings and legal traditions in the US and Europe.

4.1. Delegation in an economic emergency

All over the world, stabilization and the rescue programs are giving wide discretionary power to the Executive. The US Emergency Economic Stabilization Act is a good example. It vests the Treasury Secretary with the authority to establish a Troubled Asset Relief Program and to commit to purchasing ‘troubled’ assets of financial institutions according to terms and conditions determined by the Secretary. The Secretary is then

authorized to make decisions and take such actions as he deems necessary to implement the Program, including the authority to appoint officials and employees to administer the Program, to enter into contracts and to designate financial institutions as agents of the Federal Government for the purposes of performing all such duties as required by the Program. In addition, in order to provide the Secretary with the necessary flexibility to manage troubled assets in a manner designed to minimize the cost to taxpayers, the Secretary may establish vehicles useful for purchasing, holding, and selling troubled assets and issuing associated obligations, and may issue regulations, recommendations and other guidance.

Hence, once more, an emergency situation, whether it be economic or linked to the threat of terrorism or natural events, has led to an increase of executive power at the expense of other branches of government.²⁷ According to some commentators, this way American administrative law is going to be ‘Schmittian’, insofar as emergencies can be addressed only by extending prerogative and discretion of public bodies (Vermeule 2008–09). Indeed, all decision-making powers are directly vested in a political body at the core of the Administration. In this case, for the purposes of the implementation of the Program, the Secretary is provided with a dedicated Office of Financial Stability established within the Department of the Treasury. The Office is headed by an Assistant Secretary, appointed directly by the President with the consent of the Senate.

The delegation of power to political bodies in the executive and to administrative agencies under their control may be socially preferable when the rescue program entails the expenditure of a vast amount of public money, may lead to profound and widespread redistributive effects, and requires complex negotiations to build consensus or achieve efficiency. However, the vesting of power in political bodies may also be the result of opportunistic behavior on the part of elected bodies, which seek to maximize their own sphere of influence. Political actors may seek to maintain influence over policymaking in the administration and related agencies to help forge winning coalitions or to encourage electoral funding (Alesina and Tabellini 2007a, 2007b).

The discretionary power vested in the Executive must be wide because the economic and financial context in which decisions are made is largely unpredictable and this inevitably increases the costs of inflexibility. Widespread scrutiny and an unpredictable climate thus argues in favor of giving broad discretion to the decision-maker. In turn, the existence of wide discretion requires that it be exercised by the Treasury Secretary or, at any rate, by agencies whose heads have been chosen on the basis of their trustworthiness (see Cooter 2000, for further applications, and with reference also to European countries, Napolitano and Abrescia 2008). Managing the economic emergency by vesting political bodies in the Executive with wide discretionary powers seems consistent with criteria of efficient allocation of powers. At the same time, however, considering the sensitivity of the decisions, the amount of public resources involved, and the potentially widespread redistributive effects, an appropriate legal and institutional infrastructure is necessary to handle the emergency situation that takes in all arms of the State. A system

²⁷ See Ackerman (2003–04: 1029 ff.), Dyzenhaus (2006), from a political science perspective, on the convergence between the American and European systems in ‘Crisis Management’; Fabbrini (2007: 276 ff.).

thus framed can increase the democratic legitimacy, transparency and accountability of bailout programs enacted by the State.

According to different institutional settings (in terms of divided or unified government) and administrative law traditions, strategies to control the Executive vary across countries, selecting and mixing:

- (i) the political accountability model;
- (ii) the administrative procedure model;
- (iii) the technical advice model.

Each of these models has its own pros and cons that can be better understood, by making reference to theories of a principal-agent relationship between elected officials and appointed actors in the Executive (even if selected according to political criteria, like a Treasury Secretary or Ministry).²⁸ The political accountability model is a typical 'police-patrol' system of reviewing administrative action, based on the direct involvement of elected officials in detecting bureaucratic drift through monitoring and investigations. The administrative procedure model, on the contrary, is an indirect technique of oversight, in which 'fire-alarms' signals are sent by individual citizens affected by bureaucratic behavior. Lastly, in the technical advice model, any decision of the Executive is submitted to the evaluation of an independent body, equipped with an high degree of expertise: this way, its agenda is controlled by a third party, which limits its discretion.

