

## Chapter VII

# The Italian EU Presidencies And The De-Legalization Policy

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### Introduction

I truly believe that the Nordic democracies have much to teach the rest of Europe at this crucial stage of European unification. That is the case especially in the area of freedom of expression and transparency, as well as the rule of law, as stated in the first Article of the Instrument of Government of the Kingdom of Sweden.

Joakim Nergelius in his introductory remarks addressed the key question which we confront today in Europe, namely what kind of European Community will emerge out of the tensions and difficulties of the present time? Are we abandoning the respect for legal rules, thereby altering the original inspiration and model of the European integration? Are we in search of new rules that while promoting integration will jointly protect the original legal and constitutional vision of the founding states? These issues are not currently debated among lawyers, sociologists and political scientists. Here in lies the importance of our symposium.

I intend to discuss the Italian European policies looking at the integrity of the European institutions of government. Joakim Nergelius has taken this approach pointing to the processes of de-legalization and *constitutionalization* and the complex outcomes of the historical trajectories of the integration of

each nation, especially the eastern European states, into the European Community.<sup>1</sup> This approach delineates the proper context of this symposium. However, I will here try to take this line of reasoning one step further.

More specifically, I will discuss the policy of institution-building and integration and ask what could be the outcomes of a policy of integration *and* delegalization both sought by the two Italian prime ministers, Mr. Berlusconi and Prodi and their friend, drafter of the Constitution, and key notable, and mediator of Italian domestic politics, Mr. Giuliano Amato.

### 1.

In his *intervention orale* Gil Carlos Rodriguez Iglesias, President of the European Court of Justice, writes

*En effet, une partie essentielle de tout ordre constitutionnel est la règle de droit, dont la Cour a pour mission d'assumer le respect. C'est d'ailleurs dans la jurisprudence de la Cour que s'est manifesté un début de constitutionnalisation de l'ordre juridique communautaire.*<sup>2</sup>

Then President Rodriguez Iglesias adds:

*A cet égard la situation actuelle n'est pas pleinement satisfaisante. En effet, on peut signaler que le passage des Communautés européennes à l'Union européenne en 1993 n'a pas entraîné à une situation dans laquelle les mécanismes de protection juridictionnelle varient en fonction des différents piliers. La Cour a comme règle de ne pas revendiquer un élargissement de ses compétences, mais elle ne peut que regretter le développement de telles disparités dans le contrôle juridictionnel au sein de l'union.*<sup>3</sup>

Nergelius stresses the same critical aspects in his study of EC constitutional law, widening the scope of analysis, adopting a socio-legal view, considering the EC fundamental treaties. He writes:

*The most striking feature of EC constitutional law, from the spring of 1999 until the middle of 2001, has undoubtedly been the tendency not to lean as much as before on written EC law, in the treaties or elsewhere. The Commission, the Council of Ministers and of course the Member States themselves have on numerous occasions during the last two years shown by their actions that the wording and literal meaning of the written rules are,*

<sup>1</sup> J. Nergelius, *Reasons why a small country would want to become a member of the European Union (taking the Nordic Countries as Examples)*, Sonderbruck, publications de l'Institut Suisse de Droit Comparé, 45, Lausanne, 7 et 8 November 2001, 65–76. See also the article "De-legalize it" – On Current Tendencies in EC Constitutional Law, YEL 2002 pp. 443–470.

<sup>2</sup> La Convention européenne, Le secrétariat, *Texte de l'intervention orale de M. G. C Rodriguez Iglesias*, Bruxelles, le 20 février 2003. See also the webpage <http://european-convention.eu.int>.

<sup>3</sup> La Convention européenne, Le secrétariat, *Texte de l'intervention orale de M. G. C Rodriguez Iglesias*, Bruxelles, le 20 février 2003, 2.

*in their view, obviously not as important in determining what happens in the EU as they used to be. Instead De-legalize it seems to be the spirit of the day.*<sup>4</sup>

Nergelius delineates a “case history”, offering a number of key cases of “illegal” events in 1999–2000. One of the most important, I believe, is the resignation of the Santer Commission and the appointment of the Prodi Commission. The Santer Commission’s resignation and the appointment of Mr. Prodi are discussed as two distinct phases of a unitary process. What Nergelius conveys to us is that after the crisis opened by the commission’s wrongdoings and the independent expert report in March 1999, the appointment of Prodi did actually cover up and prevent the debate opened by Parliament and the independent experts on the accountability of the commission powers, under the umbrella of the need to re-establish the credibility of the institution.<sup>5</sup>

It would be difficult to give a different interpretation of Mr. Prodi’s request to be appointed in a manner that was not in line with the rules in the Treaties.<sup>6</sup> After the resignation of the old Commission, the governments of the Member States had to start looking for members of the new Commission. According to Article 214, the first step to be taken, then, was to find a new President who shall be nominated by common accord and then approved by the Parliament. In April 1999, Romano Prodi was proposed by the Member States as the new President of the Commission, before the Parliament had been heard on the issue. The Governments were to nominate their candidate for President having heard the Parliament on the issue. Thus, the Member States anticipated the entry into forces of the new Treaty Text, an action for which they later got the approval of the Parliament when it approved the nomination of Mr. Prodi (in June 1999, in accordance with the then new text of the Treaty of Amsterdam, which had entered into force on 1 May, 1999).

In early September 1999, the Parliament should approve the Commission as a body. The problem was that the old Commission, despite the fact that it had resigned in March, was actually elected until 31 December. The Parliament then interpreted the vote of approval of the new Commission as covering the period of September until December 1999, at the expiry of which a new vote of confidence for five full years should take place. But the newly appointed President, Mr. Prodi, declared that in that case, the proposed Commission

<sup>4</sup> J Nergelius, *De-legalize it-On Current Tendencies in EC Constitutional Law*, in P. Eeckhout and Tridimas, eds., *Yearbook of European Law*, Oxford, Oxford University Press, 21, 2001–2002, 443.

