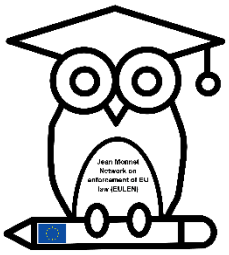

Co-funded by the
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of the European Union

Jean Monnet Network on EU Law Enforcement
Working Paper Series

The authority of administrative law

Its implications for EU integration in the enforcement of composite procedures

Luigi Lonardo

Abstract

EU administration (and the rules concerning such administration: administrative law) is acquiring a major role in European integration. This important role is what this article calls 'the authority of administrative law'. The authority of administrative law is conceptually important because there is a distinction between administration and politics. The difference is that the public is meant to have more of a voice in the second case: a key tenet of the rule of law is that the conduct of public authorities should be based on the democratic expression of the will of the majority, a will which is reached after public debate and constrained by constitutional safeguards such as the protection of fundamental rights of individuals and the rights of minorities.

After discussing the notion of composite procedures in the evolution of the EU's administrative system, the article explores the case law of the European Court of Justice on these procedures in the context of the Banking Union (BU). Then, the article reflects on the implications of the authority of administrative law for the paradigm of EU integration.

Keywords: Enforcement – EMU – composite procedure – administrative law – European jurisprudence

I. Introduction

EU administration (and the rules concerning such administration: administrative law) is acquiring a major role in European integration. This important role is what this article calls 'the authority of administrative law'. Such importance lies in the fact that the EU has established administrative bodies, agencies, or procedures in virtually all areas of governance.[1] This EU administration is conceptually separate from the administration of Member States. In practice,

[1] It might also be possible to measure such a presence quantitatively, and so to establish the percentage of administrative acts as the total of EU acts. Apart from the practical difficulty of drawing the precise boundaries of what counts as 'administrative law', the quantitative exercise is probably of limited utility for the purposes of the present inquiry, because it would not significantly affect the initial assumption: conceptually, administrative law is important in EU governance.

not so much. There are cases in which it is unclear whether it is an EU authority or a Member State's authority who adopts a measure. Therefore, individuals and their lawyers may not be in a position to identify the correct defendant in legal proceedings.

The authority of administrative law is conceptually important because there is a distinction between administration and politics. In both cases, decisions are taken by people, and in both case those people usually reach decisions by arguing or bargaining (more rarely, by threatening). When arguing, those people often rely on technical and functional (supposedly rational or scientific i.e., objective) arguments. The only difference is that the public is meant to have more of a voice in the second case: a key tenet of the rule of law is that the conduct of public authorities should be based on the democratic expression of the will of the majority, a will which is reached after public debate and constrained by constitutional safeguards such as the protection of fundamental rights of individuals and the rights of minorities. Administration is less glamorous. Far from the spotlight of politics, of luxurious parliamentary buildings, and of public debate, in gloomy chambers of technical agencies and in the plain corridors of bureaucratic apparatuses, administrative action is purportedly based on technical standards without direct democratic involvement.

After discussing the notion of composite procedures in the evolution of the EU's administrative system (section 2), the article explores the case law of the European Court of Justice on these procedures in the context of the Banking Union (BU) (section 3). Composite procedures are administrative processes in which both *EU* (institutions, bodies, or agencies) and *national* administrative authorities are involved. Such procedures are especially prominent in the context of BU, a new institutional and regulatory structure set in place by the EU starting from 2014. This line of cases is selected as an example of the reach of the authority of administrative law. Decisions on the enforcement of composite procedures in the BU results in expanding the CJEU's jurisdiction – in the sense that a greater number of factual situations are attracted under the Court's jurisdiction and, more radically, that the Court may significantly curtail the power of national courts. Then, the article reflects on the implications of the authority of administrative law for the paradigm of EU integration (section 4). Authors have shown that the importance of administrative law in the process of European Union (EU) integration reveals a subordination of democratic politics to technical administrative governance[2] carried out in the name of economic imperatives.[3] In the case of the EU, this narrative had led to some well-known criticism and extreme reactions in certain Member States. [4] To the extent that the narrative on the far-reaching influence of technical administration is correct, it points in the direction of a rule of *technical governance* (as opposed to a rule of *law*). The subordination of democratic politics by administration takes place because administrative law is not necessarily adopted by elected representatives – decisions are adopted based on technical expertise rather than, allegedly, as the result of a political deliberation.