4.2. The political accountability model

The US Economic Emergency Stabilization Act sets out a coherent institutional infrastructure for the bailout program, based on a political accountability model. When the Act was under consideration Congress was in a particularly strong negotiating position compared to the Executive and its President. Indeed, the latter was nearing the end of his term and was viewed by the general public as responsible for the financial crisis and, more generally, for the economic woes afflicting the country. In contrast, after the 2006 elections, Congress seemed to more accurately reflect the prevailing views of citizens. Furthermore, in a situation of uncertainty regarding the outcome of the upcoming presidential election, both parties preferred to adopt a strategy aimed at increasing direct and indirect oversight of the actions of the Executive, irrespective of who would be called on to lead it.²⁹

The Act provides for a multilevel system of controls to be conducted by a series of different bodies. Some of these were newly established and are temporary in nature, while others widen the powers of existing bodies. The basic idea is that the Treasury Secretary's actions should be subject to a set of political controls.³⁰

For this reason, the statute established the Congressional Oversight Panel. This is

²⁸ Regarding the different models of control on bureaucratic behavior, See McCubbins and Schwartz (1984), McCubbins et al. (1987), Ginsburg (2002).

²⁹ For a comparison of different balances of power in different types of crisis, see Posner and Vermeule (2008).

³⁰ For the view that, in certain circumstances, political oversight may be more rapid and effective than legal scrutiny, see Tushnet (2007).

a temporary body with five members: four members are separately appointed by the majority and the opposition from the House of Representatives and the Senate, while the fifth member is appointed by the Speaker of the House of Representatives and the majority leader of the Senate, after consultation with the minority leaders of the Senate and the House of Representatives. The Panel is required to review the performance of the financial markets and the functioning of the regulatory system. It must prepare a series of reports covering the exercise by the Secretary of authority under the Program, the impact of purchases of troubled assets on financial markets and institutions, the observance of principles of market transparency and the effectiveness of the Program in minimizing long-term costs to taxpayers. The Panel is also required to submit a special report on regulatory reform of the entire financial and regulatory system, aimed at protecting consumers. For these purposes, the Panel may hold hearings, take testimony and obtain information and official data.

Congressional oversight is also provided by the US Comptroller General. He is called on to oversee, on an ongoing basis, all activities and transactions carried out under the Program, including by private parties and financial vehicles, with the aim of ensuring the achievement of the pre-established objectives. For these purposes, the Secretary must make available to the Comptroller all facilities and information necessary to facilitate such oversight. Every sixty days, the Comptroller must submit reports of findings to the appropriate committees of Congress. Finally, the Comptroller must audit the financial statements issued annually under the Program. A further monitoring body is the Office of the Special Inspector General, established specifically to oversee the implementation of the Program. The Special Inspector General is appointed by the President with the advice and consent of the Senate, on the basis of criteria of integrity and demonstrated ability in management analysis, financial analysis and law. The Inspector is required to conduct, supervise and coordinate audits and investigations of the purchase, management and sale of assets by the Secretary. He is to collect and prepare information on the categories of troubled assets purchased, the reasons it was deemed necessary to purchase them, each financial institution that sold troubled assets, each person hired to manage them, the profit and loss deriving from their management and any insurance contracts issued.

The Congressional oversight of the Executive bailout programs is a typical 'police-patrol' system of political control on public officials, based on direct monitoring and investigations by elected officials. Police-patrol control systems are highly costly for politicians because they are time-consuming and require specific expertise and the sharing of political responsibility.

However, the legislature may prefer this system to a fire-alarm model based on administrative procedures and private participation, when Congressmen, acting as political principals, can earn a high pay-off through direct involvement in comprehensive oversight of the bailout programs. That is the case when Congressmen can criticize the waste of money and other failures of the bailout programs, taking advantage of the high saliency of such policies during the crisis. Rather than seeking to off-load oversight to others, the legislators hope to reap political gains from engaging in monitoring themselves.

In this context, private fire-alarm oversight, through administrative procedures and judicial review, can be costly in times of emergency. Hence, decisions of the Secretary in implementing the Economic Emergency Stabilization Act are subject to only limited judicial review. The original Bill that was drafted by the Treasury Department conferred

total immunity on the Secretary. Indeed, it provided that the decisions of the Secretary were committed to agency discretion and were non-reviewable by any court of law or administrative agency (for a critique, see Krugman 2008). This proposal was rejected by Congress, with the consequence that any actions taken by the Secretary and his/her subordinate officers may be set aside if found to be arbitrary, an abuse of discretion or not in accordance with law. However, no injunctions or other forms of equitable relief may be issued against actions involving the purchase, insurance or management of troubled assets, other than to remedy a violation of the Constitution. Furthermore, any request for a temporary restraining order against the Secretary must be granted or denied within three days of the date of the request. Any request for a preliminary or permanent injunction must, in turn, be considered and granted or denied on an expedited basis. Finally, no action may be brought by any person or company that participates in the Program other than as expressly provided in a written contract with the Secretary.