<sup>5</sup> Committee of Independent experts. *First Report of Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission* (15 March 1999); *Second Report on Reform of the Commission. Analysis of Current Practices and Proposals for Tackling Mismanagement, Irregularities and Fraud*, vol. VI (1999) par 3.2.2.

<sup>6</sup> J Nergelius, op.cit. p. 452.

would refuse to serve. Subject to that threat and the crisis it might have led to – for which the Parliament might have been held responsible – the Parliament bowed and approved the new Commission for a period of five years and four months, i.e. until the end of 2004. This decision, as Nergelius points out, was formally quite clearly contrary to Article 214, section 1, according to which the Commission is to be appointed for a period of five years.

## 2.

Prodi's case is interesting. It casts some light on a constitutional crisis in the EU which has gone almost undetected.

It was a constitutional crisis because what was at stake was the accountability of the Commission power. The Report put forward by the independent experts in March 1999 does indeed clearly suggest that the Santer Commission has committed a number of improper acts and abuses.<sup>7</sup> But since the Commission is elected for five years and was appointed as a whole single body (Article 214), without any possibility for the Parliament to vote on the fate of individual commissioners, there was at this time yet no possibility for the President to force them to resign unless the Commission or the Council would bring such a case before the ECJ (Article 216).<sup>8</sup>

By resigning as a whole on 15 March 1999, instead of facing a new vote of confidence in the Parliament, which might have led to a negative result, the Santer Commission simply prevented a general debate on the accountability of Santer Commission in particular, as well as of the general prerogatives pertaining to the Commission in the EC fundamental law. By resigning, the Santer Commission thus evaded a parliamentary debate on corruption and mismanagement, on the rule of law governing the Commission and the public scrutiny that such a debate would have drawn on the Commission accountability in Europe. Prodi's appointment then simply closed the debate on corruption and mismanagement, by announcing that he was prepared to reform the structure of the Commission, taking seriously the recommendations put forward by the two committees of inquiry appointed to review the Commission activities and suggest reforms. The crisis, which is one of the most critical in the entire history of the European Community, came to a close with a kind of implicit

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<sup>7</sup> See "First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999. A second report from the Group, called "Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud", was published 10 September 1999.

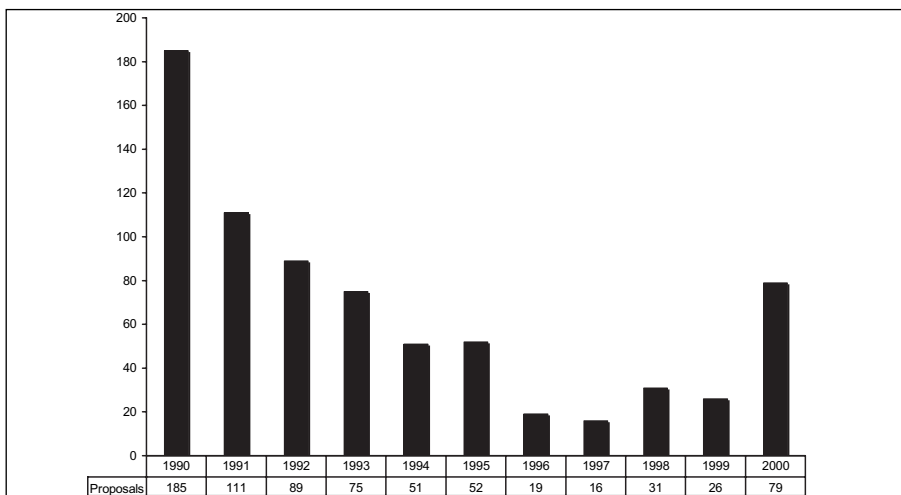
<sup>8</sup> Such a possibility was later introduced in the Nice Treaty. According to art. 217 sect. 4, the President of the Commission, having obtained its approval, is able to ask a commissioner to resign.

invitation to Prodi to provide for the necessary changes. With Mr. Prodi's promise to put the house in order, the accurate analysis of independent reviewers failed to take a stable shape in the constitutional debate opened some time later, after Mr. Prodi's access to the Presidency (leading, among other things, to the so-called White Book on EU governance).

Paradoxically enough, then, the solution of a crisis which had challenged the Commission's integrity and accountability to the rule of law, and the grounds of the European constitutional architecture, was entrusted to the very same authority whose domain had come under scrutiny for nepotism, corruption and mismanagement. This could be seen as a move which has transformed a constitutional problem, addressed by both Parliament and the independent experts, into a mere administrative procedure, breaking the fundamental rule of law, at the core of constitutional traditions, law of torts, and legal doctrine epitomized by the principle *nemo iudex in sua causa*.

### 3.

The years following the completion of the single market program have seen a marked decline in the volume of primary legislation, that is, of new legislative initiatives, adopted by European institution, as demonstrated in Figure 1.



**Figure 1.** Proposals for Primary Legislation Introduced by the European Commission<sup>9</sup>

<sup>9</sup> Sources: Reinforcing Political Union and Preparing for Enlargement, Commission Opinion for the Intergovernmental Conference 1996, 1995, p. 87, for years 1990–1995; COM (95) 512 final for year 1996; SEC (96) final for year 1997; for year 1998; [tp://europa.eu.int/comm/off/work/1999](http://europa.eu.int/comm/off/work/1999) <http://europa.eu.int/comm/off/work/2000> for year 2000.

