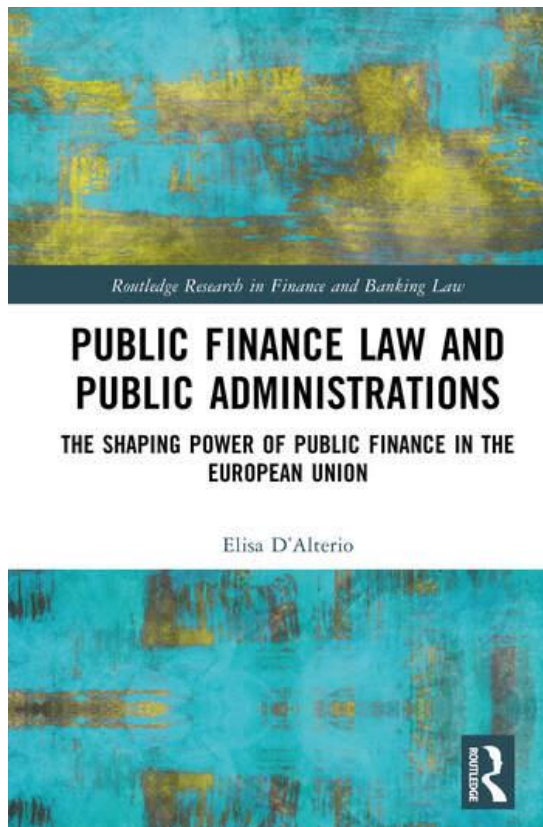


# Public Finance Law and Public Administrations

## The Shaping Power of Public Finance in the European Union

Prof.ssa Elisa D'Alterio

Il libro analizza come lo sviluppo del diritto della finanza pubblica all'interno dell'Unione europea abbia influenzato e continui a influenzare la struttura della pubblica amministrazione negli Stati membri dell'UE. In particolare, si esamina se tale influenza normativa abbia contribuito a un processo di miglioramento della pubblica amministrazione o, al contrario, abbia avuto un impatto negativo sulla società civile.



Illustrando come le crisi globali abbiano plasmato la formulazione delle normative finanziarie nell'UE, il libro discute di come l'applicazione di tali normative abbia influenzato vari aspetti della pubblica amministrazione negli Stati membri dell'UE. La ricerca valuta non solo le conseguenze derivanti dall'applicazione di queste norme, ma anche di quelle derivanti dai cambiamenti all'interno del sistema dell'UE, che si ripercuotono a livello nazionale. Di conseguenza, si approfondiscono gli effetti del diritto della finanza pubblica sia sugli "elementi statici" (come le attività pubbliche, l'organizzazione e il personale delle pubbliche amministrazioni), sia sui rapporti tra le amministrazioni pubbliche, i corpi politici e la società civile.

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# **Public Finance Law and Public Administrations**

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**Elisa D'Alterio**

First published 2026

ISBN: 978-1-032-74124-6 (hbk)

ISBN: 978-1-032-76713-0 (pbk)

ISBN: 978-1-003-47976-5 (ebk)

## **I Introduction to public finance law in the European Union**

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DOI: 10.4324/9781003479765-1



**ROUTLEDGE**

**Routledge**

Taylor & Francis Group

LONDON AND NEW YORK

# I Introduction to public finance law in the European Union

## 1. “[Public] Finance is the problem of our time”

“Finance is the problem of our time”. Arthur J. Balfour (1848–1930) stated as much with reference to England, and was quoted by the Italian economist Federico Flora in his seminal handbook on public finance. Flora added that this “problem” was also widespread throughout “all European states, which, due to rising military costs, the extension of government interference, the development of social legislation, now spend beyond [what] taxes can provide”.<sup>1</sup>

The balance between public expenditure and income has always been one of the main problems in the management of state budgets. In turn, this problem is connected to several others: the rise in public spending; the development of modern tax systems in relation to the fiscal deficit; management of public debt; adequate financing of public functions and services; the application of fiscal federalism in some countries, etc.<sup>2</sup> It would probably be more accurate to state that public finance is a set of problems that characterize the use of public resources in every State, and at all times.<sup>3</sup>

This statement prompts an important clarification: public finance is different from private finance. Public finance pertains to the state (and institutional subjects

1 F. Flora, *Manuale della scienza delle finanze*, 4th edition, Livorno: Raffaello Giusti Editore, 1912, p. VIII (author’s own translation), recalling how Balfour criticized the dizzying rise of British public spending and debt.

2 A simple definition is: “public finance deals with the financial and economic operations of individuals as parts of communities. It deals with the public part of what is called ‘economics’ . . . Public finance deals with the choices that groups, or communities, make as groups, and with the pursuit of collective interests that can be better satisfied by joint actions. . . . These collective choices may relate to defense against hostile foreign groups, to the provision of some public goods, including those related to individual protection and justice, and to others”. V. Tanzi, *Advanced introduction to public finance*, Cheltenham and Northampton: Edward Elgar Publishing, 2020, pp. 3 and 4.

3 There are many definitions for the term “finance”. Generally, it is “the management of large amounts of money, especially by governments or large companies” (*Compact Oxford English dictionary*, Oxford: Oxford University Press, 2003, p. 408), “the way in which large amounts of money are managed or organized, especially by a government, company or bank”. It differs from economics, which is the theory of how money works (*Oxford learner’s thesaurus. A dictionary of synonyms*, Oxford: Oxford University Press, 2008, p. 288).

## 2 Public Finance Law and Public Administrations

operating both at sub-state and supranational levels). Private finance concerns the behaviour of private actors (banks, businesses and economic operators) on financial markets.<sup>4</sup> The two fields are connected to each other:

when the private financial system collapsed in 2007, the integration of public and private financial systems was starkly revealed. Ensuring the survival of private financial markets required the deployment of public resources on an enormous scale. Short – and long – term fixes came in the shape of vast subsidies to insolvent financial institutions, fiscal stimulus and unconventional monetary policies, most prominently the central bank asset-purchase programmes called “quantitative easing”.<sup>5</sup>

This book concerns public finance, and, in particular, its legal dimension.<sup>6</sup> Public finance has a specific objective and purpose, and special tools and actors. More precisely, its objective is the use of public resources, defined as resources aimed at satisfying public interests. Its purpose is to manage public resources in the most appropriate way to satisfy public interests. Its tools are multifarious: the main tool is the (public) budget, the means that enable the state and other institutional bodies to plan and control the decision and management of public resources. The actors are public institutions, at various levels (local, state, European, global).

The use of public resources is subject to many rules. These comprise constitutional rules fixed in constitutional charters and are related to the financial power of national parliaments and executives. Supranational rules – that is, European Union (EU) rules – regulate the monetary union and oblige EU Member States to comply with specific parameters and procedures, especially regarding the level of public debt and deficit. Administrative rules relate to the management of public expenses in public institutions. Fiscal rules govern the assessment, collection and remittance of revenues. Technical rules affect the use of public funds. National and international rules regulate the functioning of central banks. There exist also rules that provide for financial audits, monitoring and reporting on the use of public resources. All of the aforementioned rules may be contained in norms, principles, orders, directives, recommendations, etc. Administrative acts and practices also play a fundamental role in this framework.

4 Many studies have been conducted on private finance, that also includes private banking, private capital investments, personal finance, etc.

5 W. Bateman, *Public finance and parliamentary constitutionalism*, Cambridge: Cambridge University Press, 2022, p. 233. The author remarked that there exists a constitutional position of private finance and that “all economic behaviour is the product of ‘public law’ because it occurs within a framework of legal rules fashioned by public institutions. . . . Law and constitutional practice concerning public finance have played a decisive role in developing private financial markets”.

6 In this book, the expression “public finance law” includes all rules, measures and acts related to the power of the State to collect revenue and make expenditures, by pursuing general public interests. It is a broader expression of “tax law” or “fiscal law” (referring only to the rules on revenues), and “budget law” (referring to the specific regulation of the budget and public accounting).

Therefore, public finance is a “world of rules”.<sup>7</sup> What is the reason for all these rules?

Rules set limits and constraints on the “free” use of public resources, in the interests of civil society. This concept echoes the origin of the “right of the budget” (budget law), understood as the regulation of parliamentary participation in the determination of the national budget, as theorized especially by the German school.<sup>8</sup> This is linked to the birth of modern parliamentary systems, when the financial statements were modest in size and the financial rules consisted of only a few principles.

The “right of the budget” is how the people (in contemporary terms, civil society) represented in a parliament formally “legitimate” and keep in check the actions of those who govern, functioning as a barrier to the power of government (in the past, the power of the sovereign).<sup>9</sup> From this perspective, the founding fathers of the Constitution of the United States of America stated that the

power over the purse may . . . be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.<sup>10</sup>

In this sense, public finance rules are characterized by a “democratic value”, which is closely associated with the need to (self-)limit governments’ power over the purse. At the same time, finance rules limit parliaments in exercising their power: consider the principle of financial coverage applied to spending laws, according to which every law that produces financial burdens must also specify the means to sustain them. This principle constitutes one of the most significant

7 The expression “world of rules” has been used, for example, by G.F. Schuppert (*The world of rules. A somewhat different measurement of the world*, Max Planck Institute, 2017, p. XIII) to describe the proliferation of legal sources: “the multitude of normative orders, the plurality of norm producers and norm enforcement regimes”. The realm of public finance is characterized by many types of rules, not only positive norms.

8 The classic approach to budget law in the liberal state focuses on the structure of the power of the purse. There is a longstanding debate on, primarily, the exercise of this power from a constitutional law perspective. This debate then extended to many other aspects: the relationship with the form of government, the nature of budget law, the relationship with other legal sources, etc. In this respect, the works of certain German scholars (Carl Friedrich von Gerber, Rudolf von Gneist, Georg Jellinek, Paul Laband, Carl Schmitt) are particularly renowned.

9 The origin of representative institutions in Europe is connected to sovereigns’ growing need for resources. The principle whereby taxation is conditional upon the approval and consent of those who must pay (*quod omnes tangit ab omnibus approbari debet*) was first codified under Emperor Justinian (527–565). The principle has been reiterated over time in many forms and in several sources, from the *Statutum de tallagio non concedendo* of 1297, granted by King Edward I of England, to “no taxation without representation” during the American Revolution, up to modern budget law. The taxing power was “one of the most jealously kept and exclusive sovereign rights”: L. Man-nori and B. Sordi, *Storia del diritto amministrativo*, 3rd edition, Rome-Bari: Laterza, 2004, p. 28 (author’s own translation).

10 The passage, attributed to James Madison, is drawn from Essay no. 58 of *The Federalist*.

#### 4 Public Finance Law and Public Administrations

barriers to the spending power of both parliaments and governments in the adoption of normative acts.<sup>11</sup>

In any case, public finance rules also have very practical finalities. Indeed, they serve to manage, organize and coordinate the use of public resources. All of these purposes will be explored in depth in the following sections and chapters.

In line with the initial reasoning, it can be stated that public finance has always constituted a problem, from both a management point of view, considering the difficulty of balancing revenues and public expenditure, and from a regulatory one, given the need to set constraints and limits on the conduct of public decision-makers and public administrations. From this perspective, the problem has two “souls”: one relating to management and the other regulatory.

As for the regulatory dimension, it has been noted that in the past, “the focus was on which taxes to use, and who should pay them. Today, a great deal of what we still call public finance deals with issues on the expenditure side, and with regulations”.<sup>12</sup> Nevertheless,

given the importance that regulations have acquired in the modern world, it is surprising how little attention they have continued to attract in public finance books that no longer focus exclusively on finance but deal with the full economic activities of governments.<sup>13</sup>

Scholarship on public finance has usually focused on the economic dimension and, especially, the process of managing funds. Indeed, many finance studies examine “public financial management”, providing an overview of public financial management systems from an economics and accounting perspective.<sup>14</sup> Conversely, few studies consider public finance from a legal point of view, and there are virtually none on the role of the public administration and the impact of public finance rules on administrative systems.<sup>15</sup>

11 This budgetary principle applies both to the public budget and to spending laws adopted during the year.

12 Tanzi, *Advanced introduction to public finance*, p. 5.

13 Tanzi, *Advanced introduction to public finance*, p. 113.

14 On public financial management, A. Premchand (ed), *Government financial management. Issues and country studies*, Washington, DC: International Monetary Fund, 1990; A. Premchand, *Public expenditure management*, Washington, DC: International Monetary Fund, 1993, p. 41; more recently, M.F. Sicilia and I. Steccolini, *Public budgeting in search for an identity: State of the art and future challenges*, London and New York: Routledge, 2020; J.K. Kristensen, M. Bowen, U. Zrinski, C. Long and S. Mustapha, *Public financial management and good governance*, World Bank Group, 2019.

15 The main legal studies on public finance concern constitutional aspects. There are many examples: recently, E.S. Tanasescu and E. Oliva, *Constitutional law and the EU balanced budget principle*, London and New York: Routledge, 2022; M. Adams, F. Fabbrini and P. Larouche, *The constitutionalization of European budgetary constraints*, Oxford: Oxford University Press, 2014; P. Craig, The financial crisis, the EU institutional order and constitutional responsibility, in F. Fabbrini, E. Hirsch Ballin and H. Somsen (eds), *What form of government for the European Union in the Eurozone?* Oxford and Portland: Hart Publishing, 2015, p. 17; J. Wehner, Assessing the power of the purse:

The expansion of public finance rules affects the “lower” part of the legal system that could be called the “administrative machine”. This phenomenon affects not only the very definition of “public administration”, shaping its scope of application – consider the relevance of the notion of “institutional unit”, defined by the European System of Accounts (ESA 2010)<sup>16</sup> – but also the system’s main components: its organization, personnel, administrative procedures, public services, etc. In this context, the finance rules adopted in the aftermath of the crisis provoked by the COVID-19 pandemic at both European and national levels will have, and are already beginning to have, significant impact on all components of the administrative machine.

The impact of finance rules on the main components of public administration is a little explored yet highly relevant field. It requires analysis of the complex relationship between the public apparatus and financial instruments, which is increasingly important given the significance of recent reforms and public resource investment programmes, and their current and prospective impact on EU Member States’ public administrations.

In other terms, this book “turns the telescope” to observe public administrations.

## 2. Public finance and public administrations: the engine and the machine

There is a close relationship between public finance and public administrations: the former is the engine that drives the administrative machine. This relationship can be considered from at least three different perspectives.

First, the state, and, especially, the administrative apparatus, is expensive. Historically, in the Roman Empire, the *fisco* (which replaced the *aerarium*) and other public coffers were used to cover public expenses.<sup>17</sup> Later, in the Middle Ages, the

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An index of legislative budget institutions, in *Political Studies*, vol. 54, no. 4, 2006, pp. 767–785; or A. Wildavsky, *Budgeting: A comparative theory of budgetary processes*, Boston: Little Brown, 1975. See also M. Postula, *Public financial management in the European Union public finance and global crises*, London and New York: Routledge, 2022, who offered a combined technocratic and humanist perspective on the discussion of public financial management in relation to public goods. However, the aforementioned works do not consider the relationship between public finance law and public administration.

See also the contributions on the EU’s financial legislation, for example: U. Radice, *The European Union after the crises*, London and New York: Routledge, 2017; J.M. Sarmento, *Public finance and national accounts in the European context*, Berlin: Springer, 2018; M. Chang, G. Menz and M.P. Smith (eds), *Redefining European economic governance*, London and New York: Routledge, 2016; P. Stephenson, M.-L. Sanchez-Barrueco and H. Aden (eds), *Financial accountability in the European Union. Institutions, policy and practice*, London and New York: Routledge, 2021. These works focus only on the EU system and do not consider in depth the effects of public finance rules on national (Member State) public administrations.

16 Sarmento, *Public finance and national accounts*, p. 105: under EU financial law, “an institutional unit is an elementary centre of economic decision”, such as the various types of public administration.