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[2] A Sandulli, *Il Ruolo del Diritto in Europa. L'integrazione europea dall prospettiva del diritto amministrativo* (FrancoAngeli 2018) 13-15; a historical and comparative account is L Castellani, *L'Ingranaggio del Potere* (Liberilibri 2020).

[3] M Goldmann, 'The Great Recurrence: Karl Polanyi and the crises of the European Union' (2017) 23 European Law Journal 272.

[4] Reference may be had to C Gillingham, *The EU: An Obituary* (Verso 2016). The idea is not of limited application to the European Union, of course. An exemplary treatment of the topic is the Pulitzer-winning biography of Robert Moses by Robert Caro, *The Power Broker: Robert Moses and the Fall of New York* (Knopf 1974), showing how an unelected civil servant, working in relatively obscure urban-planning agencies, managed to shape the fate of New York city. [Great book, yes.]

The article shows that the case law on Banking Union composite procedures extends the CJEU's jurisdiction in two ways. First, there are cases in which EU courts curtail the powers of national courts to interpret national law. Second, in a recent seminal judgment (*Rimsevics*), the European Court of Justice went so far as to annul a national measure. This, in turn, strengthens the reach and authority of EU administrative law. The authority of administrative law has important repercussions for the paradigm of European integration. This article discusses them with reference to the literature on technical governance.

II. Composite procedures

Ordinarily, EU administration (whose acts can be annulled only by EU courts) is separate from national administration (whose acts can be annulled only by national courts). When the first makes a decision, the second is not involved and vice versa.[5] The original structure of the European Community was predicated on this rigid separation that is no more.[6] Hybrid or composite procedures instead are those in which there is a degree of cooperation between authorities (institution, bodies, agencies) of the Member States and of the European Union.[7]

Composite procedures are being increasingly used, and they are perhaps destined to be the new normal as a reflection of the 'integrated administration'[8] in which EU and Member States 'have come to act in a regime of ever growing, close co-operation, involving not only the joint execution of EU law, but also a continuous and informal exchange of information, ideas, and best practices'.[9]

This kind of procedure gives rise to at least two broad issues: first, since they reflect the porous boundaries between the originally distinct authorities of the EU and its Member States, they make it difficult to locate the ultimate source of authority who adopted an act and therefore, in practice, it may be difficult to know what institution to sue. There are numerous examples of cases where it is not clear whether an act is attributable to the EU or a State authority. As Tridimas has shown, this may be the result of the constructive ambiguity of the regulatory design or *ad hoc* intertwined action undertaken by the Union and the Member States.[10] The boundaries between EU law and collective sovereign action 'are porous in a way that serves to

[5] Equally separate should be remedies, as the orthodoxy described by AG Kokott in Joined Cases C-202/18 and C-238/18 *Rimsevics* para 54 mandates: 'the system of legal remedies before the Courts of the European Union consists of two spheres, which are indeed interconnected but nonetheless quite separate.'

[6] F Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law' (2020) 16 European Constitutional Law Review 1.

[7] This is so-called 'vertical' hybridity. The terminology is in H Hofmann, 'Decisionmaking in EU Administrative Law – The Problem of Composite Procedures' (2009) Administrative Law Review 199. There is 'horizontal' hybridity when authorities by two or more Member States are involved in the course of the same administrative procedure, on which see P Mazzotti and M Eliantonio, 'Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union' (2020) 5(1) European Papers 41.

[8] HCH Hofmann and A Türk, 'Conclusions: Europe's Integrated Administration', in id (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006) 573.

[9] Mazzotti and Eliantonio (n **Error! Bookmark not defined.**) 42.