This way, administrative law of crisis management is based on 'grey holes', as far as 'there are some legal constraints on executive action (. . .) but the constraints are so insubstantial that they pretty well permit government to do as it pleases' (Dyzenhaus 2006: 42). But, according to a different opinion, the existence of 'grey holes' and even of 'black holes' (when statutes or legal rules either explicitly exempt the executive from the requirements of the rule of law or explicitly exclude judicial review of executive action) is inevitable. As a consequence, the aspiration to extend legality everywhere, so as to eliminate the Schmittian elements of our administrative law, is 'hopelessly utopian' (Vermeule 2008–09).

4.3. The administrative procedure model

In European responses to the crisis, on the contrary, political controls are very limited because, in a unified system of government, the Parliament does not act as an effective counter-power to the Executive. Laws approved by the Parliament delegate every power directly to the Executive, without retaining any type of oversight of either the general rules or individual decisions issued by the Executive and the Treasury Ministries.

In this context, the only legal protections available are those offered by general administrative law with its procedural requirements and rules of transparency. Final decisions regarding the application of bailout measures, like providing guarantees or underwriting credits, can be appealed to the courts on administrative law grounds. Bailouts are decided through an administrative proceeding initiated by a private party, the requesting financial institution. Thus, for example, according to the Italian Law on administrative procedure, the public official who denies a bailout request must preemptively notify the private party and explain the reasons for denying the request. Through cross-examination, the requesting bank could submit data and documents that seek to demonstrate that it qualifies for aid. Of course, such an individualized approach is unlikely to succeed if the rejection of a bank's petition depends on a political evaluation 'of high level supervision' or 'financial policy', based on data on general market trends and on classified information that is not contestable by any individual party.

One might ask if a bailout decision could be contested by pointing to the market distortions caused by the public support given to one or more competing operators. This possibility might give rise to a significant divergence between European Union and national Member State jurisprudence. The EU tends to recognize direct access to judicial

review for all public decisions that prejudice competition among rival businesses.³¹ The Member States, in contrast, tend to deny access to judicial review to contest competition and other agencies decisions to individual and collective actors that are not direct beneficiaries. Third-party banks could, in any case, protect their own interests not only on a Community level, but also at the national level by signaling potential cases of assistance fund abuse and the consequent advantage earned by the beneficiary banks to political principals.

In conclusion, administrative law rules provide an alternative framework for public intervention in the banking system as guarantor of both the public interest in the proper collection and the use of collective resources and the private interests of the banking sector in the concession of assurances and the underwriting of shares. The doubt remains as to whether such a formalized system of public decision-making, within a context characterized by a necessarily high level of discretion, is more efficient than a mechanism able to combine the informality of single interventions with a higher level of political-parliamentary control (as in the United States, according to the estimates of the Economic Emergency Stabilization Act). Administrative judges should be able to demonstrate their ability to adequately and effectively protect the various interests at hand without slowing down or paralyzing the urgent and necessary public decisions to be taken, both for the recipients of these decisions and for the entire economic system.

4.4. *The technical advice model*

A third way to balance the delegation option to the Executive is to insulate some aspects of the decision from political discretion through the involvement in the policymaking of an independent body, like a central bank, a regulatory authority or an external or supranational institution, equipped with a high degree of expertise.

That way, a public body retains an *agenda control* power over the activity of another public body, even if the degree of this power depends on the compulsory effect of its advice. Both US and EU countries use this solution in some cases, but often with quite different results.

In the US, a fundamental role is played by the Federal Reserve Bank (the Fed). The Fed was directly involved in the management of the crisis: first, in the bailout decisions on individual cases before the approval of the emergency statutes; then, in the draft of the new legislation, from the Economic Emergency Act to the Stimulus Plan; finally, in the execution and oversight of the TARP, within and outside the Financial Stability Oversight Board.³²

³¹ See the Court of First Instance, May 19, 1994, case T-2/93, *Air France v. Commission*; Court of First Instance, May 3, 2002, case T-177/01, *Jégo-Quéré et Cie SA v. Commission*; and lastly, Court of First Instance, February 10, 2009, case T-388/03, *Deutsche Post AG–DHL International*; see also the conclusions of the Advocates General, Eleanor Sharpton, May 5, 2009 in case C-319/07.