17 E.R. Khazzam, *The rise and fall of the Aerarium: Lessons in public finance from the Roman Empire*, International Federation of Accountants, 22 July 2014, <https://www.ifac.org/knowledge-gateway/discussion/rise-and-fall-aerarium-lessons-public-finance-roman-empire>.



power to tax became one of the most jealously guarded and exclusive sovereign rights. Therefore, the first reason for the relationship between public finance and public administrations is the maintenance of public power and its apparatus in the service of the emperor or the sovereign. Only later were public finances considered to be in the service of the people represented by parliaments, becoming the “instrument of liberalism and of the rule of law, safeguarding individual freedoms”.<sup>18</sup>

Second, the state, or, specifically, the contemporary state, provides public services in a market context.<sup>19</sup> Historically, this emerged with the transition from the model of mere “guarantee administration” to “performance administration”, as defined by Ernst Forsthoff (*Leistungsverwaltung – Daseinsvorsorge*).<sup>20</sup>

The function of the state was to secure the provision of public services, which Duguit defined widely to include “any activity that has to be governmentally regulated and controlled because it is indispensable to the realisation and development of social solidarity”.<sup>21</sup>

From this perspective, public resources are necessary to finance the provision of services for the community (healthcare, education, social assistance, transport, etc.). The dimensions of public finance have consequently grown, with the affirmation of the “welfare state” and the increasing development of collective interests: “public finance deals with the choices that groups, or communities, make as groups, and with the pursuit of collective interests that can be better satisfied by joint actions”.<sup>22</sup>

Third, public finance is a means of administrative action considered as a whole. After all, without the engine, the machine cannot move. Financial instruments are not only closely connected to public administrative action but also constitute its essence. Through financial decision-making and management, it is possible to provide goods and essential services to the community. In this sense, public finance is the set of instruments through which public authorities carry out their allocative or distributive functions. This function has an “external” or social declination, tied to the provision of public services, and an “internal” or administrative one, aimed at distributing financial resources among component offices.

The public budget is the means that enables planning and controlling the decisions over and management of public resources. Historically, the budget was much simpler than it typically is today, and was established as a means through which the parliament authorized the government to impose taxes. This explains why in some

18 P. Amselek, *Peut-il y avoir un État sans finances?* in *Revue du droit public et de la science politique en France et à l'étranger*, vol. 2, April 1983, p. 267 (author's own translation).

19 A well-known study on the economic power of the state was written by R.A. Musgrave, *The theory of public finance*, New York: McGraw-Hill, 1959, Chapter I, which distinguished the functions of allocation, redistribution and stabilization.

20 E. Forsthoff, *Der totale Staat*, Hamburg: Hanseatische Verlagsanstalt, 1933.

21 C. Harlow and R. Rawlings, *Law and administration*, 4th edition, Cambridge: Cambridge University Press, 2022, p. 33, who also elaborate a “green light theory” (p. 32).

22 Tanzi, *Advanced introduction to public finance*, p. 4.

legal systems the budget took the form of a law.<sup>23</sup> Today, the budget, together with overall economic–financial documentation, is more complex. In Massimo Severo Giannini’s definition, it is “at once an act of determination of the political direction, an applicative financial program of political direction, an accounting precept for the state administration apparatus”.<sup>24</sup>

However, the public budget remains the primary act with which expenditure is authorized. More generally, the budget is functional to the definition and implementation of public choices. Decisions on the allocation of revenues and expenses for one purpose or another and, therefore, the implementation or not of certain public policies are the result of the action of political decision-makers, who generally operate under pressure exercised by interest groups: this is the natural dynamic that characterizes the formation of choices in a democratic system.<sup>25</sup> In the past, this dynamic unfurled easily, due to the absence of limitations in determining the state budget. Later, the changes brought about by the process of EU integration and, more precisely, by the entry and permanence of certain EU Member States in the monetary union gave rise to some developments, starting with the parameters set in the Treaty of Maastricht and the Stability and Growth Pact (SGP), in the 1990s.<sup>26</sup>

Analyzing the relationship between public finance and the public administration requires two clarifications.

First, the relationship concerns all types of public administration: central governments, local governments, municipalities, states and provinces, etc. The EU’s administrative apparatus can also be considered. It is also true that “only central governments have final responsibility for coordinating the interrelated activities of financial management, monetary authority and practical access to sovereign debt markets. Responsibility for the national economy is thereby concentrated in central governments”.<sup>27</sup> For this reason, state financial administration usually has a key role.

However, as will be seen throughout this book, analyzing the impact of financial rules on the public administration requires considering the latter as a whole, in both the passive sense (the rules that shape specific elements of public administration) and the active sense (the rules that strengthen the role of public administrations). This is done through case studies examining the various categories of administrations in different countries.<sup>28</sup>

23 The theory of budget law as a formal body of law dates back mainly to Paul Laband (*Das Budgetrecht nach den Bestimmungen der Preußischen Verfassungs-Urkunde unter Berücksichtigung der Verfassung des Norddeutschen Bundes*, Berlin: Verlag von Guttentag, 1871).

24 M.S. Giannini, *Diritto amministrativo*, 3rd edition, Milan: Giuffrè, 1993, p. 420, which defined public finance as a tool of public administration (author’s own translation).

25 The budget as a “political thing” is analysed in the well-known book by A. Wildavsky, *The politics of the budgetary process*, Boston: Little Brown, 1964.

26 See Chapter II.

27 Bateman, *Public finance*, pp. 13 and 14.

28 See Chapter IV.

The second clarification can be summed up with one question: if the public administration is the machine and public finance is the engine, what role do the other public powers play?

According to the classical approach, in parliamentary systems, the parliament should be the driver of the entire machine:

it is quite clear that some security is needed to prevent misappropriation or irregular expenditure of the funds granted by Parliament, and the question to determine is what is the machinery by which this end is attained. This security is provided by an elaborated system of control and audit, under which not a penny of public money can be expended by the Ministry without the authority or sanction of persons (many of them quite independent of Ministers) who are responsible for the due application of the revenue. The centre of this system of Parliamentary control is the Comptroller and Auditor General.<sup>29</sup>

It follows that

the general result of this system of control and audit is that in England we possess accounts of the national expenditure of an accuracy which cannot be rivalled by the public accounts of other countries, and that every penny of the national income is expended under the authority and in accordance with the provisions of some Act of Parliament.<sup>30</sup>

Nevertheless, this description – defined as “Dicey’s legacies”<sup>31</sup> – has never corresponded to reality, much less so today. Various provisions have strengthened the role of the financial administration to the detriment of parliamentary control over public expenditure, already in Dicey’s time. For example, in the United Kingdom, the *Exchequer and Audit Departments Act 1866* assigned numerous powers to the Treasury: how departmental accounts would be prepared, the direction of the Comptroller and Auditor-General to carry out audits and controls, etc.<sup>32</sup>

In Italy, examples are Laws No. 94 and No. 174 of 1861. The former established, among other things, guarantees for state creditors and exemptions for state-issued bonds. The latter recognized as debts of the (superseded) Kingdom of Italy all debts of the pre-Unification states, listed in the law, and provided for their exchange with the new bonds. These laws profoundly shaped the evolution of the administrative

29 A.V. Dicey, *The law of the constitution*, edited by J.W.F. Allison, Oxford: Oxford University Press, 2019, p. 175. Dicey carried out various studies on the control and audit of public receipts and expenditure, dating back to 1885.

30 Dicey, *The law of the constitution*, p. 177.

31 Bateman, *Public Finance*, p. 4.

32 Historically, the British Parliament eventually assumed a weak role in the financial field, although Great Britain is generally considered the “cradle” of modern parliamentary systems. J. Binney, *British public finance and administration 1774–92*, Oxford: Clarendon Press, 1958.

system in those years. First, they compelled creation of a strong central administrative apparatus for debt management and the collection and distribution of financial resources. Second, they provided for a close dependence of the periphery, where the offices actually managed the financial resources, on the central state, which was the only level empowered to collect revenue.

These examples highlight three important aspects. First, in Italy, the Parliament has never had a truly central role in financial matters. Second, financial power has always been mainly in the hands of the executive branch. Third, within the executive branch, it is necessary to distinguish between the government, understood as the political body (prime minister, ministers, political bodies at the head of the states, municipalities and provinces), and the public administration, or civil service, which is the technical–professional body.<sup>33</sup> In both the Anglo-Saxon and the Italian systems, this distinction is expressed by the “principle of separation between politics and administration”.<sup>34</sup> Therefore, the government and the public administration are different and separate actors, especially in the field of public finance, in which the public administration tends to prevail in the direction and management of financial choices.<sup>35</sup> As will be seen later, expansion of the public administration’s role in many EU Member States (including the United Kingdom, for some time) is a possible effect of the development of the rules on public finance.<sup>36</sup>

Finally, to answer the initial question with reference to the full framework of public powers, the judicial branch must be considered. The role of the judiciary in public finance differs widely in different legal traditions (civil law or common law).

In civil law systems, especially where courts of auditors have been established, the role of judges is crucial – albeit indirectly – in defining the rules on public finance. This is the case in France, Germany and Italy. The case law of such courts contributes to the development of legal interpretations that often turn into effective rules, with significant impacts on public administrations.<sup>37</sup>

33 S. Cassese, *Le basi costituzionali*, in *Trattato di diritto amministrativo, general part*, vol. II, Milan: Giuffrè, 2003, pp. 175 ff. The main relevant passages are recalled: “as a reflection of the imbalance between parliament and government, the law ends up prevailing over the executive power and the principle of legality is affirmed. This will produce two consequences: the split between government and administration and the submission of the administration to parliament”; “initially . . . there was only the executive power that united government and administration. Today there is the government and the administration, one separate from the other” (author’s own translation).

34 See F.J. Goodnow, *Politics and administration. A study in government (1900)*, introduction by J.A. Rohr, London and New York: Routledge, 2003, especially Chapter V.

35 E. D’Alterio, *Dietro le quinte di un potere. Pubblica amministrazione e governo dei mezzi finanziari*, Bologna: Il Mulino, 2021, p. 145.

36 A similar trend may be seen in the United States of America: B.J. Reed and J.W. Swain, *Public finance administration*, New York: Sage, 1997, which focused on the management of public funds, with particular attention to the role of the US public finance administration.

37 “Without a direct role in the budget process, courts have but one point of entry into the fray. Typically, aggrieved subnational governments and individuals file suit in the courts and argue that some budget decisions and programs deprive them of rights guaranteed by constitutions and budget laws. They look to the courts to overturn or modify the objectionable policies. In adjudicating these issues,

On the contrary, common-law countries generally do not have courts of auditors. Financial audits are entrusted to technical offices, and ordinary judges assess the cases of harm to the treasury. Therefore, the role of the judiciary in the financial sector is limited and marginal.<sup>38</sup>

### 3. Notions and questions in the study of public finance law

Public finance law is defined in multifarious ways. Some scholars start with defining the financial law system as a branch of law, considering it as “the emergence of a new profiling branch of law” that

has its own specific system, [comprising] namely budget law, tax law, banking law, insurance law, currency law, investment law, securities law, the law on protecting competition on the market financial services, legislation on securities market legislation on financial control and auditing, [and] legislation on laundering of proceeds of crime.<sup>39</sup>

Other studies connect public finance law with market intervention by the state as an economic operator, market control (authorizations, monopolies, exclusive rights, market regulation, etc.), protection of market competition (competition law), market support (State aid) and collaboration with the market (public procurement).<sup>40</sup>

Tax law studies focus on the controversial relationship between public treasury law and tax law, by questioning the autonomy of the former with respect to the latter.<sup>41</sup>

Other studies affirm that the notion of public finance law is generic: it is an “umbrella term, which describes the collection of ‘legal practices’ that govern the financial activities of central governments”.<sup>42</sup> Moreover,

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the courts are called upon to interpret a formidable body of constitutional provisions and budget laws governing the budget process”: D. Axelrod, The judicial power of the purse: How the courts interpret budget laws, in A. Premchand (ed), *Government financial management. Issues and country studies*, Washington, DC: International Monetary Fund, 1990, p. 177.

38 In common-law systems, courts have a limited role in the field of public finance, as there is no established jurisdiction over disputes regarding legislation on appropriations or sovereign debt. Courts even lack the power to define their own funding except for certain cases of “inherent power”, such power pertaining to the government and parliament: “growing pressure upon court services, inadequate appropriations, and slow and expensive litigation have combined to spur judicial demands for the independent control of internal fiscal management as well as of appropriations to the judiciary”. W. Scott Ferguson, Judicial financial autonomy and inherent power, in *Cornell Law Review*, vol. 57, no. 6, 1972, p. 975.

39 M.A. Tsindeliani, Estructura institucional del derecho de finanzas públicas, in *Utopía y Praxis Latinoamericana*, vol. 24, Special no. 6, 2019, pp. 370–377 (author’s own translation). Tsindeliani reported the views described in certain financial law studies.

40 G. Poynter, *The political economy of state intervention conserving capital over the West’s long Depression*, London and New York: Routledge, 2021.

41 M.A. Plazas Vega, The autonomy of public finance law and tax law, in *International Tax Law Review*, no. 2, 2011, pp. 45 ff.

42 The text continues: “public finance law lives almost exclusively in statutes, none of which are well known outside the *cognoscenti* who advise treasury and finance ministries on their legal rights and obligations. No textbooks in Australia, Canada, New Zealand or the UK explains the form or

terms as “financial law” or “public finance” are used promiscuously, just as terms like “money” or “finance”. In fact, it does not matter which conception of public finance (or rather financial law) we are interested in, because these conceptions have these mentioned terms in common.<sup>43</sup>

From this perspective, “the uniqueness of each concept of public finance depends on the historical and political evolution of the country or region, in connection with culture, economy and social situation”.<sup>44</sup>

Last, an analytical definition distinguishes three branches of public finance law: “fiscal law, public accounting, budget law”, in any case highlighting that “the boundary between these disciplines is, by all accounts, not watertight. In this regard, public finance is truly a pivotal and intersectional discipline”.<sup>45</sup> From this perspective, public finance law includes the theoretical and normative questions related to both taxes and accounting principles. Moreover, it embraces all notions related to public budgets and controls over the use of public resources.

Therefore, to summarize, public finance law is the set of rules on: (i) ownership of the public financial power; (ii) taxes and public spending, including the use of public funds; and (iii) management and controls over public resources.

In the study of public finance law, in addition to the problematic definition of the field, there are at least four main issues to take into consideration. These are: the uncertain configuration of financial power in the public sector; the growing “juridification” of public finance; the “primacy” of financial rules and instruments; and the ever-stronger relationship between public finance rules and administrative law. A specific trend may be seen in each of these aspects.

### 3.1. The power of the purse

Parliamentary control of the budget has always been a traditional mark of western parliamentary democracy, from the very beginning. In British constitutional history, the “founding phase” of this power was characterized by the struggle between

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function of the masses of annual and standing appropriation legislation in each jurisdiction, or the statutes under which sovereign borrowing occurs, or the legislation governing the public finance activities of central banks”. Bateman, *Public finance*, pp. 14–15.

43 R. Bartes, Evolution of public finance in selected countries, in *Financial Law Review*, vol. 23, no. 3, 2021, p. 164.

44 Bartes, Evolution of public finance in selected countries, p. 164. Bartes analyzed the evolution of public finance law in France and Germany, concluding that “while the history of the public finance discipline in France dates back at least to the 14th century, in Germany a gradual evolution of this discipline can be observed with certainty only from the 19th century. In France, there are four main historical stages, in which it could be found out by observation of crucial milestones. . . . In the case of Germany, the situation was more complicated. . . . Public finance evolution in each state was different, which ended with the unification of Germany in 1871” (p. 182).

45 F. Waserman, *Les finances publiques*, Paris: La documentation Française, 2016, p. 9 (author’s own translation). On public finance law as a “science de carrefour” see P.-M. Gaudemet and J. Molinier, *Finances publiques*, 7th edition, tome 1, Paris: Montchrestien/LGDJ, 1996, p. 20. More recently, H. Rabault, *La constitution financière de la France. Sources fondamentales du droit des finances publiques*, 2nd edition, Paris: L’Harmattan, 2024.

the executive power (the Crown) and the parliament. It also played a central part in the American and French revolutions, and in the early nineteenth-century history of Belgium and Netherlands.<sup>46</sup> Nevertheless, the framework has significantly changed over time. Who truly exercises the power of the purse, today?