[10] See e.g. in relation to the Euro Group, *Chrysostomides*, and, in relation to migration law, Case T-257/16 *NM* ECLI:EU:T:2017:130; Case T-192/16 *NF v Council*, EU:T:2017:128 9 and on appeal Case C-208/17, ECLI:EU:C:2018 705; and Case T-193/16 *NG v Council*, EU:T:2017:129.

disguise the true source of authority'.[11] There are increasingly areas of governance where EU law foresees that the decision-making procedure is a composite or joint one involving action by both EU and national authorities.[12]

Second, as a consequence of the uncertainty over the adoption of the act, the role of courts can is ambiguous. what courts (EU or Member States?) are competent to assess the validity of that act belonging to a composite procedure? As shown through the examples of the next section, the fact that acts are adopted both at national and EU level complicates jurisdictional issues and the identification of the extent of the remedies that a national or an EU court may provide.[13]

III. The case law on Banking Union composite procedures extends the CJEU's jurisdiction and strengthens the authority of administrative law

Two phenomena may reasonably be considered to extend the jurisdiction of the CJEU. The first is the exclusive jurisdiction of the CJEU, in a given case, over the interpretation of EU law,[14] but without that court being able to annul acts not attributable to EU authorities. The second is the power of the ECJ to annul a national measure.

3.1. EU courts curtail the powers of national courts to interpret national law

There have been instances in which the CJEU has limited the power of national courts to interpret national law. These cases reinforce the jurisdiction of the ECJ, but do not stray from legal orthodoxy. The cases are worth closer scrutiny as they both arose in the context of BU composite procedures. *Fininvest*[15] was the first case in which the Court had the occasion to adjudicate on one such composite procedure in the field of Banking Union. Pursuant to the procedure foreseen by Article 15 SSM Regulation[16] – which is further specified under national law – notification of an acquisition of a qualifying holding in a credit institution established in the Eurozone shall be introduced with the national competent authority. That authority shall assess the proposed acquisition and notify the ECB a proposal to accept or refuse it. The ECB 'shall decide whether to oppose the acquisition on the basis of the assessment criteria set out in relevant Union law' (Article 15(3) SSM Regulation).
Fininvest, a company owned by Mr Berlusconi, filed a request for authorisation to possess qualifying holdings in Mediolanum, a financial holding company. The national competent authorities, the Bank of Italy and IVASS, forwarded to the ECB a proposal to refuse that application, because they considered that Mr Berlusconi (who had been disqualified in 2013

[11] For a discussion, see T. Tridimas, *Indeterminacy and legal uncertainty in EU law* in J. Mendes (Ed.), EU Executive Discretion and the Limits of Law, OUP, 2019, 40-63.
[12] H.C.H. Hofmann and A. Türk, 'The development of integrated administration in the EU and its consequences' (2007) 13 ELJ 253; see also G. Della Cananea, op. cit, 200.
[13] For the sake of completion, it is also worth pointing out that the literature has explored a third set of issues that is relevant to composite procedures (even though not distinctive to those): the uncertainity over the justiciability of factual conduct of EU administration. N Xanthoulis, 'Administrative factual conduct: Legal effects and judicial control in EU law' (2019) 12(1) Review of European Administrative Law 39.
[14] Provided, of course, that EU law applies.
[15] Case C-219/17 *Berlusconi Fininvest* ECLI:EU:C:2018:1023.
[16] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