The shift is far from being merely formal. It suggests that important decisions are taken by other actors – technocrats, be they bureaucrats or scientific experts, instead of politicians – and according to procedures that do not necessarily allow for the degree of transparency or citizen participation required by a democracy.<sup>10</sup> In Dehousse’s words, Europe is therefore confronted with a phenomenon akin to the emergence of what some American authors have described as a technocratic fourth branch of government.<sup>11</sup> Similarly, US administrative law has struggled to define the proper status of federal agencies, whereas European technocratic structures have a clear multilevel character, given their role as a connecting device between the EU and national administrations. Notwithstanding these differences, the growing importance of technocratic governance has given rise to serious legitimacy concerns in both cases. It has also represented an analytical challenge for legal systems that were accustomed to regard administrative decision-making as necessarily constrained by the will of the legislator.<sup>12</sup>

Accounts of committee members suggest that voting tends to be a rare event and that the Commission – which normally chairs committee meetings – exerts considerable influence over their work. In its proposal for a new framework decision on Comitology, the Commission deliberately omitted any provision aimed at enhancing the transparency of Comitology proceedings.<sup>13</sup> The view of committees, frustrating the principle of transparency, has received more importance in recent years.<sup>14</sup> Furthermore, the mushrooming of specialized European agencies is one of the most interesting developments in the functioning of EU bureaucracy in the post-Maastricht years. The Commission is by far the largest sector of the EU administration; in 1999, its number of authorized staff totaled 21,438 persons (including temporary agents) compared to 4,102 in the European Parliament and 2,671 in the Council of Ministers. Between 1995 and 2000, Commission staff, including clerical and logistical support staff as well as translators, increased from 15,836 to 17,087. In roughly the same period, ten European administrative

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<sup>10</sup> R. Dehousse, *Misfits: EU law and the transformation of European governance*, Jean Monnet Working Paper 2/02, European Union Jean Monnet Chair.

<sup>11</sup> Strauss, *The Place of Agencies in Government. Separation of Powers and the Fourth branch of Government*, 84 *Columbia Law Review*, (1984) 573–669.

<sup>12</sup> R. Dehousse, at 6; R. Stewart, *The Reformation of American Administrative Law*, 88 *Harvard Law Journal*, (1975) 1667–1813.

<sup>13</sup> Article 7 of the *Council Decision 1999/468* of 28 June 1999.

<sup>14</sup> Curtin *Democracy, transparency and Political participation*, in V. Deckmyn and I Thomson, eds, *Openness and transparency in the European Union*, 1998, 107–120. See also Carl Fredrik Bergström, *Comitology – Delegation of Powers in the European Union and the Committee System*, Oxford 2005.

agencies with a total staff of 1,045 were created. These covered areas from the environment or health and safety at work, to racism and xenophobia and reconstruction in Kosovo. The establishment of agencies for food safety, aviation safety, maritime safety and other issues is currently considered. The Commission has authority over specialized agencies, and Mr. Prodi made a plea in favor of the necessity of preserving it.<sup>15</sup>

The provision on review of legality in the above-mentioned framework decision has been controversial.<sup>16</sup> The initial draft regulation for the decision stipulated that the legality of the acts of an executive agency could be reviewed under Article 20 on the same conditions as the act of the Commission itself.<sup>17</sup> Decisions of agencies could then, as a matter of principle, be reviewed under Article 230 ECT. The ECJ has read article 230 broadly, so as to facilitate review of the acts of the EP and the Courts of Auditors, holding that the rule of law demanded that their actions should be susceptible to legal control.<sup>18</sup> The EP argued that the executive agencies were the Commission's responsibility, that the Commission should be legally responsible under Article 230 for their activities and that it should monitor the legality of every agency's action.<sup>19</sup> The final version of the Regulation is a compromise between these two views: the initial legal responsibility lies with the agency, and the legality of its acts can be reviewed by the Commission, with a further review of the Commission by the ECJ under Article 230 if the commission rejects the appeal. So article 22(1) of the Regulation provides for a novel form of internal review of agency decisions by the Commission. An act of a executive agency that injures a third party can be referred to the Commission by any person directly and individually concerned or by a Member State, for a review of its legality. The Commission must then take a decision within two months.

The regime for internal monitoring by the Commission is complemented by recourse to Article 200 ECT. Thus, article 22(5) states that an action for annulment of the Commission's explicit or implicit decision to reject an administrative appeal may be brought before the ECJ in accordance with Article 230. Article 22(5) is framed in terms of an annulment action where the

<sup>15</sup> R. Prodi, Speech/00/352 of 3 October 2000.

<sup>16</sup> P. Craig, *The Constitutionalization of Community Administration*, Jean Monnet Program, Working Paper 3/03.

<sup>17</sup> COM (2000) 788 final Art. 21.

<sup>18</sup> Some of the most well-known cases in this respect are *Les Verts v. Parliament*, 294/83, ECR 1986 p. 1339 and *C-170/88, Parliament v. Council (Chernobyl)*, ECR 1990 I p. 2041.

<sup>19</sup> *Report of the European Parliament on the Proposal for a Council Regulation laying down the Statute for Executive Agencies A5-0216/ Amendment 12.*

Commission rejects the administrative appeal. It seems therefore that the executive agency itself has no such recourse where the Commission upholds the appeal. Complaints against executive agencies are reviewed by the Commission, in accordance with the rules on the legality of agency acts. A patent conflict of interest arises here which could paralyze the proper exercise of judicial review.

The agencies being an instrument of the Commission, the difficulties to review them properly determines, in President Rodriguez Iglesias' words, a "*disparité dans le contrôle juridictionnel au sein de l'Union*", or even "*Une situation dans laquelle les mécanismes de protection juridictionnelle varient en fonction des différents piliers*".<sup>20</sup>

The executive power of the European Community is thus not transparent and somehow secret, which goes against the normal, horizontal arrangement of the legal protection in the Community.

#### 4.

It is in this context of de-legalization that Silvio Berlusconi, the Italian prime minister (formally president of the council of ministers), and leader of the right-wing coalition, *La Casa della Libertà*, took over the presidency of the Union in the second half of 2003. Mr. Berlusconi is well known for the number of judicial proceedings he has faced over the years, the most important of which is the *All Iberian* case.