In anglophone systems, some scholarship highlights a specific trend. Parliaments should have full “dominion” over the power of the purse, which theoretically signifies the authority of the legislative body over controlling and distributing public funds;<sup>47</sup> however, they do not exercise it.<sup>48</sup> Power is exercised mainly by the government, which influences the entire governance of public finance.<sup>49</sup> In particular, with regard to the United Kingdom,

throughout the XIX century, the Cabinet of Ministers continued to strengthen its position until its powers in the Parliament were not very different from those of the Tudor and early Stuart Kings. And Ministers consolidated their powers by means of the party system which has tended to become progressively more and more rigid. The consequence of these developments has been that Parliament has lost its capacity to exercise a control over the Government.<sup>50</sup>

In other countries, such as France and Italy, the power of the purse is formally exercised by the parliament and the government (the president and ministers). However, in practice, public financial administrations have acquired an increasingly incisive role in the governance of public finances. Therefore, a peculiar trend emerges in these national contexts too.

In particular, the French Minister of Finance (more precisely, the *Ministre de l'Économie, des Finances et de la Souveraineté industrielle et numérique*) has a key role, a “*suprématie*”.<sup>51</sup> In the past, this Minister’s intervention took incisive

46 From a historical perspective, H.E. Fisk, *English public finance. From the Revolution of 1688. With chapters on the Bank of England*, New York: Bankers Trust Company Publications, 1920, Kessinger Publishing reprints, 2010, especially pp. 1–163.

47 In Edmund Burke’s theory of parliamentary politics, the power of the purse is the exercise of control over government on the behalf of the people. It is further explained by W. Selinger, *Parliamentarism. From Burke to Weber*, Cambridge: Cambridge University Press, 2019, p. 59.

48 D. Coombes (ed), *The power of the purse: The role of European parliaments in budgetary decisions*, London: Allen and Unwin, 1976. The book, after analyzing the origins of the power of the purse, demonstrates how, in various western European nations, the parliaments’ power over the purse is in decline.

49 In relation to the system in the United States of America, E. James Ferguson examined the financial history of the American Revolution and the Confederation, and its connection to the country’s constitutional development: E.J. Ferguson, *The power of the purse. A history of American public finance, 1776–1790*, NC: University of North Carolina Press, 1968. See also R.F. Fenno Jr, *The power of the purse. Appropriations politics in congress*, University of Rochester: Little Brown and Company, 1966.

50 F.A. Bland, Parliamentary control of the purse, in *The Australian Quarterly*, vol. 25, no. 2, June 1953, pp. 43–52.

51 “The supremacy of the Minister of Finance is a reality attributed to the particular characteristics of the role in the realm of public spending. This supremacy logically leads, at the level of administrative apparatuses, to the finance administration’s control over the flow of public funds”, S. Kott, *Le contrôle*



forms, such as monthly orders for the distribution of funds and a visa prior to making any expenditure order.<sup>52</sup> René Stourm asked whether “in France, will the authority of the Minister of Finance ever expand beyond its current limits? Will the other ministers tolerate his excessively intimate intrusion into their affairs?”<sup>53</sup> Today, the power of public finance administrative bodies has transformed: it has been shown “how the drive to control ‘commitment’ gave rise to the function of ‘financial expertise’ and led to the concentration of financial information within the public finance administration (Ministry of Finance)”.<sup>54</sup>

In Italy, the growth of the role of the national financial administration in the decisions on and management of financial resources is linked to political bodies’ progressive loss of direction and control in this area. There is undoubtedly a correlation between the two phenomena. In fact, “the inability of the political power and parliamentary forces to tame the growth of the bureaucracy, starting with the financial one, which, to the contrary, took on an increasingly corporate mentality as a ‘separate body’ of the State” contributed to the strengthening of the powers of the financial–budget administration.<sup>55</sup>

In brief, in many countries, the power of the purse migrated from one institution to another, highlighting the loss of control on the part of parliaments.<sup>56</sup>

### 3.2. *The juridification of public finance*

In relation to the second aspect, the question is: what fuels the juridification of public finance?

With the term “juridification”, we mean “the proliferation of law” or “the tendency towards an increase in formal (or positive, written) law”, per Jürgen Habermas.<sup>57</sup> In the field of public finance, a trend towards juridification has become increasingly established. At least three main factors have contributed to this process.

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*des dépenses engages*, Paris: Institut de la gestion publique et du développement économique, Comité pour l’histoire économique et financière de la France, 2004, p. 71 (author’s own translation).

52 Orders to distribute funds gave the Minister of Finance an efficiency and “a power of constraint over spenders that many finance officials of the Ancien Régime had claimed”, M. Bottin, Villèle et le contrôle des dépenses publiques, in *La comptabilité publique continuité et modernité, actes du colloque de novembre 1993*, Paris: Comité pour l’histoire économique et financière de la France, 1995, p. 23 (author’s own translation). On the visa power, “the Minister of Finance has extremely broad powers in terms of spending control. . . . In addition to the general supervision of accountants, the Minister of Finance exercised control over all orders that were payable only after the General Movement of Funds had affixed a visa”, G. Palthey, *The prior control of public finances*, Paris: P.U.F., 1942, pp. 14 and 16.

53 R. Stourm, *Le budget*, Paris: Guillaumin, 1896, p. 511 (author’s own translation).

54 Kott, *Le contrôle des dépenses engages* p. 71 (author’s own translation).

55 R. Faucci, *Finanza, amministrazione e pensiero economico. Il caso della contabilità di Stato da Cavour al fascismo*, Turin: Einaudi, 1975, p. 137 (author’s own translation).

56 This trend is extensively examined by G.E. Metzger, Taking appropriations seriously, in *Columbia Law Review*, vol. 121, no. 4, 2021, p. 1075.

57 J. Habermas, *The theory of communicative action*, vol. 2, Boston: Beacon Press, 1987, p. 359. The term is ambiguous, and has also been used for the judiciary (A. Stone Sweet, Judicialization and the



First is the “explosion of audits”, which contributed to the “explosion of rules”.<sup>58</sup> For example, in the British system,

the audit process was to assume a position of central importance in public service delivery and throughout British public administration. A new institutional basis was provided by the National Audit Act 1983, which set in place a well-staffed National Audit Office (NAO), which works alongside devolved counterparts. The National Audit Act empowered the NAO to examine and report on the economy, efficiency and effectiveness of public spending.<sup>59</sup>

The development both of financial and management audits, and of the functions of auditors, fuelled the adoption of a vast set of technical rules, parameters, criteria, etc. This happened in all EU countries where more advanced financial audits evolved.<sup>60</sup>

Second, the New Public Management (NPM) approach incentivized the development of legislation on fiscal responsibility. In particular, NPM promoted “management by objectives”, by connecting specific responsibilities to the achievement of results.<sup>61</sup> In this framework, “fiscal responsibility laws announce substantive economic principles relating to public sector finances, orientated towards reducing or eliminating fiscal deficits and burdens imposed by long-term public debt”.<sup>62</sup>

The NPM approach is, for example, at the basis of the EU’s adoption of numerous legal constraints and criteria to contain the deficit and public debt of the Member States belonging to the monetary union. Examples are not only the SGP, including the rules establishing the infringement procedures for excessive financial deficits, but also the even more rigorous rules adopted between 2011 and 2012 as part of the so-called “Fiscal Compact” and “Six Pack” and “Two Pack” measures.<sup>63</sup>

The third factor consists of the crises and emergencies that affected the global economy over the decades. Various fiscal responsibility laws were also the result of the need to adopt measures to control deficits and ensure debt sustainability, by containing the associated negative impacts. Each crisis catalyzed the introduction of a large set of rules, as will be seen in the following chapters.

construction of governance, in M. Shapiro and A. Stone Sweet (eds), *On law, politics and judicialization*, Oxford: Oxford University Press, 2002, p. 71).

58 Harlow and Rawlings, *Law and Administration*, p. 50.

59 Harlow and Rawlings, *Law and Administration*, p. 51.

60 The NAO has conducted a useful study on this: *State audit in the European Union*, December 2005, [https://www.nao.org.uk/wp-content/uploads/2005/12/State\\_Audit\\_Book.pdf](https://www.nao.org.uk/wp-content/uploads/2005/12/State_Audit_Book.pdf).

61 Ample literature is available on the NPM. Here, suffice it to recall the key studies by C. Hood, *The new public management in the 1980s: Variations on a theme*, in *Accounting, Organizations and Society*, vol. 20, no. 2–3, 1995, p. 93; and by D. Osborne and T. Gaebler, *Reinventing government. How the entrepreneurial spirit is transforming the public sector*, New York: Penguin, 1992 (which inspired the National Partnership for Reinventing Government or NPR, a government reform initiative launched in the United States in 1993 by Vice President Al Gore).

62 Bateman, *Public finance*, p. 119.

63 See Chapter II.

In brief, the financial crisis of 2008, which primarily affected the US financial market, induced market failure on a global scale, requiring public bailouts and new financial adjustments. In the EU, on one hand, stricter financial constraints were introduced (the so-called austerity rules); on the other, collective financial assistance mechanisms were activated (consider especially the European Stability Mechanism, or ESM).

A similar reaction characterized the management of the effects of the COVID-19 pandemic. This global crisis too spiked the levels of sovereign debts, forcing states to find new resources for the significant increase in public spending on aid and assistance interventions to support the affected populations. Once again, financial rules were adopted. These were defined mostly by the EU, which activated the SGP's general escape clause and established a recovery programme and fund, NextGeneration EU. The EU also developed an articulated financial regulatory framework, the Multiannual Financial Framework (MFF) 2021–2027. Within this framework, the European Commission was temporarily authorized to issue financial instruments on the open market to directly retrieve the resources required to finance the Member States' recovery programmes (Council Decision 2020/2053 of 14 December 2020, or ORD).<sup>64</sup>

Also, Russia's invasion of Ukraine in 2022 and the ensuing critical effects on the European energy market led the EU to adopt several financial rules, in particular to promote energy transition processes in Member States (among many, the REPowerEU plan).<sup>65</sup>

### **3.3. The “primacy” of public finance rules**

With reference to the third aspect, the “primacy” of financial rules and instruments explains how the governance of financial means conditions the definition of public goals, by assuming a central weight, sometimes even in the preparation of reforms.

“Public action is a sociopolitical space constituted both by the techniques and tools and by the purposes, contents and projects of the actors”.<sup>66</sup> On this point, it has been noted that the functionalist approach, for which the most important factor are the ends, is now outdated: “the view that tools are merely instrumental is now reversed, as they enter the foreground”.<sup>67</sup>

64 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (ORD).

65 R. Bouckaert, *From the green deal to repower EU. What about the EU's Southern fossil gas suppliers?* Foundation for European Progressive Studies, February 2023, <https://feps-europe.eu/wp-content/uploads/2023/02/From-the-Green-Deal-to-REPower-EU.pdf>.

66 P. Lascoumes and P. Le Galès, *Introduzione. L'azione pubblica attraverso i suoi strumenti*, in P. Lascoumes and P. Le Galès (eds), *Gli strumenti per governare*, Italian edition, Milan: Mondadori, 2009, p. 2 (author's own translation).

67 S. Cassese, *Prefazione*, in P. Lascoumes and P. Le Galès (eds), *Gli strumenti per governare*, Milan: Mondadori, 2009, p. X.

The instruments prevail over the ends even more significantly in the context of the financial means and practices adopted in public administration. This is a long-standing trend: already in the introduction to the first complete treatise on Italian administrative law, edited by Vittorio Emanuele Orlando, it was noted that “the budgets of modern states have increased by prodigious proportions, so much so that finance, from being a simple means, has ended up prevailing over the goals of the modern state”.<sup>68</sup> From this perspective, financial rules and measures can be defined as “governance tools”.<sup>69</sup>

To specify the meaning of financial primacy, at least two aspects can be considered. First, what are the foundations of such primacy? Second, what are its effects?

With regard to the foundations, it is possible to recognize a “need for financial rules”. This need is strictly connected to the politics of sound public finances, as currently defined by Article 317 of the Treaty on the Functioning of the European Union (TFEU).<sup>70</sup> The principle of sound public finances involves balanced budgets, reduction of public debts, transparency in reporting, audits, control of expenditure and more.<sup>71</sup> It derives from the rule of law as applied in the EU context: “respect for EU values must be ensured throughout all EU policies, including the EU budget”.<sup>72</sup> Especially in relation to EU funds,

the CJEU [Court of Justice of the European Union] holds that the principle of sound financial management . . . corresponds to the principle of sincere cooperation (as applied more generally in EU law). The CJEU often recalls this principle in the context of EU rules that establish tasks related to the management and spending of EU funds to underline the necessity of ensuring the integrity of their distribution.<sup>73</sup>

From another perspective, “sound financial management can be understood as closely associated with ‘value for money’ considerations – above anything else”.<sup>74</sup>

68 V.E. Orlando (ed), *Primo trattato completo di diritto amministrativo italiano*, Milan: Soc. ed. Libreria, 1897, I (Introduzione), p. XIII (author’s own translation).

69 P. Bezes and A. Siné (eds), *Gouverner (par) les finances publiques, Perspectives de recherche*, Paris: Presses de Sciences Po, 2011, p. 17.

70 Article 317(1): “The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management”.

71 Sound public finances form the cornerstone of budget law. See Chapter V, Section 2.

72 A.V. Bogdandy and J. Lacy, *Suspension of EU funds for breaching the rule of law – a dose of tough love needed?* in *European Policy Analysis*, no. 7, June 2020, p. 2.

73 Bogdandy and Lacy, *Suspension of EU funds for breaching the rule of law*, p. 4.

74 N. Vogiatzis, On the interplay between good administration and sound financial management. The view from Strasbourg, in P. Stephenson, M.-L. Sánchez-Barrueco and H. Aden (eds), *Financial accountability in the European Union. Institutions, policy and practice*, London and New York: Routledge, 2021, p. 77.

Therefore, the primacy of public finance law in the EU context is based on the need to guarantee specific financial conditions in order to preserve the economy of the Member States and ensure first entry, and then permanence, in the monetary union (euro area). The Treaty of Maastricht, as later also reiterated in the TFEU, declares that sound management of the public finances of Member States must be considered one of the main premises for the creation of an open market economy with free competition, giving rise to the need to set specific and uniformly applicable parameters, based on the ban on excessive deficits. This goal prevails over all others.

With regard to the foundations, there is another aspect to consider. The primacy of public finance law also appears to derive from financial rules' apparent "moralizing force". Using public resources properly is a duty, regardless of the existence of specific regulatory provisions. Such proper use enables concrete respect for the rule of law, which lies at the basis of a democratic state, a cornerstone of modern civilized democracies. This ideological perspective has also been expressed in the following terms: "finance is like fate in ancient times: it leads the willing and drags the unwilling".<sup>75</sup>

The primacy of public finance law has multiple effects, as will be seen in the forthcoming examples.

Some scholars examine the relationship between public finance and the protection of rights, by highlighting at least two dimensions. The first considers the positive impact that public financial rules can have on the protection of some fundamental rights (as in the case of the European financial conditionality, envisaged to guarantee the protection of the rule of law: see, for example, Regulation EU 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, or the rules on European funds for the common agricultural policy and cohesion policies). The second dimension, instead, highlights the negative impacts and limitations that public financial constraints can have on the protection of certain social rights (for example "financially conditioned rights", which the Italian Constitutional Court examined in relation to the rules on public spending cuts).<sup>76</sup>

Other effects regard how public finance constraints condition the formulation of administrative reforms, not only in the sense of spending reviews but also of developing specific public policies (such as digital transition in public administrations, financed by NextGeneration EU). From this perspective, the rules on public finance conditioned the policies to recover and relaunch the country after the pandemic, especially within the NextGeneration EU framework.<sup>77</sup>

Last, the primacy of public finance law strengthens public administration, and especially the role of the financial bureaucracy. It is the natural reflection of the growing weight of financial means in formulating public policies: whoever manages the resources also manages the power. This tendency is also part of the more

75 Chamber of Deputies of the Italian Parliament, *Discorsi parlamentari di Marco Minghetti, II*, Roma: Tipografia della Camera dei deputati, 1888, 2 August 1862, p. 78 (author's own translation).