from managing a corporation) did not satisfy the reputation requirement for ownership of qualifying holdings in financial intermediaries.[17] The ECB concurred with the national authorities and refused the application. For the purposes of the present discussion, it is relevant that Fininvest challenged the national measure, i.e. the proposal of the Bank of Italy and IVASS, before a domestic administrative court. This court asked the ECJ whether it is Italian or EU courts who have jurisdiction over the proposal of the Bank of Italy and IVASS.[18] The Court considered that the attribution of an act to an EU institution is not affected by the participation of national authorities, if the final act is adopted by an EU institution not bound by preparatory acts.[19] In this reasoning, the Court followed the line of case law of *Sweden v Commission*.[20] The ECJ concluded that, since the final decision is attributable to the ECB, EU court must have exclusive jurisdiction over it, pursuant to Article 263 TFEU. It added that, in light of the principle of sincere cooperation and to guarantee the effectiveness of EU law, acts adopted by national authorities in a procedure such as that issue in *Fininvest* cannot be subject to review by the courts of the Member States.[21] It is only for EU courts to rule, as necessary, on the derivative illegality of the ECB's decision, in case it is due to an illegality of national preparatory acts.[22] In *Iccrea Banca*,[23] the Court dealt with another manifestation of this interconnectedness: this time, at issue was whether an Italian court had jurisdiction over the calculation, made by the Bank of Italy, of contributions to be paid by an Italian bank to the Single Resolution Fund. Not dissimilarly from the composite procedure that resulted in litigation in *Fininvest*, the determination of those contributions consists of a procedure that involves the Bank of Italy, who helps the Single Resolution Board (SRB) to determine the amount by producing preparatory acts.[24] While the Bank of Italy took part in the calculation of those costs, the Court recalled that the final decision was attributable exclusively to the SRB, that is an EU body, and thus its validity could be challenged exclusively in front of EU courts.[25] Moreover, the Court recalled that the principle of sincere cooperation and of effectiveness of EU law require that the national acts could not be reviewed by the national court.[26]

3.2. EU courts can annul a national measure

In the seminal *Rimšēvičs* judgment, the Court has affirmed its exclusive jurisdiction to annul an act contrary to EU law, regardless of the authority adopting it. This new understanding encompasses an expansion of jurisdiction as the Court issues a (specific) remedy against an act of a Member State's body.

In *Rimšēvičs,* the ECJ had the opportunity to consider for the first time the interpretation of Article 14.2 of the European System of Central Banks (ESCB) Statute[27] which provides for redress where a central bank Governor is relieved from her position in the Governing Council

[17] *Fininvest* para 32.
[18] *Fininvest* para 39.
[19] Fininvest para 43.
[20] C-64/05 P *Sweden v Commission* EU:C:2007:802.
[21] Fininvest para 47.
[22] Fininvest para 57.
[23] Case C-414/18 *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia* ECLI:EU:C:2019:1036.
[24] Regulation No 806/2014 and Implementing Regulation 2015/81.
[25] *Iccrea Banca* Para 37.
[26] *Iccrea Banca* Paras 40-42.
[27] Protocol (No 4) to the TEU and the TFEU Treaties on the Statute of the European System of Central Banks and of the European Central Bank.

of the European Central Bank, but also contains an atypical remedy against dismissal. It states that a Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. It then specifies that a decision to this effect 'may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application.' It is unclear whether Article 14(2) ESCB Statute empowered the CJEU to annul the decision (just like in an annulment action), or merely to declare it in breach of EU law (as it happens in infringement proceedings). Latvian authorities suspended from office Mr Rimšēvičs, the Governor of the Central Bank, as part of measures adopted in the course of a preliminary criminal investigation for corruption. Since the Governors of the Eurozone States' central banks are *ex officio* members of the ECB Governing Council,[28] that suspension automatically resulted in his suspension from the Governing Council. As a consequence, both Rimsevics and the ECB brought an action in front of the CJEU. Mr Rimšēvičs sought annulment of his dismissal whilst the ECB asked the Court to give a declaratory judgment.[29] To be sure, since the decision dismissing Rimsevics was attributable to national authorities, the well-established case law, following from the principle of conferral, did not empower the CJEU to annul it, but merely to declare it incompatible with EU law.[30]

Contrary to decades-long case law, instead, the CJEU found that Article 14.2 derogates from the general distribution of powers between the CJEU and national courts. That derogation is explained by the novelty of the ESCB institutional framework, 'within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails',[31] along with a rationale of protecting the constitutional objective of the independence of governor of a central bank. The Court understood Article 14(2) as providing a remedy of annulment, and proceeded, for the first time in its history, to invalidate an act by a Member State.[32] There is more: the jurisdiction of the CJEU in actions involving Article 14(2) ESCB ought to be construed as exclusive – thus implying an important curtailment of national courts over national law. Few months after the decision in *Rimsevics,* the Court made another important pronouncement in which it did not shy away from heavy involvement in (national) procedures concerning the Slovenian central bank (thus a national central bank which is also in the ESCB system). In *Commission v Slovenia (Archives)*,[33] the CJEU held that national authorities must involve the ECB in a procedure aimed at seizing archives of the Slovenian central bank. This was because documents of the archives of the Slovenian central bank could be construed as being part of the archive of the ECB.[34] The Court thus confirmed the entanglement between national and EU authorities,[35] and indeed firmly reconducted action by

[28] See Article 283(1) TFEU and Article 10.1 ECB Statute.