³² This body is set up for a defined period and comprises the Treasury Secretary, the Secretary of Housing and Urban Development, the Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the Securities Exchange Commission and the Director of the Federal Housing Finance Agency. In general, the Board must ensure that the measures adopted by the Secretary are effectively in accordance with the purposes of the Act, the economic interests of the United States and taxpayer interests. To this end, the Board is tasked with reviewing the

In providing highly technical support to government decisions, the Fed is playing an important role in circumscribing the political discretion of the Executive and in assuring the transparency and accountability of the bailout measures.

However, the effective role played by the Fed may have been diminished by a number of factors. First of all, its authority has been somewhat weakened by its direct responsibility for the origins of the crisis, due to the monetary policy followed in the past by Alan Greenspan. Second, its credibility has been undermined insofar as it has been involved in deciding whether Bank X should be allowed to fail while Bank Y receives a huge bailout, or when it uses its position as a bank's creditor to alter its management or influence its business strategy. In such cases it can be easily suspected of favoritism or worse (Posner 2009b). As a result, it is less able to provide an effective check and balance on Executive discretion in the bailout programs.

The weakness of the Fed is particularly dangerous in the US context where the independence of the Fed is not protected by the Constitution. Central bank independence is valuable to prevent its power over interest rates from being abused for political ends. Because the costs of inflation are now widely recognized, a central bank that focuses on limiting inflation will be reasonably popular and its independence will be highly appreciated by public opinion (Posner 2009b). But inflation provides a possible way out from under the enormous amount of public debt generated by the crisis. As a matter of fact, history tells us that the independence of the Fed has changed enormously over time, rising and falling according to different economic and political situations (Becker 2009).

Regulatory reforms may greatly change the relationship between the Executive, the Fed and the other financial authorities.

On one side, the new Financial Services Oversight Council is going to be chaired by the Treasury Secretary and staffed by Treasury officials. This solution will give the Treasury the last word on regulatory and oversight strategies of each individual regulator and on conflicts between them arising from overlapping authority over the market. Furthermore, the Treasury can develop specific expertise on financial matters, without solely relying on disclosure of information by regulators.

On the other side, the Federal Reserve Board is required to receive prior written approval from the Secretary of the Treasury for emergency lending under its 'unusual and exigent circumstances' authority. Hence, the Executive is going to play a much more important role in both regulatory oversight and crisis management, gaining an informational advantage from the increased institutional competition between different authorities and from solving conflicts of competence between them.³³

Completely different is the situation in many European countries. There, technical advice from financial authorities can play a much more effective checks and balance role, for at least three reasons.

ways in which the Secretary and the Office of Financial Stability implement the Program, including the appointment of financial agents, the designation of asset classes to be purchased and intervention plans adopted from time to time. The Board may also appoint a Credit Review Committee for the purpose of evaluating the way in which the authority to purchase troubled assets has been exercised. The Board may also make recommendations to the Secretary regarding the exercise of authority under the Act and report any suspected fraud, misrepresentation, or malfeasance.

³³ On the topic, in general terms, see Macey (1992).

First, the legislation makes a clear distinction between the technical advice provided by the bank or financial market authority and the political decision to adopt a bailout or subscribe to stocks or obligations. This way, the independent authority reduces the danger of being suspected of favoritism and discrimination, insofar as it must give reason for its judgment on objective grounds. Second, the delegation of the monetary function to European Central Bank avoids any risk of confusion between this role and the evaluation of the stability of the financial institutions.

Third, the independence of national authorities is protected, if not by national constitutions, by European treaties and legislation. The degree of protection is very high when the national bank authority is a member of the European central bank system. In this case, any infringement of the independence of the bank authority can be prevented by the compulsory advice of European Central Bank and can eventually be sanctioned by the European Court of Justice.

In this context, regulatory reforms at European level may be twofold. On one side, at the national level, the Executive retains high-level oversight powers and last-resort lending authority. As a matter of fact, Member States succeeded in avoiding both the conferral of oversight powers directly on the European central bank and the establishment of a common European fund to manage financial and economic crisis in the area.

On the other side, the establishment of three European Authorities on banking, insurance and securities, even if composed of the existing national regulators, will loosen the relationships between them and national political actors. Moreover, the European Systemic Risk Council will be chaired by the European Central Bank President or other appointed person, not by any European political figure.

Finally, the European Commission is an important check and balance on the exercise of political discretion by Member State Executives in its oversight role on State aids. The evaluation of the impact of State aids on competition becomes indirectly a highly influential judgment concerning the necessity of a bailout. Of course, the technical assessment of the European Commission was weaker when the crisis was at its peak and the EU was in transition; but its influence will greatly increase as the economic emergency becomes under control and a new Commission takes charge.