76 For further details, see Chapter V, Section 2.

77 See Chapters III, Section 4 and V, Section 1.

complex phenomenon of the power of “instrumentation” (think of Max Weber’s theories on the role of the instruments of public action as techniques for domination, or Michel Foucault’s studies on the concept and practices of “governmentality”).<sup>78</sup>

Currently, the growing weight of the EU financial constraints is one of the main causes of the strengthening of both public administration (to the detriment of politics) and the administrative bodies’ ability to influence public policies. However, this tendency was also clear in the past. Basically, financial constraints are not readily understandable by politicians, while they are the “daily bread” of the professional bureaucracy.

Think of the Treasury’s role in the history of England, as told by John Maynard Keynes:<sup>79</sup>

The Treasury has been co-existent in its present form with the civil service in its present form, and it was the crown of the structure which under the Gladstonian epoch took the place of the old semi-corrupt patronage institutions which were the legacy of the eighteenth century. Under the successive great chiefs of the Treasury, its prestige was built up. As it existed in the days previous to the war, while its legal authority was very considerable, its real force was derived, I should say, from its prestige which had been built up by the successive great chiefs under various Chancellors of the Exchequer and traditions of government of which it was so important a part.

Moreover, “the Treasury thus came to adopt those weapons which are, perhaps, usual with an institution which depends to a great extent on prestige – precedent, formalism, aloofness, and even sometimes obstruction by the process of delay, and sometimes indefinite replies”. The upshot is that:

the Treasury is not only the head of the civil service in name, but it stands for the prestige of the whole body; and no bureaucracy can be efficient unless it is subject to the hourly castigation of a formidable Treasury.<sup>80</sup>

Thus, the technicality and relevance of the rules and instruments of public finance strengthen those who know and control them – the financial bureaucracy (“*burocrazia della cifra*”, in Italy). In this sense, the primacy of public finance law translates into the strengthening (and primacy) of public administration (and especially of public financial administration).<sup>81</sup>

78 On the relationship between instrumentation and administrative capacities, K. Wegrich, Policy instruments and administrative capacities, in B.G. Peters and I. Thynne (eds), *Oxford encyclopedia of public administration*, Oxford: Oxford University Press, 2022.

79 In January 1915, Keynes took up an official government position in the Treasury.

80 Shorthand record of a speech given by Keynes in 1921 at the Society of Civil Servants. The speech is published in English and Italian: G. Farese, *John Maynard Keynes. Il Tesoro*, Rome: Fondazione Ugo La Malfa, 2018, p. 48.

81 This theory is explained by J. Gonçalves De Araújo, F.J. Sobreira De Matos and J.G. Nascimento De Araújo, Accounting as a tool for maintenance of bureaucratic domination, in *International Journal of Critical Accounting*, vol. 10, no. 5, 2018, p. 380.

This book identifies and explores a new issue: the effects of public finance rules on the public administration. This approach could be considered a new way of studying and demonstrating the primacy of public finance law, through a reversal of perspectives: no longer is the lens of the exercise of power adopted, but rather that of the specific impacts of the exercise of such power. Such impacts also have repercussions on those involved in the exercise of power, that is, public administration, as will be explained in the following chapters. For this reason too, the approach both of administrative law and of public administration scholarship take on a central role.

### **3.4. Public finance law as part of administrative law**

Paul Laband defined budget law as “the cornerstone and basis of all rights of representation of the people, the fulcrum of constitutional law”.<sup>82</sup> Later, the fourth volume of Guido Zanobini’s “Administrative Law Course”, on the “tools of administrative action”, contains an analysis of “financial legislation as part of administrative law”. It concerns the “dynamic tools” of public action, which demonstrate the “natural position of financial activity within the broader field of administrative activity”.<sup>83</sup>

Therefore, public finance law is intimately connected with public law. In particular, it is possible to affirm that the origin of financial power (the power of the purse) constitutes the backbone of every modern parliamentary system, the reason why there are constitutional law studies on the genesis and substantive nature of this power. At the same time, its concrete exercise is of direct interest to the executive branch and, in particular, to the public administration; various administrative law textbooks devote a chapter to public finance.<sup>84</sup>

The management of public resources is one of the main functions of public administration. The use of public resources is an instrumental activity and forms the objective of the organization of public administrations. The management phase is usually characterized by common revenue management procedures (assessments, collections, tax payments) and expenses (commitments, liquidations, orders and payments) and by other administrative tasks of different types. Indeed, the public administration is tasked with the management of public resources, although, as reported in the previous section, the administration also plays an increasingly significant role in decision-making and governance – that is, the direction expressed through the identification, definition and programming of financial means. Public administration *de facto* affects and makes many financial choices, which precede the management phase.

From this perspective, public finance law is the core of the administrative state.<sup>85</sup>

<sup>82</sup> Laband, *Das Budgetrecht*.

<sup>83</sup> G. Zanobini, *Corso di diritto amministrativo*, vol. IV: *I mezzi dell'azione amministrativa*, Milan: Giuffrè, 1945, p. 250 (author’s own translation).

<sup>84</sup> For an interesting point of view, see Tsindeliani, *Estructura institucional del derecho de finanzas públicas*, p. 370, which studied how to define the system of financial law as a separate branch of the law.

<sup>85</sup> For a general perspective, see K.C. Dogan and O. Ugur (eds), *Public administration and public finance research*, Lyon: Livre de Lyon, 2021. This work analyzes the relationship between public administration and public finance in non-EU countries, such as Türkiye.

Currently, the centrality of public finance law in the activity of public administrations, and consequently administrative law, is even greater, for at least two reasons. The first is the process of EU integration, especially through the creation of the monetary union. This entailed the establishment of precise constraints and financial rules at the EU level, the application of which was entrusted mainly to national public administrative bodies in the Member States.

For example, the balanced budget rule established under EU law requires Member States to carefully evaluate the financial effects of expenditure forecasts on their balances, not only in the state budget but also in the legislative acts adopted throughout the year and that may entail new or greater charges than those foreseen in the budget. Identifying these effects, especially on countries' net debt, is key to comply with EU parameters, especially under the previous SGP. For budget forecasts, this calculation is entrusted to public administration – more precisely, to the administrative bodies dealing with public finance. For further regulatory provisions involving new or greater charges than those in the budget, the task would fall to the ministries responsible for the matter covered by the expenditure forecast. This significantly affects the public administration's actions.<sup>86</sup>

Another example regards the introduction of the European Semester cycle. This Semester has a timetable, according to which the Member States receive EU guidelines and then submit their policy plans for assessment by EU institutions. The evaluation of these plans, explained in country-specific recommendations (CSRs), affects national budgetary and reform policies. "The Member States are expected to take these recommendations into account when defining their budget for the following year and when taking decisions related to their economic, employment and education policies, among others".<sup>87</sup> The cycle is articulated in various phases, within which EU institutions orient and monitor the main public reforms and choices of Member States.<sup>88</sup>

Therefore, EU rules on public finance are increasingly blended with the state's procedural and organizational administrative rules, becoming one and the same.

The second reason why public finance law has assumed a pivotal position in public administrative activity concerns the recent economic global crises, which also involved the EU. The great economic crises of recent decades, such as the one resulting from the COVID-19 pandemic, have highlighted even more how the EU Member States' stability and capacity for recovery and development depend, first and foremost, on the ability to direct and manage public resources, in the two opposing perspectives of austerity and the more recent one of "cascade of resources". In both cases, the financial framework played a preliminary role, constituting the framework within which public administrations were required to implement reform plans.

The application of the national recovery and resilience plans (RRPs) under the NextGeneration EU framework is a clear example of this trend. The Recovery and

86 See Chapters II, Section 3 and III, Section 5, which also analyze the revised SGP.

87 See <https://www.consilium.europa.eu/en/policies/european-semester/how-european-semester-works/>.

88 For the analysis of the European Semester cycle, see again Chapters II, Section 3 and III, Section 3.



Resilience Facility (RRF) generated an enormous amount of new administrative rules, profoundly influencing the reporting methods of administrative activities, the regulation of public contracts, the transparency of public accounts and the system of administrative controls, to mention only some aspects.<sup>89</sup>

Both of the aforementioned reasons (EU monetary policy and economic global crises) can be considered “exogenous” factors with respect to the state. These phenomena not only have enormous impacts on the subject matter of administrative law (the organization of the administration, civil service, administrative procedures, institutional relations, etc., as will be seen in following chapters) but also on the configuration of this branch of law in relation to the legal system, as a whole. Administrative law has become the “site” where the rules of national administrative action and the needs of public finance, increasingly dependent on exogenous factors, are reconciled. From this perspective, administrative law today contains the “point of balance” between the specificities of national systems and the financial conditioning resulting from multifarious external sources. This tendency has fuelled the “living dimension” of this branch of law, which evolves into strict adherence to the evolution of the relationship between public institutions and civil – today, global – society.<sup>90</sup>

#### **4. The European Union context: the scope of the analysis**

In the EU context, a “supranational governance of public finance” is distinguishable, based primarily on Articles 119 and 121 TFEU. Article 119(3) TFEU establishes the principle of sound (national and supranational) public finances within the regulation of economic and monetary policy. Article 121(3) provides for “closer coordination of economic policies and sustained convergence of the economic performances of the Member State”. Therefore, public finance governance in the EU is based on a general mechanism of closer coordination among Member States, and between the EU and each Member State. It reflects a specific structure of

89 For an analysis of the burdens entailed under NextGeneration EU and related details, see D. Cahen, A. Valroff and E. Krief, *Is next generation EU a game changer? A comparison with IRA and ways to respond*, EUROFI Regulatory Update, February 2024, [https://www.eurofi.net/wp-content/uploads/2024/03/eurofi\\_is-next-generation-eu-a-game-changer-a-comparison-with-ira-and-ways-to-respond\\_ghent\\_february\\_2024.pdf](https://www.eurofi.net/wp-content/uploads/2024/03/eurofi_is-next-generation-eu-a-game-changer-a-comparison-with-ira-and-ways-to-respond_ghent_february_2024.pdf).

90 There are several studies on how EU law affects national administrative law in Member States: for example, among the studies regarding the founding Member States, see H. Hofmann, *Europeanisation and German public administration*, in S. Kuhlmann, I. Proeller, D. Schimanke and J. Ziekow (eds), *Public administration in Germany. Governance and public management*, London: Palgrave Macmillan, 2021, p. 53; on the newer Member States, see J. Radomir, *The influence of EU Law on public administration in new Member States*, in *Public Governance, Administration and Finances Law Review*, vol. 5, no. 1, 2020, p. 48. In contrast, it is worth mentioning the study of L. Enqvist and M. Naarttijärvi, *Administrative independence under EU law: Stuck between a Rock and Costanzo?* in *European Public Law*, vol. 27, no. 4, 2021, p. 707, who explained how the effect of the EU law obligations of effectiveness and loyalty weakens the government’s hierarchical influence over its own bodies, interfering with the effective application of EU law. Nevertheless, there are no studies on how EU public finance rules have shaped – and are shaping – national public administrations.



attributions: while monetary policy at national and supranational levels is an exclusive competence of the EU (regarding which the roles of the European Central Bank, or ECB, and the European System of National Central Banks are essential), economic–financial policy falls within the shared competence of the EU and the Member States.

This legal framework is the result of a long historical process.<sup>91</sup> In particular, the affirmation of an EU monetary governance, which began as early as the 1970s with the establishment of the European Cooperation Fund and the European Monetary System, gradually led to the inclusion of national budgetary policies in the matters of common EU interest.<sup>92</sup> At least two important points arise. The first regards the centrality of EU monetary policy and its growing ability to influence economic–financial policy at national and supranational levels. The second concerns how the governance of public finances constitutes the *passé-partout* through which the needs of EU monetary policy influence not only the contents of national public policies but especially the configuration of the “right of budget” and, more specifically, national public administration.

In relation to the first aspect, the Delors report recognized the strong role of the ECB and foreshadowed a centralization of monetary policy, separating it from economic–financial policy, as was then crystallized in the Maastricht Treaty and in the TFEU.<sup>93</sup> Some scholars underlined that this separation was a serious mistake in the construction of the EU legal framework.<sup>94</sup> Nevertheless, EU monetary policy does not only have strong and evident connections with economic–financial policy (it should be recalled that sound national public finances were defined as a main parameter for the development of the EU monetary union, as programmed by the aforementioned Delors report). Above all, it also exercised growing forms of conditioning on economic–financial governance in Member States, by increasingly affecting the public finance choices adopted by national governments.

This ability of monetary policy to influence the governance of national public finances became more pronounced especially during crises. Briefly, the sovereign debt crisis and, in particular, the near-default of Greece in 2009–2010 led the ECB to intervene on a “supplementary basis” due to the limited effectiveness of

91 It was a process partially influenced by the – positive and negative – developments of the preexisting Bretton Woods system: for the theoretical framework, we recall the well-known study of J.M. Keynes, *A treatise on money* (1930), London: Palgrave Macmillan, 1935, especially Chapters 36 and 38 (vol. VII), pp. 332 and 388 ff.

92 From a historical point of view, A. Varsori, *Storia della costruzione europea. Dal 1947 a oggi*, Bologna: Il Mulino, 2023, especially p. 185.

93 The Delors report (report on “Economic and Monetary Union in the European Community”, April 1989), among other aspects, studied the full and irreversible convertibility between currencies, the absolute free movement of capital and the elimination of exchange rate fluctuations.

94 Nevertheless, this approach was strengthened by the CJEU. In Case C-370/12, *Thomas Pringle v Government of Ireland*, 27 November 2012, it excluded that the ESM Treaty could affect the rules on monetary policy, on the basis of the different objectives pursued by the two types of measures: the mechanism for granting financial assistance to Member States “manifestly does not fall within the sphere of monetary policy” (paragraphs 53 and 57).

the financial assistance instruments put in place by the European Commission (or Commission) and Council of the EU (or Council). To this end, the ECB purchased bonds and debt securities of struggling Member States (Italy, Spain, Portugal, Greece), made loans to central banks (to increase circulating liquidity), established reductions of the interest rate and launched the Outright Monetary Transactions (OMTs) programme, with which the ECB could unlimitedly purchase public debt securities of Member States that agreed to implement a structural reform programme. Moreover, in 2015, the ECB launched quantitative easing programmes to promote an increase in the quantity of currency in circulation and to facilitate access to credit for businesses and families. Through these tools and interventions, monetary policy strongly influenced the adoption of several public reforms in some Member States, in those specific historical phases.<sup>95</sup>

More recently, it should be noted that the RRF, within NextGeneration EU, further increased the weight of monetary policy and its connection with the governance of public finances. In particular, the “common European indebtedness”, with the issuance of debt securities directly by the Commission (in a “Europeanization” of debt), had the main aim of guaranteeing the conditions to ensure price stability and the solidity of the euro area. The trend confirms that monetary policy has always been the main driver of the EU public finance choices applied to Member States.

As regards the second aspect, it can be seen that the governance of public finances is the vehicle through which EU monetary policy can influence national legal systems. In this sense, a “chain of conditioning” is recognizable, which starts from EU monetary policy and reaches national public administrations in the Member States. The conditioning operates through indirect interconnections, intrinsic but not formalized links, which are made possible especially thanks to the tools and rules of public finance established by the EU.

This phenomenon makes far-reaching changes to the configuration and aims of the right of budget. Previous sections have highlighted how such a right lies at the origins of modern European national states, representing the cornerstone of democratic–parliamentary structures. The sections recalled the fundamental principle according to which the budget, which contains the state’s main financial rules, is approved by the parliament (the representative body of the community taxpayers), which authorizes the government (in the past, the sovereign) to exercise the power to arrange income and expenses. Spending is limited by the economic capacity and willingness of taxpayers to finance it.