Milan prosecutors there needed access to the Fininvest papers in London, which was denied by Mr. Berlusconi. He and others were alleged by the Italian prosecuting authorities to be involved in a huge fraud, whereby at least Lire 100 billion (about £51 million £ sterling) had been surreptitiously removed from Fininvest and used for criminal purposes. Prosecutions are already afoot against Mr. Berlusconi respectively for bribing Revenue inspectors (Proceeding No. 12731/94) and for making illicit donations of Lire 10 billion to Mr. Craxi, the former Prime Minister and Leader of the Italian Socialist Party (Proceeding No. 9811/93). Such donations were illicit because they were made without proper authority of Fininvest's Board of Directors and without proper records; Italian law requires transparency of political payments both from donors and recipients.

The applicants and others were also investigated in relation to other offences involved in this overall fraud, notably offences of false accounting

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<sup>20</sup> Rodriguez Iglesias, *supra* at 2.



within the Fininvest Group whereby the source of these large sums was concealed.<sup>21</sup>

The Italians requested assistance in obtaining documents relevant to the allegations of false accounting, in particular documents held by C.M.M. *Corporate Services Limited* (CMM) at an address in Regent Street, London. CMM is a company founded by Mr. David Mills, a solicitor and a partner in Messrs. Withers. The request was referred by the Home Secretary to the Director of the Serious Fraud Office (the SFO) under section 4(2A) of the 1990 Act (introduced by amendment by the Criminal Justice and Public Order Act 1994).

The Milan prosecutors, Colombo, Boccassini and Greco, had been checking the *Fininvest* secret offshore banking system.<sup>22</sup> They believed that it had financed political party corruption in Italy, corruption of the tax police inspectors,<sup>23</sup> and illegal acquisitions of companies in 1991. The prosecutors suggested that the Italian *Socialist Party*, and its leader Craxi, received billion of euros, as illicit payments, during the critical decades of Berlusconi's ascent as a media tycoon,<sup>24</sup> which eventually as we know led him to high office. What was at stake was the mysterious financial system of bank-holding companies created to come in control of national and perhaps European politics. Money-laundering means transmitting illicit funds through the banking system in such a way as to disguise the origin and ownership of the funds, usually in collusion with third parties. The enormous flow of resources raises suspicions on the sources from which they come from. Usually, companies cannot count upon resources of such a great scale, even if they usually practice kick-backs.

The flow of billions of euros from secret offshore financial companies into politics is a terrible menace to the existence of democracy in Italy and Europe.<sup>25</sup>

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<sup>21</sup> High Court of Justice, Queen's Bench Division, (Divisional Court) Co-1540-96, *Application for leave to appeal to the House of Lords, R. v. The Secretary of State for the Home Department ex parte Fininvest Spa*, 25 October 1996.

<sup>22</sup> A Commission of Inquiry established by the French Parliament to investigate on the Mafia does detail the background of this system and its history. See F. D'Aubert, *L'argent sale. Enquete sur un krasch retentissant*, Paris, Plon, 1993. M. D'Aubert has been the president of the Parliamentary Commission and Finance Minister.

<sup>23</sup> *Proceeding No. 12731/94*.

<sup>24</sup> *Proceeding No. 9811/93*. Such donations were illicit because they were made without proper authority of *Fininvest's* Board of Directors and without proper records.

<sup>25</sup> See, for instance, R. H. Lord Justice Bingham, *Inquiry into the supervision of the Bank of Credit and Commerce International*, Return to an Address of the Honourable the House of Commons dated 22 October 1992. *Bcci v. Morris*, Chancery Division, (2000) BLCC 263, Hearing Dates: 13 October 2000, 18; USA before the SEC, File n. 3-89-10, *Sec v. Fiorini*, January 3, 1996. Fiorini was tied to Mr. Berlusconi and to BCCI.

It should be noted that, according to the Milan prosecutors, *Fininvest Spa* tried to illegally acquire a number of communication companies and publishers.

The *Law Lords*, ruling against the Home secretary, stated that Mr. Berlusconi's *Fininvest Spa* stood on a *gigantic fraudulent system*. The *Law Lords* upheld the charges brought by the Milan judges.<sup>26</sup> The *Fininvest* probes met with enormous difficulties. Eventually, the Berlusconi cabinet managed to change the law defining the crime of falsification of accounting records,<sup>27</sup> the creation of companies to facilitate and disguise it, making undocumented loans, fictitious transactions, regulatory breaches, pay-offs to employees, misuse of deposits, deceptive routing of funds and false confirmations.<sup>28</sup> What the Government did was to write them off from the Italian criminal code. In September 2005, the *All Iberian* trial, under way at the Milan court, had come to an end. The trial judges write that they cannot judge on the alleged *Fininvest's* crimes because they cannot be categorized and recognized legally as such according to the new law, enacted by the Berlusconi's Government. This is an *abolitio criminis*, as the advocate general Kokott writes.<sup>29</sup> But this does not mean that Berlusconi was acquitted. The judgement does not consider the acts which would have been punished under the previous Italian law and for which the British magistrates gave a search warrant to the *Serious Crime Office* in London, under the provisions of the *European Convention on Mutual Assistance in Criminal Matters 1959* (the 1959 Convention), implemented in the United Kingdom by the Criminal Justice (International Cooperation) Act 1990 (the 1990 Act). The *Law Lords* ruled that the offence of making an illicit contribution to a political party, committed with the intention of *inducing a requesting government to change its policy*, is "a political offence" within the meaning of Article 2 of the *European Convention on Mutual Assistance in Criminal Matters 1959*.