[29] The ECB also submitted an application for interim measures, which led to an interim order requiring Latvia to take the necessary measures to suspend, pending delivery of final judgment, the restrictive measures adopted by the KNAB against Mr Rimšēvičs, in so far as they prevented him from designating a substitute as a Member of the Governing Council of the ECB: an interim order to that effect was awarded on 20 July 2018, *ECB* v *Latvia* (C-238/18 R, not published, EU:C:2018:581).

[30] This was also the view taken by AG Kokott in her Opinion in Rimsevics.

[31] Para 69.

[32] See A Hinarejos, 'The Court of Justice annuls a national measure directly to protect ECB independence: Rimsevics' (2019) 56 Common Market Law Review 1649.

[33] Case C-316/19 *Commission v Slovenia (Archives)* ECLI:EU:C:2020:1030.

[34] Case C-316/19 *Commission v Slovenia* Paras 84-85.

[35] G Butler, 'The Inviolability of National Centrals Banks as a Matter of EU Law: Composite administrative procedures must be followed before national investigative authorities in Member States seize documents from national central banks', VerfBlog, 2020/12/17, https://verfassungsblog.de/the-inviolability-of-national-centrals-banks-as-a-matter-of-eu-law/, DOI: 10.17176/20201217-172949-0.

national administration under the aegis of EU law (and of the CJEU's jurisdiction as a consequence).

Fininvest and *Iccrea Banca* limit the practical impact (and the exportability) of *Rimsevics* because they are instances of a different kind of hybridity. In those cases, despite the connection between national and EU authorities, namely the involvement of the Bank of Italy in the production of preparatory acts, the only measure capable of affecting rights was adopted by an EU institution or body, who was not bound by the acts prepared by the national authority. This is the key aspect that allows to distinguish the hybridity of *Fininvest* and *Iccrea Banca* on one hand, and that of Article 14(2) on the other hand: only in the latter case a national measure affects the rights of individuals. Even when the ECJ considers national preparatory measures to be invalid, in the context of composite procedures such as those at issues in the cases considered above, the remedy would only be an annulment of final act, which is an EU act, and which is the only one capable of affecting individual rights.

It remains clear nonetheless that Economic and Monetary Union (EMU) is a particularly fertile grounds for composite procedures and related issues of judicial protection. It was noted, for example, that a hitherto 'unresolved' problematic consequence of Fininvest and Iccrea Banca is to leave certain (preparatory) acts of national law outside the scope of judicial review (be it by national or EU courts).[36] It will be recalled that the distinctive characteristics of EMU were invoked by the Court in *Rimsevics* to justify the decision to annul a national law.

IV. The authority of administrative law

The authority of administrative law proved to be a powerful engine of EU integration. The EU has set up an administrative paradigm characterised by delegation to independent agencies, constitutional ingenuity, and hybridity with national authorities, which has achieved a capillary reach of EU law within Member States. Administration carried out through technical regulatory governance often proves less contentious than political deliberations as it tends to be less polarising and removed from the spotlight of public discourse. This EU (technical) administrative space 'colours', through the hybrid procedures, the national administrative space it touches, and in this sense it leads to strengthening the presence of the CJEU, as its jurisdiction directly follows the expansion of EU administration as outlined in the previous section.