In the EU context, the original aims of the national right of budget are increasingly replaced by the purposes of EU monetary policy, through the rules and tools of EU economic–financial policy. This trend – as will be seen in the following

95 For a general analysis of impacts deriving from crises on the EU, also in the financial dimension, M. Riddervold, J. Trondal and A. Newsome (eds), *The Palgrave handbook of EU crises*, London: Palgrave Macmillan, 2021, pp. 375–442 (the four chapters written, respectively, by A. Newsome, M. Riddervold and J. Trondal; E.D.H. Olsen and G. Rosén; E. Tegle Stenstad and B. Sofus Tranøy; J.A. Caporaso).

chapters – places public administration at centre stage for at least two reasons. First, national finance rules are strongly conditioned by EU financial rules and programmes. This further contributes to the weakening of national parliaments (with the resulting problem of a democratic deficit), since financial decisions taken in Brussels assume a leading role, and the main interpreters of those decisions are the national executive branches, through the technical–administrative apparatus.<sup>96</sup> Second, EU financial rules and programmes, which are also implemented at the national level, touch upon every aspect of public administrative action. Hence, a “shaping power” of public finance law emerges, in ways and forms that will be examined in the following chapters.

Therefore, EU and national public finance rules (which usually implement the European ones) are the main tools of this shaping power. At the same time, EU institutions and, especially, public administrations in the Member States are “shaped”. In the past, “administrative systems and administrative law were shaped according to the needs of the various different state models”.<sup>97</sup> Today, national administrative systems are shaped by public finance rules, according to technical and exogenous needs.

This scenario raises numerous questions. Do public finance rules cause the fragmentation of public administrations? Or, on the contrary, do they standardize them? Do they “Europeanize” public administrations? Do they improve them? Do they make them worse? Do they affect the relationships between the public administration and other public powers? Do they affect the capacity of public administrations to protect fundamental rights?<sup>98</sup>

## 5. The structure of this book

The main purpose of this book is to analyze how the proliferation of public finance rules (public finance law) in the EU has affected – and still affects – the configuration of public administrations in EU Member States, shaping their characteristics in light of technical needs, which do not always represent general public interests.<sup>99</sup> The ultimate goal is to understand whether such a “shaping power” has resulted in the capacity to improve the public administration or, instead, has produced negative and dysfunctional effects, especially for civil society. Therefore,

96 On the democratic deficit in the EU, there is a vast literature. Among the many studies, we limit ourselves to recalling D. Curtin, *Executive power of the European Union. Law, practices, and the living constitution*, Oxford: Oxford University Press, 2009 and P.L. Lindseth, *Power and legitimacy. Reconciling Europe and the nation state*, Oxford: Oxford University Press, 2010.

97 S. Cassese, The administrative state in Europe, in A. von Bogdandy, P.M. Huber and S. Cassese (eds), *The administrative state*, vol. I, Oxford: Oxford University Press, 2017, p. 58.

98 A wider process of “Europeanization” has been studied in terms of institutional learning and legal doctrine: K. Featherstone and C. Radaelli (eds), *The politics of Europeanization*, Oxford: Oxford University Press, 2003 and M. Bobek, Europeanization of public law, in A. von Bogdandy, P.M. Huber and S. Cassese (eds), *The administrative state*, Oxford: Oxford University Press, 2017, p. 631.

99 Therefore, this analysis is not an economic evaluation or impact assessment of the rules (such as those implemented by the EU Commission for EU rules).

the book seeks to shed light on and study a phenomenon or trend that transcends specific temporal coordinates, while having a specific spatial scope (the territory of the EU).

The effects to be considered are those related to the application of the rules, but also those that arise due to changes in the EU system and are reflected at the national level. Accordingly, the impacts of public finance law on the “static” elements of public administration (functions, public organization and the civil service) are analyzed.

The analysis will develop in the following chapters and, in particular, in Chapter II (*The problem*). This chapter examines the legal dimension of public finance, reconstructing the complex of principles and rules adopted by the EU. EU financial rules have a crucial role and impact on the national management of public finance. From this perspective, there exist a multilevel governance of public finance and a complex of financial law sources applied at both the EU and national levels, with significant effects on the configuration and functioning of the public administration.

Chapter III (*The origins of the problem*) examines the effects of the global crises on public finance and, especially, how they have contributed to the expansion of public finance law in EU legislation. More precisely, public finance rules have proliferated over the course of a decade. This was fuelled by the directly proportional relationship between the entity of the crises, exacerbated by the outbreak of war in Ukraine in 2022 and the interventions of the EU and national regulatory powers. This trend left – and continues to leave – notable marks on the public administration, at both supranational and domestic levels. Indeed, the recent global economic crises increased the legal dimension of public finance. This emerged visibly in relation to the 2008 economic crisis but also the more recent one caused by the COVID-19 pandemic, which entailed the need to define and adopt new financial rules. Indeed, in both the austerity and the post-pandemic periods, the EU adopted several financial rules and measures to deal with the crises affecting the Member States (and the rest of the world). This contributed to the increasing influence of public finance rules on the EU administrative apparatus, especially the role of the Commission, and on public administration in the EU Member States. In this sense, the constant leading role of public finance law in the EU emerged.

The following chapters of this book engage in a detailed analysis of the various impacts of public finance on public administration in EU Member States. In particular, for the purpose of identifying these forms of conditioning or impacts, certain key components of the public administration are selected.

Chapter IV (*How public finance rules shape public administration: case studies*) analyzes the impacts of public finance rules on certain structural aspects of the public administration, here called “static elements”. These elements include activities such as the provision of public services, the organization of the public administration (apparatus, ministries, departments, agencies, etc.) and the civil service. The chapter examines the impacts of public finance rules on administrative activities, especially the development or curtailment of public services. Second, it studies how public finance rules redefine the scope of public administrations’ organization.

Third, it analyzes the impacts of public finance rules on the size of the civil service. For each element, case studies from selected EU Member States are examined. Nevertheless, the analysis does not compare different national experiences, but rather shows how public finance rules act in different EU Member States.

Chapter V (*Constructing a theory of the shaping power: general trends and perspectives*) reconstructs general trends and perspectives in the implementation of public finance rules, especially in relation to the political and social dimensions. The chapter draws a set of outcomes (lessons) from the case studies analyzed in Chapter IV, around a series of questions. Do public finance rules improve or worsen the functioning of the public administration? Does more public spending mean better functioning for the public administration? What is the impact of the primacy of public finance rules on good administration? Is there opposition between the principle of sound financial management and that of good administration? Did these principles improve the public administration's capacity to react to increased complexity in the management of public resources? Did these regulations strengthen the role of the public administration, or weaken it by favouring other centres of power?

In answering these questions, on one hand, the chapter explains the relationship between public administration and civil society, also in relation to the ability of public administration to protect individual rights and public interests. On the other hand, the chapter considers the relationship between public administration and politics in broad terms, especially the roles of public administration, governments and parliaments in the exercise of financial power. An analysis of the public finance rules' impacts on the balance between public powers follows, examining how public finance rules boost the role of budget administration (especially) to the detriment of the other public institutions. At the same time, the chapter investigates the influence of public finance rules on the relationship between public administration and the private sector, highlighting interesting trends.

Chapter VI (*Conclusions: will public finance law "save" public administration?*) concludes the analysis, highlighting that the shaping power of EU public finance law is not detrimental to public administration – quite the opposite. Nevertheless, the national implementation of EU public finance rules and measures has generated various problems, due to the promotion of a model that is not always aligned with the specificities of public administrations in the Member States. The future implementation of EU public finance rules should, instead, take these specificities into greater account, also because public administrations in Member States will play an increasingly crucial role in the future evolution of the European public finance system.

# **Public Finance Law and Public Administrations**

The Shaping Power of Public Finance  
in the European Union

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First published 2026

ISBN: 978-1-032-74124-6 (hbk)

ISBN: 978-1-032-76713-0 (pbk)

ISBN: 978-1-003-47976-5 (ebk)

## **V Constructing a theory of the shaping power**

General trends and perspectives

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DOI: 10.4324/9781003479765-5



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# V Constructing a theory of the shaping power

## General trends and perspectives

### 1. Lessons learned from the analysis

The previous chapters highlighted a number of important issues and trends serving to construct a theory of the shaping power of public finance law. To this end, this chapter first examines the main issues and general aspects that emerged in the foregoing analysis, identifying at least four lessons that can be drawn from the study. The lessons concern the tools on which the shaping power is based, how the power works, the context within which it arises and the relationships between the shaping power and certain administrative law reforms.

According to the theory, certain critical questions emerge, relating to an assessment of the impact of public financial rules on the public administration. First and foremost: do these rules improve or worsen public administration?

Answering this question requires revisiting some general concepts and principles, such as the principle of good administration, and relating them to the general principle of sound financial management. This implies considering the “relational dimension” of the shaping power. This dimension is characterized by three facets.

First, the relationship between public finance law and individuals (or, generally, civil society), in connection with the notion of good administration. In this regard, not only does financial regulation shape the structure of the public administration, but financial rules also affect how the public administration relates to civil society and, therefore, its ability to pursue general public interests and to protect fundamental rights.

The relational dimension of the shaping power also includes the relationship between the public administration and other public powers. From this perspective, the shaping effect of public financial rules involves the relationship between the national public administration and EU institutions (especially the Commission) and between the public administration (especially the budget administration) and other centres of public power within national systems.

Finally, the shaping power of financial rules affects the relationship between the public sector and private powers, especially economic power (enterprises, economic operators, etc.), reconfiguring it.

**1.1. The tools of the shaping power**

The tools of the shaping power consist especially of rules. As seen in previous chapters, these comprise EU rules and the national rules adopted to transpose and/or implement them. Therefore, throughout this book, the expression “EU public finance rules” encompasses national transposition and implementation rules as well.<sup>1</sup>

Rules can belong to different categories. For example, there are the principles and constraints deriving from the EU Treaties and agreements, such as the SGP. The principle of sound financial management and the principle of the balanced budget (according to which the budgetary position of a Member State’s government must be balanced) are other examples. These are stringent and coercive rules, in that their violation leads to negative consequences for noncompliant Member States – initiation of an excessive deficit procedure, imposition of sanctions, etc. At the same time, the application of these rules leaves Member States some leeway.

More precisely, the principle of balanced budget is a highly “relative” rule and is dynamic and tendential in nature. Indeed, it refers to the sustainability of the budget in the medium term, encouraging the Member State’s gradual approximation to the EU’s parameters. The balance allows for forms of cyclical compensation between budget surpluses and deficits, as well as deviations from the objective in case of exceptional events. Although this category of rules is the most coercive type of tool, the rules are relatively pliable given that Member States can deviate from the parameters under certain conditions.

Another category consists of the EU acts adopted within the European Semester(s). In all cases examined in Chapter IV, it could be seen that the Commission’s recommendations (as CSRs) and reports or the Council’s recommendations and opinions, as well as other types of EU public acts, specified the interventions Member States were to adopt to pursue certain financial objectives, relevant to the national economic and financial cycle. These rules were not coercive in the strict sense, but, especially in some cases, their implementation was essential to obtain a positive assessment by the EU institutions and/or access to EU funds and other financial assistance.

European Semester acts are usually closely related to the parameters and principles defined in the EU Treaties and in the SGP. All rules are linked to one another. The recommendations of the European Semester are based on an assessment of the Member State’s compliance with parameters indicating stability. In turn, those recommendations affect the ESM’s financing programmes, and so on.

Generally, the tools through which the shaping power operates are characterized by a legal nature, necessary to produce the shaping effects.<sup>2</sup> Indeed, legal

1 The nature of financial rules is seen in detail in Chapter II, Section 1.2.1., which sets out a detailed description and taxonomy of EU financial rules. Only some types of rules are mentioned here.

2 This finding is in line with studies on the general impacts of EU law on national legal systems: among many, see T. Van Den Brink, The impact of EU legislation on national legal systems: Towards a new approach to EU – member state relations, in *Cambridge Yearbook of European Legal Studies*, vol. 19, 2017, p. 211; P. Eeckhout, The growing influence of European Union law, in *Fordham International Law Journal*, 2011, p. 1490. More generally, the phenomenon of “juridification” indicates



rules have a recognizable form, valid for all Member States. They are official, as emanations of the EU's power. Also, they are supported by enforcement instruments. In other terms, the tools of the shaping power are “legally existing” rules.<sup>3</sup> Means without a legal nature may have the capacity to produce effects; consider rating agencies' assessments, which are not legal in nature but have incisive effects on markets and national economies. However, these effects are not legally shaping – they cannot affect the public administration.

In this sense, the legal nature of the instruments, through which the power manifests, is a specific and structural characteristic of power itself. The shaping power of public finance needs legal rules – hence, the shaping power of public finance law. This has been clear since the beginning of this book, to the extent that could almost be considered to presuppose the study. However, this is not a foregone conclusion, because these legal rules are quite peculiar.

The means are, in fact, rules “with broad meshes”. They are neither general rules nor detailed rules in the strict sense. They are “open-structured” rules conditioned by utilitarian considerations. They are necessary in order to follow the right direction. If the Member State does not comply and takes the wrong path, it commits an infringement (given the legal nature of the rule) and suffers negative consequences that it would be convenient to avoid (utilitarian perspective). If the State takes the right direction, the rules support and encourage it, relying on the State's capabilities and timing.

As regards their contents, the rules (especially those examined) often contain very well-defined indications. The EU financial rules indicate the interventions that the Member State must implement. Therefore, the contents and types of national interventions are directly decided at the EU level, especially by the Commission's technical bodies and offices. This is an interesting trend, which has grown over time (significantly accelerated by NextGeneration EU). It is a break with the past or, at least, a new configuration of the relationship between Member States and the EU.<sup>4</sup>

Some important questions emerge: at the EU level, and in the Commission especially, is there a clear idea of how national public administrations work and how they can be improved? Or is this a “one-size-fits-all” approach, generically applied to all Member States?

Both in the European Semester CSRs and in the assessments and reports associated with the RRP and related funding, a uniform method emerges. The EU acts and rules consider the same aspects for each Member State, analyze the state's

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the centrality of law or regulation and its effects: more recently and with regard to the financial sector, S. Eriksson, The centrality of law for EU sustainable finance markets: Outlining a research agenda, in *Review of European, Comparative & International Environmental Law-RECIEL*, vol. 33, no. 1, 2024, p. 57.

3 A definition elaborated by A.M. Sandulli, *L'attività normativa della pubblica amministrazione. Origini-funzioni-caratteri*, Naples: Jovene, 1970, especially p. 95.

4 In more general terms, A. Bradford, *The Brussels effect. How the European Union rules the world*, Oxford: Oxford University Press, 2020, p. 67.

(recent) history, focus on the state of the art and rely heavily on acts and declarations of national authorities (although they do not consider case law or scholarship).

As stated in one of the Commission's evaluation reports published within Next-Generation EU, the RRF has been a mechanism for the Commission to become closely acquainted with the Member States. Indeed, it could study national systems in detail, in order to evaluate their reforms and investment programmes.<sup>5</sup> Moreover, "the governance structure of the RRF combines a strong role for both the Commission and the Council in a multilateral setting and provides for close scrutiny by the European Parliament during the implementation".<sup>6</sup> In this sense, a form of co-management has developed between the EU institutions and Member States. Therefore, these rules and measures are the result of an almost contractual and, more recently, co-management process, which examines the merits of the interventions. This is all the more so, considering that some areas of administrative relevance are already governed by EU rules, such as public procurement, competition and public services, etc.

This form of co-management and influence of EU institutions on the contents of national measures and programmes implies a gradual process of standardization of public policies in the Member States. This process seems set to strengthen through the design of EU funding instruments, which is increasingly characterized by "a clear focus on EU policy priorities, including by way of mandatory expenditure targets to promote the climate and digital transitions, combined with a country-specific approach based on the European Semester process".<sup>7</sup>

Hence, we can answer both questions. EU financial rules and acts are the result of the Commission's in-depth studies of Member States, analyzing individual sectors and matters in detail. Such a trend has become even stronger with the RRF. Nevertheless, these studies take a macro approach and are unaware of the concrete internal situation of the public administration in each Member State. Individual recommendations and reports are based on a homogeneous method that considers national realities and differences, but not the real needs of public administrations (especially at local level). As will be seen later, this is a vicious cycle. The Commission can only consider what Member States actually communicate to it. Thus, the more precise and timely the information provided by Member States, the better the Commission can reconstruct the situation of the national public administration and adopt effective recommendations. Conversely, there is a sort of short circuit.<sup>8</sup>

5 Commission staff working document, Mid-term evaluation of the Recovery and Resilience Facility. Accompanying the document "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Mid-Term Evaluation of the Recovery and Resilience Facility: Strengthening the EU through ambitious reforms and investments {COM(2024) 82 final}", 21 February 2024.