The policy that the Italian Presidency and the President of the European Commission did jointly deploy could be evaluated in the context of the constitutional difficulties I have described above. Although President Berlusconi

<sup>26</sup> Lord Justice Simon Brown & Mr. Justice Gage, *In the manner of application of judicial review, Regina v. Secretary of State for the Home Department, ex parte Fininvest Spa*, Queen's Bench Division, Royal Courts of Law, Wednesday. 22 October 1996, CO-1540-96. C. Rossetti, *What the Law Lords say*:

<sup>27</sup> Presidential Decree of 11 April 2002 and Decreto legislativo n. 61/2002, Official Gazette of the Italian Republic, 15 April 2002, n. 88, at 4.

<sup>28</sup> Article 2640 of the Italian Civil Code.

<sup>29</sup> ECJ, Conclusioni dell'avvocato generale, Joined Cases C-387, C-391/02, C-403/02, Silvio Berlusconi e altri, ( domanda di pronuncia pregiudiziale proposta dal Tribunale di Milano e dalla Corte di Appello di Lecce), 14 October 2004.

and President Prodi adhere to two different political alignments, Mr. Prodi being a leading representative of the coalition of the opposition center-leftwing parties, they have in fact worked harmoniously to achieve the same target: the consolidation of the prerogatives of the president of the Commission and the opening of the Community to the newcomers.

Having weakened the constitutional protections of fundamental rights, one of the first being accountability to the rule of law and the right to an independent and impartial judge, the way was opened to push forward a policy of de-legalization, which contemplates a weak review system, inoffensive before the old and new powers.

In fact, the constitutional problems raised by Prodi's accession to office, and the advice given by the Expert Committees, have never been addressed by the Presidency of the Council of Ministers of the EU. The consolidation of the prerogatives of the president of the Commission and the opening of the Community to the newcomers, Cyprus, Slovakia, Slovenia, Czech Republic, Malta, Estonia, Hungary, Latvia, Lithuania, Poland are closely interwoven. Indeed in an EU with 25 Member States, the de-legalization policy could be devastating.

A system with a weak legal review augments the executive and parliamentary powers, which tend to encroach upon the judiciary. The move to consolidate powers of the president of the Commission could involve the risk of shielding the executive from an effective legal review.

The new Member States are new, even transitional democracies.<sup>30</sup> This means that most of them are building or rebuilding their government institutions and the rule of law on the ruins left by communist rule.<sup>31</sup> In the course of this process, especially in the critical years in the immediate aftermath of the downfall of the Soviet Union, a number of new political and financial entrepreneurs have come to the fore, establishing commercial companies, financial services, especially banking, media, both the press and television channels. It was the gray and black economies which provided the foundation for those individuals to secure their power-bases in the early 1990s. Many of them worked as *tsekhoviki*, underground entrepreneurs, during the Soviet era, or Black Millionaires with capitals to invest in a plethora of business opportunities

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<sup>30</sup> R. Teitel, *Transitional Democracies*, Oxford, Oxford University Press, 2000. V. Tismaneanu, *Reinventing Politics. Eastern Europe from Stalin to Havel*, New York, Free Press, 1992.

<sup>31</sup> A. Janos, *What was communism? A retrospective in comparative analysis*, "Communist and Post-Communist Studies", 1996, 29, 1, 1–24. B. Nunberg, *The State after Communism. Administrative Transition in Central and Eastern Europe*, World Bank technical Paper, n. 466, 1998.

now available.<sup>32</sup> The chaos of the immediate aftermath of independence in which the ensuing power vacuum left by a weakened state, no longer able to preserve order and impotent in its ability to create and implement appropriate legislation for the revolutionary economic changes, provided fertile ground for organized crime. The complex banking wars of 1993–95 involved some of the leading political figures of the day, as well as the top echelons of the security and law enforcement agencies. The myriad and often bewildering relationships between the criminal underworld new business and officialdom helped simultaneously to shape and stymie Latvia's reforms.<sup>33</sup>

In the post-communist countries with the less favorable starting-point, like Romania, Bulgaria, Albania, impediments and resistance to change have proved formidable. High personalization of exchange relations, vested interests, systematic rule-breaking and bureaucratic inertia have blocked any real change. There are indicators that the level of corruption is rising in most eastern central European states since the fall of communism, with Romania and Bulgaria as leading examples.<sup>34</sup> This consideration is corroborated by the weakness of the system of political representation,<sup>35</sup> which could facilitate the rise of criminal entrepreneurs to public office and a dominant position in markets.<sup>36</sup> The democratic institutional threshold has actually, in my view, not been crossed in any of the former communist countries.

<sup>32</sup> P. Rawlinson, *Russian Organized Crime and the Baltic States*, ERSC "One Europe or Several?" Working Papers 4144, 38/01. Just to give a few examples, Estonia became a haven for the black trade in armaments. The burgeoning of organized crime in Latvia followed the similar pattern to that in Estonia.

<sup>33</sup> The economic and political upheavals witnessed in Estonia and Latvia reverberated throughout Lithuania, that was particularly sensitive to illegal transit routes bordering as it does the Belarus and the Russian enclave of Kaliningrad. Figures by the Prosecutor's General Office in 1993 estimated that there were approximately one hundred criminal groups in Lithuania, of which some well-armed and about thirty of which had international links. See United Nations Development Program (UNDP) *Lithuanian Human Development Report*, 1998, Vilnius 1998.

<sup>34</sup> M. Rice, *Public Administration in Post-Socialist Eastern Europe*, "Public Administration Review", 52, 2, 1992, 116–25. J. Heinrich, *Toward a Cultural Theory of Transition. The Strange Architecture of Post-communist Societies*, Collegium Budapest Workshop Series, N. 7, 1999, 121–125.

<sup>35</sup> B. Crawford, (ed.) *Markets, States and Democracy. The Political Economy of Post-communist Transformation*, Boulder, Westview Press, 1995; J. Hall, *After the Vacuum: Post-communism in the Light of Tocqueville*, in B. Crawford ed., *Markets*, 82–100. R. A. Dahl, *Pluralist Democracy in the United States. Conflict and Consent*, Rand McNally & Co., Chicago, 1967, 297.