Is the invocation of this perspective sufficient to justify the result? Considering that the EU is founded on the rule of law, it is justified, albeit not inevitable, that administrative processes 'touched' upon by the EU – i.e. regulated or permitted by an EU act, or with a degree of involvement by EU authorities – are monitored centrally by the CJEU. This is not dissimilar from what happens in other hybrid situations (with EU and MSs involvement): for example when the ECJ annuls a mixed agreement,[37] or where it annuls an act adopted by Representatives of the Member States in their capacity as Representatives of their Governments, not as members of the Council.[38] The test for ECJ's jurisdiction to annul a mixed agreement seems to be that there is involvement by EU authority in decision-making. Mixed agreements and

[36] F Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law' (2020) 16(1) European Constitutional Law Review

[37] C-28/12 *Air Transport Agreement* para 15.

[38] C-114/12 *Commission v Council (Broadcasting Rights)* para 38.

composite procedure both present *some* involvement of EU and MSs authority in the decision-making: but judicial centralisation does not occur in all composite procedures, only in those where there is substantial involvement of EU authority. This suggests that the nature of the EU competence in the composite procedure; the substantial involvement of EU authority; and institutional status are important elements the interaction of which leads to a strong jurisdictional monopoly.[39] This implies a teleological, integration-oriented attitude. More broadly, one could polemically say that it shows a certain integration *policy*. The model implies a subordination of politics to technical/administrative governance.[40] It will be recalled that Habermas spoke of the management of the Eurozone crisis in similar terms. However, the response to Coronavirus may mark an important change in this respect, as discussed in the next section.

One may take the view that such authority of administrative law more poses a challenge, executed in the name of technical administration, to democratic politics. And that governance by administrative law 'bureaucratises' constitutionalism and democratic politics by transforming them into administrative decision-making. It is well established that the decision to delegate power to agencies has major repercussion on the fundamental political organisation of the polity.[41] As mentioned, administrative law is technical and therefore meant to be 'neutral' rather than political and 'partisan', so it is a powerful tool for integration.[42] In the context of Banking Union, technical governance has proved a useful tool to overcome 'political and legal obstacles previously thought insurmountable'.[43]

A comparative note shows that if the 'shortcut' of administrative delegation is similar to what happened in the United States. Much like the EU in the past decade, nineteenth-century United States also experienced debt crises and default. The classical study by Skowroneck[44] shows that the US reacted with new *administrative* capacities and policy instruments to preserve the market. Even before the establishment of the Interstate Commerce Commission in 1887, which marks the emergence of regulatory agencies, the expansive role for administrative discretion emerged under broad delegations of Congressional authority. As authors such as Mashaw and Perry[45] have explained by analysing the role of administrative agencies in American political development, the Congress generated substantial regulatory activity on the part of administrative agencies, through permissive acceptance of administrative adjudicatory and enforcement authority. Thus, scholarship on American political development offers an important reference point for understanding how institutional allocation of power may end up subtracting deliberation from the political spotlight, and delegate it instead to technical bodies.

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[39] On the other hand, the Court has declined jurisdiction in a circumstance in which, despite a degree of EU involvement, the subject matter of the dispute fell within Member States' exclusive competence. See L Lonardo, Case C-457/18 *Republic of Slovenia v Republic of Croatia*: 'Am I my brother's keeper?' International agreements by Member States and the limits of the European Court of Justice's jurisdiction (2021) 46(1) European Law Review 104.

[40] Excellent on this theme is Sandulli, *Il Ruolo del Diritto in Europa. L'integrazione europea dall prospettiva del diritto amministrativo* (FrancoAngeli 2018) 13-15. Mixed agreements do not share this feature, because there is an involvement of political bodies (i.e. national parliaments).

[41] G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) 8 European Law Journal 319, 322.

[42] Ibid

[43] N Moloney, 'European Banking Union: Assessing its Risks and Resilience' (2014) 51 Common Market Law Review 1609

[44] S Skowroneck, *Building a New American State. The Expansion of National Administrative Capacities, 1877-1920* (CUP 1982).

[45] JL Mashaw and A. Perry, 'Administrative Statutory Interpretation in the Antebellum Republic' (2009) 7 Michigan State Law Review 7.