6 Commission staff working document, "Mid-term evaluation of the Recovery and Resilience Facility", p. 80.

7 Commission staff working document, "Mid-term evaluation of the Recovery and Resilience Facility", p. 84.

8 See Section 3.3. of this chapter and Chapter VI.

Moreover, it is becoming increasingly evident that such EU acts and rules lead to increasingly convergent public programmes and policies in Member States. These policies pursue EU interests and affect national public administrations to an increasingly complete extent and in multiple areas, even beyond the EU's spheres of competence (exclusive or shared). From this point of view, public finance law exercises a shaping power that is specifically oriented towards EU values and interests, determining – an indirect and de facto – expansion of EU competence, which appears to challenge the principle of conferral.<sup>9</sup>

## 1.2. How the shaping power works

The second lesson concerns how the shaping power of public finance law works. This is a complex point that can be expressed as follows: the shaping power operates on the basis of a “strong impetus”, which is different from the nudging approach, the logic of moral suasion or the conditionality mechanism.

Some differences are evident. The nudging approach is characterized by implicit encouragement towards a certain option that is preferable for several reasons.<sup>10</sup> This is not the case with EU public finance regulation: the case studies show how EU measures and recommendations contain precise indications that, generally, leave no scope for multiple options and attach specific consequences to violations. Moral suasion is even more different. This consists in authoritative moral persuasion, which aims to guide choices and behaviours based mainly on prestige and the positive value of what is addressed.<sup>11</sup>

The difference between the shaping power and the conditionality mechanism is less clear. A vast body of literature on EU public finance law and NextGeneration EU highlights how the latest EU programmes and measures use conditionalities when granting funds.<sup>12</sup> However, conditionalities are only one tool of EU public

9 The trend consists in the development of peculiar and informal implied competences in the financial sector. “Informal”, because they emerged beyond the scope of Article 352 TFEU. More generally, P. Eeckhout, *The doctrine of implied powers*, in *EU external relations law*, 2nd edition, Oxford: Oxford European Union Law Library, 2011, p. 70. See also B. De Witte, *Legal methods for the study of EU institutional practice*, in *European Constitutional Law Review*, vol. 18, 2022, p. 637, who interpreted the Treaties in an evolutionary manner, also in terms of competences.

10 A renowned work on this topic, examined as a general trend, is R.H. Thaler and C.R. Sunstein, *Nudge*, The final edition, New York: Penguin, 2021.

11 C.J. Ting, *Examining the influence of moral suasion on sovereign debt default risk*, in *Asia Pacific Management Review*, vol. 4, no. 1, 2019, p. 44, which studied whether moral suasion contributed towards reducing the sovereign debt default risk in some EU Member States. A similar logic is described by L. De Lucia, “Pastorato” e “disciplinamento” nella governance economica europea, in *Diritto pubblico*, 2016, p. 867.

12 Economic and financial conditionality has a long history and has always been controversial: G. Bird, *The effectiveness of conditionality and the political economy of policy reform: Is it simply a matter of political will?* in *The Journal of Policy Reform*, vol. 2, no. 1, 1998, p. 89; S. Schadler, A. Bennett, M. Carkovic, L. Dicks-Mireaux, M. Mecagni, J. John and M.A. Savastano, *IMF conditionality: Experience under stand-by and extended arrangements, part I: Key issues and findings, and part II: Background papers, occasional papers*, no. 128, IMF, 1995.

finance law; the mechanism does not exhaustively describe the dynamics characterizing EU public finance law and its impacts on the Member States. In relation to the shaping power, it differs from the conditionality mechanism in at least two respects.

First, the logic behind the EU regulation of public finance is much more complex than that of a mere conditionality approach. This logic can be defined as a “strengthened” logic. It is divided into three components, that can be called “political-compromise”, “legal-imposing”, and “evolutionary-programmatic”.

The political-compromise component is the preeminent and foundational one. It consists in the fact that EU public finance instruments are the result of an inter-governmental will (expressed especially by the Council), aimed at ensuring certain balances between the Member States, especially on the economic level. The legal-imposing component seeks to strengthen and solidify this will by transferring decisions into legal acts and instruments, thus making it possible to attach consequences (responsibilities, procedures, sanctions) to their infringement. The evolutionary-programmatic component further strengthens intergovernmental balances, providing that public finance rules and measures must follow specific programmes, with future impacts especially on the public sector, as seen in the case studies in Chapter IV.

Second, the logic inspiring the shaping power of EU public finance law is both permanent and mutually useful, features that the notion of conditionality does not have. As for permanence, conditionality is usually a requirement to obtain something, but is (often) temporary in nature. The instruments of EU public finance law seek to consolidate permanent behaviours in Member States, based on financial rigour and aimed at the stability of the euro area.

As for mutual utility, conditionality aims to satisfy the interests of those who set the conditions. Thus, the interest generally belongs to the party who set the condition, to the detriment of the one who must meet it to obtain something in exchange (a loan or something else). Conversely, in the case of EU financial rules – even those that provide for financial conditionalities – both the EU and the Member State in question have an interest in the fulfillment of the condition. The EU because fulfillment responds to a specific plan linked to the EU project (consider the conditionality mechanisms linked to compliance with the rule of law). The Member State because fulfillment brings not only income (financing) but especially an improvement and evolution of the State in terms of long-term development (and of the advancement of democratic values).<sup>13</sup> Hence, EU conditionalities too are not genuinely characterized by a conditionality logic, despite their name.

Therefore, how can the logic or approach characterizing the shaping power of EU public finance law be defined?

The case studies in Chapter IV help answer this question. Portugal had to comply with the privatization programme to obtain the financial assistance granted by the Council, which was essential to escape an irreversible crisis. Spain, which

13 Although this aspect may not be as pronounced in certain national contexts.

requested financial assistance from the ESM, had to follow the EU institutions' recommendation to reduce the number of its municipalities, under pain of regional slippage, budget imbalances and local authorities' bankruptcy. Greece had to comply with the draconian administrative reforms indicated by the EU, especially by cutting public employment, in order to restore market confidence in the (scarcely credible) national finances and preserve the country's economy and stability.

In all these cases, although the Member States could – at least in theory – avoid following the EU's recommendations, in practice they followed and implemented them correctly. Member States have become increasingly dependent on the recommendations, decisions and financial interventions of the EU institutions, as the case studies clearly demonstrate. The EU measures shape national administrative systems exactly as the EU institutions want, under pain of lack of funding and other irreversible and drastic consequences that would be unacceptable for any Member State.

From this perspective, the shaping power of EU public finance rules appear to present a “logic of addiction” or codependency, a sort of addictive mechanism or cycle. This has strengthened following the evolutions of the EU public finance system due to the COVID-19 crisis. It is a mechanism that is far more intense than conditionality.

Certain studies have described the institution of the euro, and therefore of the monetary union, as a source of crisis for the EU's stability (as emerged especially with the 2010 sovereign debt crisis), highlighting how the euro area was “born ill”. The euro area was defined as an imperfect structure, characterized by mistaken policies and devoid of the mechanisms and measures that are necessary for the proper functioning of a common currency.<sup>14</sup> The studies proposed mainly two types of solutions: leaving the euro area, believing that the Member State's exit would be manageable through certain measures (for example, by resorting to a new national electronic currency); or maintaining the single currency and safeguarding the euro area, but adopting radically non-austerity policies.<sup>15</sup>

In practice, the second of these paths has been followed, and many of the indicated policies have been adopted, especially the mutualization of debt (creating a European debt) and the establishment of a banking union. As examined in Chapter III, the fundamental impetus for the adoption of these policies (especially

14 J.E. Stiglitz, *The Euro: How a common currency threatens the future of Europe*, New York: Norton, 2016, highlighted how the common currency involves a fixed exchange rate between countries and a single interest rate. Even if these are set according to the financial conditions of most member countries, there must be a series of institutions capable of helping countries. However, he argued, in the EU there are neither the policies nor the institutions for this. Furthermore, the coercive mechanisms resulting from the euro area would have caused a contraction of the economy, reducing the probability of repayment of the sums borrowed. Stiglitz quoted Robert Mundell's studies on the essential conditions for the common currency.

15 Stiglitz, *The Euro: How a common currency threatens the future of Europe*, maintained that it would have been possible to exit the euro “and prosper”. However, this argument was based on a regulatory and economic framework that no longer exists, the EU having made several far-reaching interventions since 2020.

debt mutualization) was the need to deal with the devastating economic effects of the COVID-19 pandemic.

The most recent EU financial policies, starting with the new regulation of the EU's system of own resources and debt mutualization, have confirmed the "addiction" mechanism, making it bidirectional. On one hand, each Member State is dependent on the EU's financial rules and measures, without which its economy and social welfare would collapse; on the other, the EU, by providing financing and loans to Member States with resources collected on the financial market (social bonds, Eurobonds, etc.), is dependent on the States' ability both to honour their debts and to implement the policies and reforms for which the resources were allocated within the RRF. One party depends on the other, and vice versa.

Therefore, the dependence is not so much, and not only, related to the negative economic consequences that leaving the euro area could have for a Member State. Rather, it derives especially from the EU financial regulatory framework, as seen in previous Chapters II and III.<sup>16</sup>

This is also confirmed by the Member States' growing receptiveness to CSRs: indeed, CSR effectiveness has increased significantly following the implementation of the national RRFs within the RRF. In particular,

the RRF has significantly accelerated policy action to implement CSRs . . . over the 2011–2017 period, only 1.6 % of CSRs were deemed to have been "fully implemented" within one year after issuance, and that only 26 % of the CSRs have been implemented over the full 2011–2018 period. In the two years preceding the RRF, the share of 2016–2017 CSRs reaching at least "some progress" increased by only six percentage points from 53% in 2018 to 59% in 2020. In comparison, the share of 2019–2020 CSRs reaching at least "some progress" increased by percentage points from 2% in 2021 before the RRF to almost 69% in 2023, after two years of RRF implementation.<sup>17</sup>

This shows how the trend has become increasingly permanent and irreversible.

In conclusion, it could be argued that the EU financial regulatory framework, especially since 2020, has led to a form of dependence that acts like a "glue" within the EU. Currently, the EU's main aggregating element is precisely the financial law framework (European Semester, RRF, NextGeneration EU, etc.). In this sense, the

<sup>16</sup> Moreover, the euro does not provide its members with an option to leave. It was designed as a one-way street: Europa Briefing, *Leaving the Euro: An emergency exit for the currency union?* Berlin: Bertelsmann Stiftung and Jacques Delors Institut, 2017. See also M. Gastinger, Introducing the EU exit index measuring each member state's propensity to leave the European Union, in *European Union Politics*, vol. 22, no. 3, 2021, p. 566, who highlighted that the United Kingdom was uniquely positioned to leave the European Union, while all other states were far behind. The author posited that the EU would be in better shape today than before the Brexit referendum and that, currently, no further exits are – and could be – on the horizon, especially considering specific factors.

<sup>17</sup> Commission staff working document, "Mid-term evaluation of the Recovery and Resilience Facility", p. 50.

establishment of an EU fiscal union, as described in Chapter III, would consolidate and safeguard the EU's financial framework and its uniting function.<sup>18</sup>

### 1.3. The context within which the shaping power manifests

The third lesson regards the context within which the shaping power has impact. The “context” means the public sector, with special regard to the public administration. Previous chapters have reconstructed how public finance rules affect the public administration, also conditioning public policies in the field of public services, organization and civil service.

In this regard, two clarifications must be made. The first is a potential objection: financial rules clearly place conditions on public administration, because administrative action requires financial resources – to pay public employees' salaries, finance public services and carry out other functions. This might seem self-evident. However, this analysis has shown that the impact of financial rules goes far beyond such simple observations. Financial rules can shape fundamental aspects of national administrative systems, in the name of external (EU) interests that orient the action of public administrations in Member States.<sup>19</sup>

The second clarification concerns the context. Public administration varies significantly across Member States in terms of traditions, regulation, evolution and efficiency. This variety raises questions. Which countries have experienced a stronger impact of public finance rules on their public administration? Are there common indicators? Why have some public administrations been more affected than others?

Analyzing the context allows us to hypothesize a correlation – based on the case studies seen in Chapter IV – between the characteristics of public administrations and the intensity of the shaping power of financial rules. At least three types of correlation can be identified.

The first correlation is the most direct and applies generally. The EU's financial rules have a more evident shaping effect in Member States that are more financially vulnerable, because they have a greater need to align with EU financial parameters. This has been evident not only during the austerity period, but also under Next-Generation EU. Member States that had to make greater efforts to approach the objectives defined in the European Semesters and to avoid the risk of excessive deficit procedures, and their consequences, faced greater pressure to adapt. The same need to adapt was equally strong for states receiving the highest amounts of

18 P. Dermine, The EU's response to the COVID-19 crisis and the trajectory of fiscal integration in Europe: between continuity and rupture, in *Legal Issues of Economic Integration*, vol. 47, no. 4, 2020, p. 337; F. Fabbrini, *EU fiscal capacity. Legal integration after Covid-19 and after the war in Ukraine*, Oxford: Oxford University Press, 2023, especially pp. 99 and 127.

19 In this sense, an alternative approach to EU integration via public spending steering could be recognized. From a general perspective, U. Villani-Lubelli, The EU budget and the European integration process: A historical analysis, in L. Zamparini and U. Villani-Lubelli (eds), *Features and challenges of the EU budget*, Cheltenham and Northampton: Edward Elgar Publishing, 2019, p. 12.



financial resources under the RRF, which had to use the resources received strictly in line with the agreements made with EU institutions.

In this sense, there is a directly proportional relationship between two factors: the weaker and more exposed a Member State, due mainly to high public debt, the greater the impact of EU financial rules. In other words, the “financial weakness” of a Member State (its financial exposure due to high public debt and scarce or reduced GDP growth) is closely related to a stronger impact of EU financial rules on its national institutional structure and, more specifically, public administration. The case studies examined in Chapter IV prove this trend.<sup>20</sup> But why does this happen?

One reason is that EU financial rules and measures are formulated in line with the “good shepherd” approach. Through legal mechanisms (see Section 1.1. of this chapter) and an “addiction” logic (Section 1.2.), Member States are prompted to follow a “proper” direction. This direction aims to achieve the financial rigour required for the stability and good functioning of the euro area, as well as towards implementing policies aligned with EU interests.

The second correlation concerns the proportion public spending allocated to the functioning of public administration, with specific reference to the establishment of new public bodies and the recruitment of public employers. The greater the proportion of these expenditures in national budgets, the greater the impact of EU public finance rules on the relevant public administration. This correlation is linked to the first: Member States with high levels of public spending, for example on public administration, generally also have a problematic public debt/GDP and deficit/GDP ratios, as indicated in the SGP.<sup>21</sup>

It should also be noted that the Member States with high levels of public expenditure on these items are often contexts in which the public administration has historically functioned as a “social safety net”. Examples are Greece and Italy, where the creation of new public entities and large-scale public recruitment (which occurred especially in certain historical periods) served primarily to provide many people with employment, rather than meet specific needs within the exercise of public functions and services.

This correlation has been evident in several circumstances. For example, when EU financial rules made funding available (such as under NextGeneration EU), Member States with a history of using the public administration as a “social safety net” significantly increased these practices. These included mass recruitment, outsourcing tasks and establishing new offices and special units without specific needs linked to the public functions to be performed. A recent example is Italy. In such cases, it would have been preferable to map the public functions in detail, eliminate the superfluous ones and base the need for further public staff on this evaluation.