5. New challenges for (comparative) administrative law after the financial crisis

The fundamental changes in the role of the State brought about by the financial crisis create new challenges for administrative law that may be best addressed in a comparative perspective on four different grounds.

The first challenge is a reassessment of the proper economic role of the State and of the different legal forms of it. All around the world, the last two decades were dominated by the retreat of the State. In almost every economic sector, the State ceased the direct production of goods and services. Public corporations were privatized and public aids to enterprises were forbidden or strongly controlled. The financial crisis, on the contrary, has led to a re-discovery of the fundamental economic role of the State.

Models and legal forms of public intervention, anyhow, differ through time and across nations, according to the different legal and economic structures and cultures. Bailout programs include buying toxic assets, temporary public ownership, public guarantees of private transactions, direct funding or underwriting of financial instruments of banks. Moreover, some countries have opted for direct intervention by the State. Others have

stressed the importance of market models of public intervention and emphasized the role of public-private partnerships in assuring the achievement of the most efficient solutions. At the same time, stimulus packages are characterized by a policy mix of tax cuts, State aids, welfare provisions and public works programs. Except for the first, all the others expand the influence of the public sector and increase the scope of administrative law.

As a result, the convergence in re-conceptualizing the economic role of the State does not necessarily involve a convergence in the specific tools adopted, which are deeply influenced by the institutional setting, administrative law traditions and the different relations between the State and the market across countries. Paradoxically enough, at least in the short term, common law countries, like the US and the UK, adopted public law schemes, like bank nationalization, more than continental European countries, with a long-standing administrative law tradition. And the US largely overdid European countries in terms of the relevance of both economic and social reforms following the crisis, even if it is too early to say if the overall impact will be similar to the New Deal's one.

The second challenge is related to the optimal design of economic emergency management. The necessity of facing with promptness the financial and economic crisis has greatly widened the discretionary powers of the Executive branch of government. The constitutional impact of this shift, of course, is greater in a system of divided government like the US, than in a system of unified government, like the one prevailing in European countries. Everywhere, anyhow, deep concern has emerged about the multiplication of black and grey holes zones in which Executives are called to act to face the crisis.

That way, across Western countries, different institutional models of control have arisen to check and balance this enormous extension of powers of the Executive. The US moved toward the establishment of a Schmittian administrative State, only limited by some means of political control by the Congress and of technical advice by the Fed. Some European countries, on the contrary, adopted a much more – American style – proceduralized system of control, based on participation and monitoring by vested interests and on judicial review.

The third challenge concerns the techniques and the structures of regulation. Since the 1990s there has been a constant move in the direction of light regulation, co-regulation, and self-regulation. The failure of these alternative methods of regulation, at least in the financial markets, explains the worldwide pressure for the re-building of a strong regulatory State, in which public functions would no longer be delegated to private actors. Models and techniques of re-regulation differ across countries. Some will move in the direction of reinforcing political patronage and command and control systems. Others aim to strengthen the independence of regulatory authorities and their supervisory powers with the goal of finding more efficient systems of sound regulation.

Once again, US and European countries are playing the game in a somehow inverted way. The latter are adopting American-style reforms, extending the US regulatory model of independent agencies at European level. The first, on the contrary, are going to introduce bureaucratic means of control over both business and regulators that are much more consistent with the European tradition than with the US one.

The last challenge requires re-conceiving regulation at global level. Deregulatory races to the bottom and the worldwide negative externalities of financial activities offer strong arguments for increasing regulation at the global level. Many of the existing and failing regulations at the global level are based on delegation to private regulators and

the dominance of soft law mechanisms. Their legitimacy and accountability problems were limited through consultation processes, even if the consulted parties only included the regulated firms. Preventing new crises in the future calls for global solutions based on the direct involvement of new public bodies at the international level and on a more balanced consultation process to avoid capture by regulated interests.

The building up of a new worldwide regulatory system requires passage from a comparative administrative law approach to a global administrative law approach. The first is necessary to select the best options available, taking into proper account the different institutional context of each. Once a new worldwide system of regulation and oversight is established, global administrative law may provide the proper mechanisms of both substantial and procedural legitimacy, making reference also to the different national administrative law traditions.

Undoubtedly, it is too early to forecast the way in which countries and international organizations will solve the open questions arising from the crisis and how national and global administrative law will face all these challenges. But the history of the 1930s following the Great Depression teaches us that the solutions that will prevail in the next months will deeply influence the future development of the economic role of public bodies and of administrative law rules and institutions. A widespread and highly specialized use of comparative administrative law may be highly recommended to catch the actual meaning of all these transformations around the world.

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