It shows that integration also passes by stages where technical independent agencies enjoy a rather large amount of discretion. Notwithstanding this 'democratic deficit' and the problems of legal accountability of the 19th century agencies, several studies suggest that it was precisely the expansion of administrative law and steady growth of regulation to achieve market consolidation that strengthened the role of the state and underpinned American political–economic development.[46]

This might have been acceptable in a system that did not constitutionally protect fundamental rights, such as the United States in the 1800s. It is much more problematic in a Union based on the value of the rule of *law*. Two brief reflections are in order at this point. The first is that the subordination of politics to administrative governance is decisively aristocratic.[47] It is based on the 'epistocratic' assumption that decision-makers derive legitimacy from their expertise, not from their popular mandate (or from something else). The second, building on the previous, is that the choice to delegate public decisions to technical governance is not necessarily to be imputed, in a conspiracy-style narrative, to the desire of some élite to escape political accountability. It may be due, instead, to a trust in the 'intellectual primacy of economics'. The epistocracy works in favour of, and selects, those with an economic, functional expertise.[48] The intellectual primacy of economics entails the subordination not only of other disciplines (law, political science, and research in general[49]), but perhaps more radically also the subordination of democratic political processes, to the imperative of economic growth. This line of thought, of clear Marxist ascendance, found clear expression in the writings of Lukács[50] and Marcuse,[51] and has been maintained with renewed vigor in more recent times. Several legal scholars have in fact lamented the primacy of economics and shown how the resulting rule-making constitutes 'a technical-pragmatic construct of economic rationality'.[52] Habermas expressed this concept when he defined the management of the Eurozone crisis as '[t]he favorite ordoliberal dream of precluding democratic participation for those affected by withdrawing financial and economic policy from the realm of politics and placing it under the control of a technocratic administration'.[53]

If decision-making for a community must indeed pursue an economic rationale (say, of efficiency and competition[54]), then it might well be the case that administration (by few, technical experts) is indeed the way forward: but this carries obvious risks.

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[46] WJ Novak, 'Common Regulation: Legal Origins of State Power in America' (1994) Hastings Law Journal 45 (4): 1061–97; M Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (The Belknap Press of Harvard University Press 1977); M. J. Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press 1977).

[47] J Lukacs, *The Passing of the Modern Age* (Harper and Row 1972) 37 quoted in Castellani, *L'ingranaggio del Potere* (2021).

[48] M Magatti, *Oltre l'infinito. Storia della potenza dal sacro alla tecnica* (Feltrinelli 2018).

[49] A von Bogdandy, 'The Current Situation of European Jurisprudence in the Light of Carl Schmitt's Homonymous Text' (MPIL Research Papers Series 2020/08) 4.

[50] G Lukacs, *History and Class Consciousness* (MIT Press, 1st printed 1923, 1971) 83

[51] H Marcuse, *One-Dimensional Man* (Beacon Press 1964).

[52] Ernst-Wolfgang Böckenförde, *Wissenschaft, Politik, Verfassungsgericht* (Suhrkamp, Berlin, 2011) 302, quoted in A von Bogdandy (n 49) 8.

[53] J Habermas, 'How Much Will the Germans Have to Pay?' (*Spiegel*, 26 October 2017)

[54] Ibid: 'The main political impetus for a European jurisprudence and the corresponding tax payer's money is owed to the project of transforming the European Union into "the most competitive and dynamic knowledge-based economic area in the world"' quoting Council conclusions by the Lisbon European Council of 23-24 March 2000 (SN 100/1/00 REV 1), No. 5.

V. Conclusion

As a survey of the case law on composite administrative procedures in the field of Economic and Monetary Union has shown, the authority of administrative governance is widespread and, one may think, inescapable.

Scholarship on EU administrative law and scholarship on European jurisprudence shows that there can be a very fruitful dialogue. A study of administrative law shows the increasing authority and reach of composite procedures and, following those, of the jurisdiction of the Court. A study of European jurisprudence had reached the same conclusion, philosophically, so to speak, denouncing, that is, the perils of an administration with little democratic legitimacy. In practice, the hybrid construction of EMU, as interpreted by EU courts, would appear to confirm the narrative established by critical scholars.