In other cases, when EU financial rules imposed resource cuts, Member States with disproportionately large staff levels and entities compared to actual needs

20 Portugal, Ireland and Greece are significant examples (Chapter IV, Sections 2.1., 2.4. and 4.1.).

21 The Italian case is paradigmatic (Chapter IV, Sections 3.3. and 4.2.).



experienced strong impacts. Drastic interventions on the public administration were often made, as in Greece. Even in France, the EU financial rules under austerity had led the national government to plan public employment cuts. However, in practice, the rules had little impact, to the point that the cuts did not materialize.<sup>22</sup> One explanation is that the French administrative apparatus is more proportionately sized to actual needs (unlike in Greece and Italy).

Here too a directly proportional relationship emerges: the larger the disproportion between the size of the public administration (in terms of organization and personnel) and actual needs, the greater the impact of EU financial rules on the public sector. Again, one might ask: why does this correlation exist?

The answer can be found by considering the content of EU financial rules and measures. The acts and rules adopted under the European Semester, financial assistance mechanisms or NextGeneration EU have usually sought to foster the “innovation and modernization” of national public administrations, ultimately to achieve greater efficiency and effectiveness in administrative actions. Thus, EU financial rules aim to encourage Member States to implement the public administration model that the EU considers optimal. This raises an important question. What is the “ideal model” of public administration, according to the EU regulatory framework?

In this regard, at least two considerations emerge. First, the EU’s “ideal model” does not correspond to those present in various Member States. The EU’s model can be defined as “centralized in coordination” and “ramified in articulation”. Examples are networks of authorities and agencies (the networking model), centralized public procurement, decentralization and devolution in the relationship between central administrations and local authorities.<sup>23</sup>

Second, the EU model for public administration results from a discretionary choice, which may align with some national realities but not others. For example, decentralization in Spain and France has led to a very high number of local authorities, which can be difficult to reconcile with the coordination and rationalization required by the EU. Likewise, the centralized public procurement system imposed in Italy as part of its RRP under NextGeneration EU created various challenges for local authorities.<sup>24</sup> No one model fits all, because each Member State has different and unique histories and traditions in public administration.

As for the third correlation, EU rules tend to have a stronger shaping effect where there is a greater need for change in the national public administration, due to high inefficiency and an inability to meet community and, especially, business

22 Moreover, the French Government lowered its job-cuts target within the public sector to about 85,000 by 2022 (<https://www.politico.eu/article/france-to-cut-15000-jobs-in-state-public-sector-by-2022-emmanuel-macron/>). In this context, the problem was especially local government spending.

23 These models are promoted by several CSRs, as examined in Chapter IV.

24 Italian local authorities usually prefer to manage tenders on their own and with simplified methods. For a general view, OECD, *Centralised and decentralised public procurement*, Sigma papers no. 29, Paris: OECD Publishing, 2000, where arguments for/against centralization in public procurement are analyzed.

needs. It is well known that excessive bureaucratic complexity can have adverse effects on business start-up times and the proper functioning of the economy.<sup>25</sup> The greater the bureaucratic complexity and the negative effects on businesses and economic activities, the more incisive will be the EU financial rules imposing interventions on public administration, aiming to innovate it. In these cases, the measures usually envisaged and recommended promote simplification, as well as transparency, anti-corruption measures or even accelerating payment terms. Therefore, EU financial rules can promote transformation in public administration, making it more responsive to the needs of businesses and economic operators. This explains why for countries such as Greece, Italy and Portugal – where this gap is especially pronounced – EU financial rules mostly contain provisions intended to reform and “innovate” public administration.

The various correlations examined here are closely interlinked. They highlight how, in various cases, EU financial rules and acts are tools to pursue ends far beyond financial rigour. They serve to orient administrative reforms, as will be analyzed in even further detail in the next section.

#### ***1.4. Relationship between the shaping power and administrative law reforms***

The fourth lesson regards the relationship between the shaping power of public finance law and administrative reforms. EU financial rules bear a significant impact on the content of national administrative reforms. Some cases, examined in Chapter IV, are paradigmatic in this respect.

Two types of relationship deserve consideration: the first regards the relationship between public finance law and the administrative reforms concerning local authorities; the second deals with the relationship between public finance law and administrative reforms aimed at promoting privatization in the public sector.

As for the first relationship, Spain, France, Italy and the United Kingdom are illustrative. In Spain, EU financial recommendations emphasized the need to enhance control and improve coordination among the national, regional and local administrations.<sup>26</sup> According to the Commission, this would be the optimal way to achieve fiscal consolidation, reducing waste in public spending by Spanish municipalities. Enhanced coordination between the various public administrations would also reduce costs and limit the administrative burden on companies and households. In summary, EU financial rules encouraged a particular type of administrative reform in Spain, one aimed at “tempering” the country’s strong municipal decentralization. This was done by implementing forms of coordination, especially in order to safeguard financial needs.

This reform led neither to the suppression of local authorities, nor to any curtailment of their powers. On the contrary, the financial rules and measures, which

25 P.C. Patel and M. Wolfe, Public administration and new venture startups: The association between economic development and the role of bureaucracy in startup activity, in *Journal of Small Business Management*, vol. 61, no. 6, 2022, p. 3255.

26 Chapter IV, Section 3.1.

Spain gradually transposed into and implemented within its legal system through several budgetary stability laws (“stability paths”), in line with the prudent fiscal policy promoted by the Commission, provided greater fiscal space for autonomous communities and local councils. This allowed them to strengthen the public services provided to citizens.<sup>27</sup> Therefore, the coordination and rationalization promoted by EU financial rules did not lead to centralization. Rather, they brought about a new type of decentralization, in which local authorities retained or even strengthened their powers. However, such powers are to be coordinated to achieve greater efficiency and financial control. In other words, there are more powers but also more controls.

In the French case, EU recommendations highlighted that the number and variety of subnational governments were significantly higher than in other EU countries, creating the risk of inefficiencies due to duplicated functions and costs.<sup>28</sup> Thus, the need to contain the rise in the administrative costs for local authorities became clear, and the Commission pushed for a more effective rationalization of these bodies.

Similarly to Spain, EU financial rules and measures did not promote a centralization model in France. In this respect, it is worth mentioning that France historically adopted a centralized administrative system, although one featuring several territorial entities. Rather, the EU’s recommendations sought to make decentration financially sustainable.

The model promoted by EU rules is also different from the type of decentralization that characterizes the Italian system.<sup>29</sup> EU measures noted the weaknesses of the Italian federal project, and recommended that rules on fiscal federalism be adopted to improve the accountability of local governments and foster efficiency. The country was invited to reduce the persistent disparities between regions, by strengthening administrative capacity and improving political governance. Therefore, from the EU’s perspective, the Italian federal model needed adjustments, in particular to enhance the powers of regional and local authorities and, at the same time, strengthen (central) controls.

In the United Kingdom, austerity rules contributed to a disaggregation of the central public administration. Central grants were cut and local authorities were allowed to collect additional revenue from different sources.<sup>30</sup> In this case too, the

27 According to the declarations of the Minister for Treasury, Maria Jesus Montero, released in September 2024, the Spanish path (2025–2027) includes less demanding deficit targets for the autonomous communities and local entities than in the past, so that the additional resources can be allocated to public services: “We are redoubling our effort so that we can preserve the welfare state, which is provided mainly by the autonomous communities and local councils” (Council of Ministers, The Government of Spain approves a stability path that fuses fiscal rigour and the strengthening of public services, in *La Moncloa*, 10 September 2024).

28 Chapter IV, Section 3.2.

29 Chapter IV, Section 3.3.

30 We recall that, from 2015, local councils were permitted to increase local taxes, for example to raise money for adult social care; they also introduced or increased charges for garden waste collection and NHS parking income (Chapter IV, Section 2.2.).

trend was to strengthen the powers of local authorities in response to inefficiencies in local public spending.

In all countries, the common problem was excessive local government spending. However, the solution pursued by Member States in light of EU recommendations was not the centralization or concentration of public functions. As discussed in Chapter IV, decentralization led to a significant growth in public spending in several Member States, incompatibly with the principle of sound financial management. However, EU rules did not challenge the decentralized model. They rather aimed towards a new configuration: one that could be called “financially sustainable decentralization”, a “rationalized and coordinated decentralization”, in light of EU recommendations.<sup>31</sup>

This model orients some of the national administrative reforms analyzed in Chapter IV. However, several difficulties in implementation were encountered. This was due to an evident paradox: the existence of multiple power centres has not contributed to the development of mechanisms for financial accountability, but to an increase in public spending because of duplication and waste. This why the model of coordinated and rationalized decentralization promoted by EU rules may – and often has been – an “oxymoron”.<sup>32</sup>

The most interesting result of this trend is that decentralization models in EU Member States are evaluated not based on the best exercise of public functions and services (that is, the “ordering nature” that should characterize the allocation of administrative activities) but rather on economic–financial evaluations, related to the best way to manage public spending. The two priorities can sometimes coincide, but also lead to divergent results. In some cases, decentralization is not a financially virtuous model, as demonstrated especially by the case studies seen in Chapter IV.<sup>33</sup>

As for privatization reforms, Portugal, the United Kingdom and Ireland are illustrative.

In Portugal, EU financial acts recommended privatization in key public sectors, such as transport and postal services.<sup>34</sup> The recommendations led Portugal to

31 It is interesting to note how the model recommended by the EU financial acts, aimed at regulating the relationships between the centre and the periphery within the Member States, has nothing to do with the wider debate on the model to adopt in the relationships among Member States in the Union (see the long-standing debate on the adoption of a federal or confederal model, etc.). Among many studies, S.R. Larsen, *The constitutional theory of the federation and the European Union*, Oxford: Oxford University Press, 2021.

32 The aim is not to discuss the validity of models and reforms, but how European financial rules have promoted certain models and reforms without systematic and ongoing in-depth studies on the scope of the models and measures recommended by the CSRs and other financial acts.

33 As seen in Chapter IV, Section 2.2., in the United Kingdom, the increase of local taxes to raise money for the provision of certain public services was insufficient to offset the drop in grants. In some cases, decentralization led to inequalities in treatment, placing at a disadvantage the poorest areas and those in most need (this became clearer in the aftermath of the COVID-19 pandemic). S. Hoddinott, M. Fright and T. Pope, “Austerity” in public services. *Lessons from the 2010s*, Institute for Government, October 2022, especially p. 14.

34 Chapter IV, Section 2.1.

cut the number of state-owned enterprises by at least 20 percent, privatizing some large state enterprises in strategic public service sectors. Public–private partnerships were also introduced to reduce the impact of public spending. EU financial rules strongly encouraged and drove the privatization of public bodies responsible for providing public services, thus reducing the scope of the public sphere.<sup>35</sup>

In the United Kingdom, where privatization in the public sector has historically been prominent, EU financial measures supported the continued involvement of private subjects. This was clear especially in adult social care and education,<sup>36</sup> where public finance rules achieved savings by redefining the role of public administration in delivering the services.

In Ireland, EU financial measures noted the need to reform the healthcare system to align with standards prevailing in other EU countries, especially in relation to essential principles and conditions such as universal access to care. The EU financial rules called for a structural solution by promoting the development of universal service on a public basis, without (explicit, at least) references to involving the private sector, although the Irish Government concluded various agreements with private entities to compensate for the shortcomings in public health and ensure wider access to care (Chapter IV, Section 2.4.).

The previous examples and the case studies show that the EU rules adopted during the European Semester sometimes directly supported the privatization of public services. Other times, they did so indirectly, inducing the Member States to privatize in order to guarantee the required quality of service. In any case, there is a connection between EU financial rules, and the promotion and development of privatization and outsourcing reforms in the public sector. This is not particularly surprising. Indeed, the impact of EU financial rules and measures perfectly aligns with the policies of liberalization and competition that have always prevailed in the EU.<sup>37</sup>

EU financial rules and measures are thus used as a “crowbar”, to push Member States towards public reforms in line with EU economic policy objectives. This is an interesting trend, that has also strengthened in recent times, as noted by the Commission itself: “at the same time, as CSRs respond to broader EU policy priorities, the implementation of the measures included in the RRFs also support the broader EU agenda”. Further, “by design, the RRF ensures a strong alignment of Member States policies with EU priorities”.<sup>38</sup>

Denmark is also worthy of consideration. Although the country is not in critical financial straits and is theoretically able to access more convenient forms of credit

35 The privatization process in Portugal is ongoing: in summer 2024, the Portuguese Government reaffirmed its plans to privatize the state-owned airline TAP Air Portugal, adding that the terms of the sale were still to be defined.

36 Chapter IV, Section 2.2.

37 From a similar perspective, some studies link the development of EU policies to the limitation of the welfare state: M. Răileanu-Szeles, *Crisis and prospects for the welfare state in the EU*, in M. Răileanu-Szeles (ed), *Re-examining EU policies from a global perspective*, London: Palgrave Macmillan, 2013, p. 32.

38 Commission staff working document, “Mid-term evaluation of the Recovery and Resilience Facility”, pp. 72 and 79.

through national debt financing, it still requested and received subsidies through the RRF. Access to the RRF subjected Denmark to the same control and evaluation procedures applied to other Member States (in much worse financial situations) and expressed in the measures undertaken under the European Semester. In these measures, the Commission went so far as to praise the work of the Danish Government on digital transition, as seen in Chapter IV.<sup>39</sup>

In other words, the application of EU financial rules and mechanisms no longer entails only accounting controls (as in the pre-austerity phase, especially) but, increasingly, forms of conditioning, orientation and sharing of national public policies, even towards Member States that are not in critical financial situations (another case, which was not examined in Chapter IV, is Germany).<sup>40</sup>

The latter consideration highlights another side of the “addiction logic” examined previously in Section 1.2. The dependence of Member States’ public sector on the EU public financial system relies not only on financial needs but above all on balances and symmetries that each Member State, even the most financially virtuous, has an interest in safeguarding. Germany, Denmark and other so-called frugal countries constitute a specific group in the EU that is not particularly favourable to the EU mechanism of public debt mutualization. However, they entered the mechanism all the same, by accessing funding under NextGeneration EU, in order to take advantage of the funds available to promote policies that they had already put in place (namely, the green and digital transitions). They were thus able to further strengthen their national programmes.

Moreover, the green and digital transitions promoted at the EU level under NextGeneration EU are much more effective when all Member States engage in them. The countries that have already reached an advanced stage of these transitions (Germany, Denmark, etc.) have every interest in everyone going in the same direction.<sup>41</sup> Therefore, the addiction logic characterizing the shaping power of EU public finance rules in these Member States works differently, but is still a mechanism of dependence and interdependence.

## **2. Do public finance rules improve or worsen the functioning of public administration?**

The foregoing analysis has shown us how the shaping power of the public finance law follows purposes and presents characteristics that depend only limitedly on the type of public administration considered. The measures, logics, context and impact of the power depend on complex and composite dynamics.

At this point, a question arises: does the shaping power produce benefits, or does it exacerbate the dysfunctions affecting the public administration of EU Member

<sup>39</sup> Chapter IV, Section 2.3.

<sup>40</sup> Germany will be considered in the conclusions of the book (Chapter VI).

<sup>41</sup> There is cross-influence between some national policies (such as German public policies) and EU policies. More generally, C. Knill, European policies: The impact of national administrative traditions, in *Journal of Public Policy*, 1998, p. 1.

States? In other words, does the shaping power improve or worsen the performance of public administrative bodies?

The problem emerged clearly when analyzing, for instance, the links between EU financial rules and the development of privatization programmes in the Member States. In both Portugal and the United Kingdom, privatization and the reduction of state intervention, induced by EU rules on public services, left aside the issues of the quality of services and the general public interest.

The definition and adoption of public financial rules and measures did not consider whether privatization has a positive or negative impact on the good functioning and quality of public services. These assessments were entirely secondary compared to other aims. Therefore, the financial rules' shaping capacity acted regardless of evaluations of the administrative activities covered by the interventions. At the same time, it did not exclude the possibility that the interventions could and did concretely improve the provision of public services; however, this was a secondary question compared to the financial reason. Indeed, in the case of the United Kingdom, privatization in the education sector was heavily criticized because it bore negative repercussions on the quality of educational services, thus worsening the exercise of an administrative function.