<sup>36</sup> L. Stefan Scalat, *Pacts in Conflict in Post-communist transformation. In Search of a New Social Contract*, in *A Captured Moment in Time*, IWM Junior Visiting Conference, vol. 10, ed by Anne Rubel and N. Vucevick, Vienna, 2000.

The European Union is thus facing, it seems, the dramatic choices that Italy had to take in the decades following the national unification, after 1870. The unification *from above* incorporated the southern local communities, which were controlled by cliques of entrepreneurs having the monopoly of violence, the *mafiosi*, as violent power-brokers.<sup>37</sup> Following the waves of extension of electoral suffrage, they moved from the rural regions to the cities, to the urban markets and building areas as well as into the organization of the public administration and financial services. They came in control of the local political markets and sent their own men to the Italian Parliament.<sup>38</sup> This is the process which has been described as the *politicizzazione of the mafia*. "Prima c'era la mafia. Ora c'e' la politica." ("Before it was *mafia*; today it is politics.") This opaque and ambiguous statement was made to Anton Blok by a local Sicilian man resident in Palermo in the 1960's, employed by the Agrarian Reform Board. According to Blok, the rise and development of the Sicilian *mafia* must be understood as an aspect of a long-term process of centralization and national integration of Italian society.

This process altered the center of gravity of the political system, setting forth an irreversible historical process which brought the Mafia well into the system of government (with tragic results). By giving equal vote to the southern representatives, the founders of the state, a learned and cosmopolitan elite decried its death sentence. The political transformations following the extension of suffrage meant an utter change of the moral collective identity of the ruling elite. This phenomenon was then paradoxically accompanied by the gradual weakening of the commitment to the basic values and principles of modern Constitutionalism.

When one Lithuanian prosecutor was reported to wearily remark *It used to be Moscow, and now it is Brussels*, referring to the European integration, this applies to Italian history very well. One could say: *It used to be Palermo and Rome and now it is Brussels*. These aspects may even threaten the creative energies in the post-communist societies. The Community enlargement may in fact even work against the processes of consolidation of democracy. The heirs of the communist secret system of government, organized exactly like the Mafia, as Varese aptly writes, could become the new political entrepreneurs, the new constitutional players in Europe. To avoid this development is one of the big challenges of the EU enlargement.

<sup>37</sup> A. Blok, *The Mafia of a Sicilian Village. 1860–1960. A Study of Violent Peasant Entrepreneurs*, Oxford, Basil Blackwell, 1974.

<sup>38</sup> C. Rossetti, *Constitutionalism and Clientelism in Italy*, in L. Roniger ed *Democracy, clientelism and civil society*, Boulder, Lynner Rienner Publishers Inc., 1994, 87–104.

It does not come as a surprise then that Raymond Kendall, chairman of the OLAF supervisory committee, heard by the House of Lords on 24 May 2004, has recommended that the law enforcement function that is working within the Union should be totally revised.<sup>39</sup> Furthermore, as Mr. Kendall himself suggests, the investigative bodies, like OLAF and EUROPOL, should come under judicial supervision. But at the present they are not, which is an alarming situation. It is an aspect of the de-legalization policy that the Prodi Commission has pursued, in fact giving to the executive a prominent power over investigations.<sup>40</sup>

## 5.

It is interesting that the Italian President of the EU, Berlusconi, and the President of the European Commission, Mr. Prodi, together with Mr. Amato, one of the drafters of the constitutional charter,<sup>41</sup> insisted so keenly upon 1. the

<sup>39</sup> House of Lords, Minutes of Evidence Taken Before the Select Committee on the European Union, (Sub-committee E), *Strengthening OLAF: Inquiry in the European Anti-Fraud Office*, Mr. R. Kendall, Evidence heard in public. Wednesday 19 May 2004.

<sup>40</sup> In Kendall's own words: *The major problems that OLAF has had, and we as a Committee have seen, over their insistence, is the reclamation that are made by people who criticize the way in which OLAF does not respect simple things that we would all respect in terms of interviewing suspects and this kind of thing, and all the complaints, I have to say objectively, many of them are justified. For example, there is the recent case of the journalist. The OLAF people will say if you talk about this journalist that they had passed information to the Belgian judicial authorities and the Belgian judicial authorities acted on the information in the way they did, and they acted in a pretty high-handed way by going along and arresting this guy and keeping him in custody for 11 hours with no access to a lawyer, seized all his records, his computers and everything else, and you have to say there must have been some pretty strong information for them to have reacted like that, but when we finally saw last week the information that was actually sent at one and the same time to the Belgian authorities, who acted upon it, to the German authorities in Hamburg, who did not, it was purely on the basis of hearsay evidence from an informant, one informant, who happened to be in one of the public relations offices of the Commission before he was sacked. Any normal person would have to say that somewhere along the line OLAF were probably trying to get back at this man. An interesting thing about it as well – and I can say this too – is that OLAF has an obligation to tell the Committee before it refers anything to a judicial authority. They came to us in January and said, “This is highly confidential. We would prefer it, if you would allow us, to tell you next time as opposed to this time,” but it was very clear to me, being the suspicious person that I am, that there had been obviously some agreement between the magistrate in the OLAF office from Belgium and the magistrate who was going to receive the information from OLAF, and that there was going to be a search warrant.*

<sup>41</sup> G. Amato, *From Nice to Europe*, Jean Monnet Lecture, European University Institute of Florence, Florence, 2000.

integration of the post-communist states into the EU 2. the removal of any qualified majority voting in Parliament and 3. the parliamentary election of the President of the Commission. Berlusconi did not even hesitate to announce the imminent entry of Russia into the EU.<sup>42</sup> He insisted on the imminent entry of Romania and Bulgaria. The newcomers, all marked by weak and shabby legal institutions, could form a powerful coalition. More importantly, perhaps, Russia shows very little respect and understanding for the human rights which have given birth to the new Europe. Be it enough to mention that, in Moldova, annexed by the Soviet Union after Molotov-Ribbentrop Pact, Russia still maintains military bases regardless of protests from Moldova, the OSCE and the European Union. To this day Russia maintains that Estonia, Latvia and Lithuania were never occupied by the Soviet Union. In August 2004, Russia refused to apologize for standing by, just outside the city of Warsaw, as the Nazi soldiers crushed the uprising of 1944. Worse yet, Russia refuses to apologize to the victims of communism. The crimes of communism are not condemned.

The three policy guide-lines proposed and actively promoted by the Italian Presidency, could, if taken together, give a powerful blow to the European legal order. They may even be envisaged as a perfect de-legalization plan, a comeback to executive sovereignty, strongly controlled by the new-comers with a strong influence also in the EU parliament. The present and historical identity of the EU would then be shattered in a decade.

As against this background, the Italian Presidency has surely done what it could to ensure that judicial power remains confined within its traditional scope. The result is a limited judicial autonomy and a fundamental constitutional unbalance, in favour of the executive and legislative branches, that the EU should try to overcome.

This hostility to the rule of law has serious outcomes. The Italian presidency has done everything in its power to impede the adoption of more effective measures against organized crime, especially in the field of coordination of investigation and prosecutions of complex, dangerous crimes. Measures that the judges have been asking for for years have not been introduced. This de-legalization policy has given a blow to judicial independence and efficacy in the investigations touching on fraud, money-laundering, terrorism, corruption and security, thus putting Europe at serious peril.

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<sup>42</sup> "I'm acting as President Putin's defense lawyer here, even though he hasn't asked me to", said Mr. Berlusconi at a joint press conference between the two in November 2003, praising the Russian President's actions in the breakaway republic of Chechnya – although they have been widely condemned.

## 6.

It is particularly interesting that these policies are closely associated with the plan embraced by Berlusconi, Amato and Prodi shifting the center of gravity of the Union by introducing their voting system.

In this context, on 1 July 2003, Italy took over the Presidency of the European Union. It was expected to play a key role in the formulation of the EU Constitution, as Mr. Silvio Berlusconi himself announced. As of July 2003, Berlusconi and Prodi thus came to hold the two most powerful posts in the EU.

The Italian Presidency of the EU did surely not work to consolidate the legal architecture of the Union. I suggest that it did encourage de-legalization policies even further.

According to the EU Commissioner Mario Monti, the Italian Prime Minister, Berlusconi, worked against his efforts to check international monopoly powers and secret monopolies, anticompetitive forces, emerging in that arena and keep markets open, especially in the new media sector. Incidentally, one of the allegations by the Milan prosecutors is that Mr. Berlusconi was a party of an international financial secret scheme. Mr. Monti claims that Mr. Berlusconi in 1992 and then the next Italian EU Presidency did not endorse his IPO project providing safeguards against hostile takeovers in the Union,<sup>43</sup> which means that secret networks can come in control of companies. Italian, and Union markets, could then be at the mercy of players pursuing criminal and other illegal projects, acquiring an European identity, then being free to move in Europe. In this context, the ones who would benefit most would be the illegal associations or networks of post-communist Europe, working together with the international crime families, as judicial studies confirm. These networks would be unfairly privileged in the competition in markets, including political markets, open to corruption which needs a veil of anonymity to work. This is especially important in the new media markets, a province where Mr. Berlusconi has many interests. Tracking and targeting anticompetitive behaviour in emerging markets is a clear priority, for two main reasons. The first is that new markets are of key importance for the development of the European economy. Their unhindered growth is an essential condition of Europe's ability to stand its grounds in increasingly internationalized markets. Building a knowledge-based society, as set out in the Lisbon strategy, depends heavily on the vigour of competition and innovation.

It is in this setting that the Italian presidency's failure to provide this guidance comes dramatically to light.

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<sup>43</sup> M. Monti, *All'Italia non conviene favorire i potenti. Germania e Francia non ricambieranno*, "Corriere della Sera", Friday July 30, 2004, 3.



The man who actively opposed Monti's project is Mr. Buttiglione, then minister for European Affairs in Berlusconi's cabinet. Buttiglione is one of Berlusconi's closest associates, a political philosopher, with an uncertain intellectual profile, a leader of the conservative and populist movement *Comunione e Liberazione*. He was designed by Berlusconi as Justice Commissioner, but as we know. The EU Parliament in the fall of 2004 opposed and rejected his nomination, thus opposing the message that de-legalization policy should go on.

The Italian presidency's policy is well documented by a recent and crucial controversy. I refer to the decision taken on 25 November 2003 at the ECOFIN ministers meeting, by Germany and France, to break the stability and growth pact (SGP) regarding the deficit procedures, a move that changed the nature of budgetary surveillance and the Commission role in budgetary surveillance. The Commission challenged this decision before the European Court of Justice, who annulled the decision taken by France and Germany and ruled that was illegitimate, breaking article 104 EC (Regulation EC) N.1467/97 and the Stability Growth Pact Resolution(SGPR).<sup>44</sup> But the Luxemburg judges also said that Member States have a certain amount of discretion in applying the Stability Pact and rejected the Commission's request of further budget cutbacks.

The Pact is a mechanism designed to constrain the Council to oblige the Member States to take the necessary measures to correct excessive deficit. Germany and France objected that the deficit parameters should be changed in accordance with the present problems and contested the Commission's interpretation of the Pact and its decision to sanction the two Member States, as the Luxemburg Court maintained.

The SGP was conceived and signed to guarantee a monetary stability to the Member States and the Union's citizens in the difficult years of the transition to the Euro. But the recent economic and financial trends have since then changed the situation. A prolonged international recession and the unprecedented rise of oil-prices did require new measures, dictated by the international economy, by the global flow of prices, goods and jobs. All members agreed that the stability pact was a temporary measure and that a new legal framework would be necessary after the transition period and the consolidation of the Euro, which has now been achieved. Indeed, the Euro-zone economy is still growing in August 2004. But the new and by now urgent steps need a concerted efforts of Parliament, the Commission, the Council and the Member States, as the ECJ remarks. To curb excessive deficit exceeding 3% EU limit, Germany is trying to restructure labor and product markets, as well as employment benefits, while unemployment remains 9%. In the

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<sup>44</sup> C-27/04, *Commission v. Council*, ECR 2004 I p. ??

second week of August 2004, an estimated 40,000 Germans took to the streets in Dresden, Magdeburg and Berlin to protest against a law that will cut unemployment benefits next year as an incentive to get people back to work.<sup>45</sup>

The Italian presidencies could have played a key role co-ordinating and promoting the search of a new and more flexible framework within the existing legal compact, but for many reasons, the Italian presidency did almost nothing to guide in this dispute between the Council and the Commission. It showed no interest in a legal framework which would give proper consideration to the parties and their reasonable interests. Mr. Berlusconi played none of the legal functions and duties pertaining to the presidential function in the EU. One reason for this is that he does not particularly like legal frameworks in general. But in this case, his lack of action was a blow inflicted to the architecture of the new Europe and the mutual understanding among the branches of government, and the Member-States, on which it rests. On the other hand, the Commission, and Mr. Prodi, unable to exercise a proper leadership, insisting that Germany and France should be sanctioned, not mentioning the others, opened a political and legal dispute at the core of the EU's institutions. As the Luxemburg judges state, both the Council and the Commission should have acted jointly, within the legal framework of the SGP, exploring an efficient solution to the very complex problems.

The Italian Presidency thus inflicted a *vulnus* on the rule of law which will have serious consequences. Europe is a community of law and changes have to be debated and decided through clear community procedures. The efficiency of economic governance has suffered from these recent episodes. The two presidents apparently joined forces to impede a concerted reconsideration of the Stability Pact.

Berlusconi and Prodi apparently share a similar hostility towards the core European nations. Romano Prodi even lamented their *arrogance* in a public meeting in Trento in the fall of 2003, celebrating his decision to return to Italian politics in 2004, as a national coalition leader. But he did not offer any proposal regarding the key questions of the specific historical conditions in which the Member States find themselves, their different needs and the policies necessary to promote both growth and stability. This is a critical question

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<sup>45</sup> After an emergency meeting with key economic advisers, Chancellor Gerhard Schröder conceded to watering down the law slightly. The reform will replace earnings-indexed benefits for the long-term unemployed with flat-rate payments, resulting in stable benefit cuts for about a third of those affected. This measure has sparked outrage in the six east German Laender, where unemployment stood at 18.5 per cent last month, more than double the level in the east. B.Benoit, *Schroeder moves to build bridges with the east*, "Financial Times", August 31, 2004.

for Europe's future, which was openly addressed by the European Court of Justice recommending that structural and historical specifics should be carefully taken into account and balanced in European policy-making.

To take an example, Portugal's problems and needs are different from Germany's local problems. An understanding of history is the key to the EU's future. The Presidency and Commission duty and function is to provide a legal framework for cooperation, stability and innovation through deliberative procedures. Instead, the Italian Presidency policy raised feelings of hostility and lack of trust between the largest members of the Union and the small states, between east and west.

## Concluding Remarks

The core of what we may today call *Western Europe*<sup>46</sup> is the result of an interplay of ideas, interests and institutions, interrupted by years of wars and destruction, that has been developing over the centuries. It is the key premise of the European founding charter: legality, peace, cooperation, justice, solidarity.

If successful, the strategy of the Italian presidencies would give Italy a prominent position in the new European parliament and, most importantly, a dominant power in the management of agencies. The regulatory policies and culture could then be undermined.<sup>47</sup>

The costs of this operation would be immense. If successful, this policy would shift the cultural and moral center of the European Union toward the regions where the rule of law and the influence of the great constitutional traditions is either weaker or ineffective or has never taken root.

It would be lethal for the European dream renouncing to pretend that the newcomers put their house in order, regarding transparency, the entrenchment of the rule of law, the institutionalization of the procedures and safeguards of fair trial and an independent and impartial judiciary.<sup>48</sup>

*De-legalization* could also bring about the decline and fall of the original European conscience, of *l'ésprit des lois*, the *Bildung* ideal, which have inspired the history of constitutional democracies and provided the foundations for the new Europe.<sup>49</sup>

<sup>46</sup> F. Chabod, *Storia dell'idea d'Europa*, Bari, Laterza, 1958.

<sup>47</sup> O. Zetterquist, *A Europe of the Member States or of the Citizens? Two Philosophical Perspectives on Sovereignty and Rights in the European Community*, Lund, 2002.

<sup>48</sup> R. Stevens, *The English Judges. Their Role in the Changing Constitution*, Oxford and Portland, Hart Publishing, 2002.

<sup>49</sup> O. Zetterquist, *op.cit.*

It is troubling that the EU presidency office has been held by an entrepreneur under trial, charged of judicial and political corruption, as well as serious commercial and financial frauds. The legal safeguards of the integrity of the EU government have proved to be inadequate. It is a terrible *vulnus* inferted to the legal values and institutions of the Union and to those Member States who still nourish a sense of public dignity. Very few voices in the national judiciaries and parliaments, or in the Union Parliament, have dared to address the matter. (Judge Garzon of Madrid is a clear exception.)

A minimum request in order to avoid this future development would be that the European constitution should enshrine a provision stating that elected officials, under trial, should resign from office, as the Basic Law of Israel does.