Some points can be drawn from the scholarship that, recognizing a neoliberal streak to EU financial rules and programmes, commented on how the European integration process was used to mainstream neoliberal policies and thereby circumvent and erode the public sphere.<sup>42</sup> More generally, some studies describe the EU's development as a chapter in the history of neoliberalism.<sup>43</sup>

It is useful to examine whether and what contribution this approach has made to the evolution of public administration in EU Member States. It is not, therefore, a question of examining the goodness or correctness of the approach, nor whether shaping power is a neoliberal instrument or not, but rather of reflecting on how public administration has reacted to the expansion and impact of EU financial rules and measures. Was this a positive or negative reaction?

To this end, two dimensions of public administration's sphere of action can be considered. The first is the relationship between public administration and society: has the shaping power affected this relationship? Has shaping power made public administration and administrative functions more responsive to the needs of individuals and of society more generally?

The second dimension concerns the relationship between public administration and other public institutions, starting with EU institutions. Has shaping power transformed these relationships? Has public administration been strengthened or weakened by the application of EU financial rules?

The following sections seek to answer these questions.

42 C. Hermann, Neoliberalism in the European Union, in *Studies in Political Economy*, vol. 79, no. 1, 2007, p. 61.

43 J. Elvander, *Disciplinerad Demokrati: EUs nyliberala historia*, Stockholm: Verbal förlag, 2024.



### **2.1. Sound financial management and good administration: the relationship between public administration and civil society**

The EU legal framework considers the relationship between public administration and civil society (or individuals) in a specific and significant way. This emerges especially in the meaning of “good administration”, as codified in Article 41 of the EU Charter of Fundamental Rights.<sup>44</sup> Some scholars highlight how good administration is, first of all, a principle related to “a general category under which may be subsumed a whole set of subjective rights intended to limit arbitrary administrative conducts in the Union”.<sup>45</sup> The EU Charter recognizes good administration as a fundamental right, thus linking it to the individual sphere that can be affected by public administrative action.

This analysis neither delves into the characteristics of this principle or right nor enquires why Article 41 of the EU Charter considers only certain general procedural rights and duties and not others.<sup>46</sup> There is ample literature on these and other aspects of good administration.<sup>47</sup> There are also various studies on the relationship between public finance and rights. However, there are only very few on the relationship between public finance and good administration.

On the relationship between public finance and rights, the focus is usually on the negative impacts and limitations that can derive from public financial constraints to the exercise and protection of certain social rights.<sup>48</sup> Protecting rights is costly, which is why financial resources are needed to ensure adequate levels in the implementation of these rights. Consider, for example, the costs of services to protect the right to health, to social security, to education, to individual freedom (the exercise of which requires the functions of security and public order), etc.<sup>49</sup>

As analyzed in Chapter I, administrative functions need an administrative machine for their exercise, and this machine entails a cost. The more the state intervenes in the protection of rights by providing benefits, according to the welfare state model, the more the costs necessarily increase. In EU Member States, public finance is therefore the necessary means through which the exercise of rights is possible, but also, consequently, the negative limit to the level of rights protection – consider how financial cuts affect the exercise and protection of various social rights.

44 Article 41(1): “Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union”. Article 41(2) describes the contents of the right (i.e. the right of every person to be heard, to have access to his or her file, the obligation of the administration to give reasons for its decisions).

45 L. Azoulay, *Le principe de bonne administration*, in J.B. Auby and J. Dutheil de La Rochère (eds), *Droit administratif Européen*, Brussels: Bruylant, 2007, p. 493.

46 J. Mendes, *Good administration in EU law and the European Code of good administrative behaviour, working papers no. 9*, EUI, 2009, pp. 3–4.

47 Among the various studies, N. Vogiatzis, *The European Ombudsman and good administration in the European Union (European administrative governance)*, London: Palgrave Macmillan, 2017.

48 Note that the public administration both protects and enables the conditions of the exercise of the rights.

49 Famously, S. Holmes and C.R. Sunstein, *The cost of rights: Why liberty depends on taxes*, New York: W.W. Norton & Company, 2000.

From this theoretical setting arises the singular theory of “financially conditioned rights” and “financially incompressible rights”, in relation to the rules of public spending cuts affecting the protection of social rights.<sup>50</sup> The theory, explored in some Member States’ constitutional case law, recognizes that generally the law can limit the exercise of rights, if there are real financial needs. However, the exercise of certain fundamental rights can never be limited, not even due to specific financial reasons. In these cases, financial limits are not recessive, but rather should be mitigated and made compatible with the protection of rights. In this sense, these rights are incompressible.

For example, specialist assistance for students with disabilities is functional to support teaching and, as such, constitutes part of the incompressible content of the right to education. Therefore, this social service cannot be hindered by the principles of financial and patrimonial coverage applied by the public administration. These must be fulfilled through a correct and planned management of expenses, but this cannot automatically impair the right to school assistance. Otherwise, the effective protection of a fundamental right would be subject to the arbitrariness of the public administrative action in distributing financial resources.<sup>51</sup>

Thus, good administration, defined as a fundamental right by EU legal order, can be “limited” and challenged by public finance rules and principles (the second type of relationship is considered here). At the EU level, Article 317 TFEU provides that the Commission is formally responsible for the implementation of the EU budget and the ECA, pursuant to Article 287(2), is called upon to examine the soundness of the financial management. The two principles of good administration and sound financial management are sometimes intertwined, as emerged in some European Ombudsman inquiries, in which public finance principles are considered as part of good administration.<sup>52</sup>

Nevertheless, there are usually tensions between the principles. Public finance principles and rules fuel the philosophy that errors are unacceptable, which hinders administration: a zero risk of error would imply zero activity. Financial rules increase audits and controls, and would contribute to “defensive administration” (or “fear of signature”).<sup>53</sup>

Moreover, public finance rules limit some activities that are instrumental to good administration. Originally, EU institutions published consultations only in English, and did not accede to requests to translate them due to resource and budgetary constraints. However, this impeded the right of all citizens to participate in

50 See, especially, the Italian Constitutional Court’s case law, such as Judgment No. 275 of 19 October 2016.

51 Italian Constitutional Court, Judgment No. 275 of 19 October 2016.

52 N. Vogiatzis, On the interplay between good administration and sound financial management. The view from Strasbourg, in P. Stephenson, M.-L. Sanchez-Barrueco and H. Aden (eds), *Financial accountability in the European Union. Institutions, policy and practice*, London and New York: Routledge, 2021, p. 79.

53 The phenomenon is studied by F.M. Artinger, S. Artinger and G. Gigerenzer, C.Y.A.: Frequency and causes of defensive decisions in public administration, in *Business Research*, vol. 12, 2019, p. 9, who examined 950 public administration managers to analyze the frequency and causes of “defensive decision making”.

the public procedures and consultations of EU institutions (the right to participate in the democratic life of the Union). Another example concerned the legislation on EU funds, which was considered incompatible with good administration.<sup>54</sup>

At the EU level, the (apparent) contrast between public finance rules and good administration was somewhat reconciled in the principle of proportionality. This is a general principle of EU administrative law, and is often applied to balance conflicting interests or principles.<sup>55</sup> Financial constraints that affect good administration, including by restricting fundamental rights, can go no further than is necessary to achieve administrative and financial needs. Therefore, public finance rules and measures must be proportionate, in order to avoid challenging good administration.

In European administrative law, the principle of proportionality is often considered the needle in the balance. However, its application in administrative decisions on the use of public resources encounters a limit: the highly technical nature of the assessments involved in the governance of public financial resources. The public administration's financial choices express an "administrative reserve", characterized by a degree of technical discretion. For example, these decisions are not directly subject to judicial review.<sup>56</sup>

Thus, the quantification of a financial burden and the identification of its coverage are objective and technical activities, with respect to which there is often little room for bureaucratic discretion. Financial coverage is either provided or not. Also, it is often linked to historical spending and planning. Where no such financial coverage is provided, it is necessary to partly or wholly stop financing a certain service, or to reduce the funding for another service, thus shifting resources around (unless new tax revenues are deemed necessary).

These considerations highlight how the relationship between good administration (and therefore a proper exercise of administrative discretion) and sound financial management is not only a matter of balancing interests or rights, nor a question that can be resolved with sole reference to the principle of proportionality. The key point for the public administration is not to balance two plates, but to be able to use financial rules as a tool to improve (in other words, a "smart application" of financial limits, combined with the capacity to perform in a more effective and efficient way).

More precisely, financial rules should not be interpreted as a limit to good administration but as a stimulus and incentive that fuels the public administration's

54 These examples are drawn from Vogiatzis, On the interplay between good administration and sound financial management . . . , pp. 82–86: for example, the Commission had imposed "unreasonable bureaucratic obligations on recipients of EU funding"; therefore, financial regulation on EU funds was deemed incompatible with good administration.

55 There is ample literature on the proportionality principle. Among many, G. de Búrca, The principle of proportionality and its application in EC law, in *Yearbook of European Law*, vol. 13, no. 105, 1993, p. 126. J. Schwarze, *European administrative law. Revised first edition*, London: Sweet & Maxwell, 2006, pp. 664–665, recognized that proportionality is the most important general principle in EU economic law.

56 This is the problem generally concerning the judicial review of administrative discretion: G. della Cananea and M. Andenas, *Judicial review of administration in Europe. Procedural fairness and propriety*, Oxford: Oxford University Press, 2021.

good performance (or good administrative behaviour). The performance of the public administration includes more than “good administration” as codified in Article 41 of the EU Charter. It includes all administrative functions and services, also related to the public administration’s internal functioning, with the general aim of satisfying the public interest and creating public value. Civil society needs good performance by the administration. This means not only protecting individual rights in administrative procedures (good administration) but also receiving good services and relying on the execution of public functions.<sup>57</sup>

From this perspective, the implementation of public finance rules should improve the performance and efficiency of public administration. It starts a virtuous cycle geared towards innovation of the public administration, as was seen in some case studies. This assumption is true even when the financial rules impose limits or cuts. Consider the spending review rules. As noted, “they could help targeting spending towards growth-friendly items, or items that promote long-term sustainability, including of the environment. In addition, by improving expenditure controls, they help make space for more resources, especially in those settings with limited fiscal space”.<sup>58</sup> A better allocation of financial resources, induced by the implementation of public finance rules, produces benefits for civil society. For this reason, under the European Semester, the Council over time addressed CSRs to some Member States to carry out spending reviews.

On the contrary, improper implementation of public finance rules contributes to maladministration. Consider the many studies on corruption in the public administration or public procurement, financial accountability in the public sector or the management of EU funds.<sup>59</sup> These studies share their analysis of the dysfunctions in the public administration. A better application of public financial rules would systematically contribute to mitigating all of these pathological situations. Other scholarship highlights how the application of EU public finance management instruments can be essential to protect global, European and national public goods, for instance in the areas of environmental protection, transnational infrastructure projects and social policy.<sup>60</sup> In this regard, an important initiative was the EU Budget Focused on Results. This was launched in 2015 as a multi-pronged initiative to improve the EU budget’s effectiveness in contributing to the

57 The notion of good administration is expanding, also to include the quality of public services and the prevention of maladministration: J. Wakefield, *The right to good administration*, 58 *European monographs*, Alphen aan den Rijn: Wolters Kluwer, 2007.

58 E. Bova, R. Ercoli and X. Vanden Bosch (eds), *Spending reviews: Some insights from practitioners*, discussion paper no. 135, European Commission, December 2020, p. 6.

59 C.A. Bowsher, Sound financial management: A federal manager’s perspective, in *Public Administration Review*, vol. 45, no. 1, 1985, p. 176, highlighted that government managers face many challenges, dealing with budget deficits that increase pressures to cut programmes, reduce costs and administer activities more effectively. However, financial management structure and systems do not usually provide managers with the timely and reliable information required to overcome this challenge.

60 M. Postula, *Public financial management in the European Union*, London and New York: Routledge, 2022.

achievement of EU objectives for growth, jobs and stability in the Member States. The initiative included analysis of how the application of EU funds and related rules and measures helped to improve national public administration and the satisfaction of important public interests.<sup>61</sup>

Briefly, EU public finance regulation is not only as a negative limit or source of tension between public administration and the civil society in Member States (the aspect most highlighted in public debate, especially by Eurosceptics). On the contrary, multiple elements should point towards the EU financial system being a set of tools for improving the performance of public administration. Although there is always a gap between theory and practice, rules and measures are aimed at ensuring a more balanced and controlled use of public resources, less subject to political conditioning by the national government in power in the moment – political conditioning being the main cause of the increase in public debt in various countries – and more accountable.<sup>62</sup>

## ***2.2. The impacts of public finance rules on the public administration's ability to protect fundamental rights***

The tension between the protection of fundamental rights and public finance rules concerns not only the methods of allocating financial resources and the choices connected to public policies, as seen in Chapter IV. It also affects how the public administration concretely exercises welfare functions, especially in relation to the exercise and protection of social rights.

In the history of Europe, towards the end of the nineteenth century, “the State [had] become aware of its social tasks”, providing “for the primary needs of citizens with its welfare and economic functions”.<sup>63</sup> Until then, the administrative apparatus served mainly to support the exercise of (the sovereign’s) power and the activity of enforcing the law (done by the judicial bodies). Therefore, the contemporary state’s current phase is characterized by the transition from a “guarantee administration” to a “performance administration”, intended to provide essential services for life.<sup>64</sup> To what extent is the performance administration conditioned by public financial rules? To what extent does shaping power affect it?

The answers can be gleaned by considering the material consequences of the application of certain public finance rules. The United Kingdom case study provides some interesting elements. The British austerity programme, adopted within the EU austerity framework, supported greater involvement of private parties in the provision of public services. This led to lower-quality services, because costs

61 R. Downes, D. Moretti and S. Nicol, Budgeting and performance in the European Union: A review by the OECD in the context of EU budget focused on results, in *Journal of Budgeting*, no. 1, 2017, p. 9.

62 This process is closely connected with broader economic integration in the EU: more generally, R. Pomfret, *The economic integration of Europe*, Harvard: Harvard University Press, 2021, who commented on the several benefits of European integration in the economic dimension. In this sense, many important achievements also affect the development of national administrative systems.

63 L. Mannori and B. Sordi, *Storia del diritto amministrativo*, Rome-Bari: Laterza, 2001, p. 487.

64 E. Forsthoff, *Der totale Staat*, Hamburg: Hanseatische Verlagsanstalt, 1933, is key in this respect.

(such as staff costs) were cut and profits maximized, but without any real savings for State. The conversion of schools to academies was paradigmatic.<sup>65</sup>

This vicious cycle, caused by the tension between the growing costs of welfare functions and the protection of social rights, is one of the main reasons for the crisis of the welfare state model. The previous section's findings always apply: crisis, and therefore worsening of the conditions aimed at ensuring the exercise of social rights, is caused not so much by financial constraints and rules. Nor is it due to the contents of these constraints and rights, that is, whether they allow access to financial resources or whether it limits those very resources. Rather, the main cause is the inability of the public administration (and governing bodies) to identify appropriate organizational measures in the application of the financial constraints and rules ("good performance").<sup>66</sup>

The United Kingdom case study can be useful to further explain this point. Outsourcing to private entities can be advantageous if the public administration maintains control over the prices and quality of the outsourced services. Unfortunately, the public administration rarely attempts to do so, leaving too much freedom to the private sector. This happens especially in areas where services have not been liberalized but there is outsourcing, namely state management through private entities (such as education and healthcare). Instead, where public services have been fully liberalized, market competition is an important compensation factor for the public administration's poor quality control.

Another broad example concerns social security and related rights. The need for financial rigour and containment of public spending is somewhat incompatible with an increase in social security spending, especially in systems such as Ireland or Italy, where the trend appears extremely difficult to reverse even in the medium and long term. The financial aspect and the social dimension tend inevitably to conflict. In this regard, it is recalled the main EU public finance rules – such as the austerity measures – do not mention the need to adequately protect social rights or to balance them with the economic interest, despite the unavoidable impact of financial constraints.<sup>67</sup>

In this connection, it is noteworthy that there is a peculiar relationship between the protection of social rights and the financial constraints, depending on whether present or future generations are considered. In other words, while financial constraints can limit and affect social security functions for current generations, the same constraints are purportedly a tool for safeguarding the interests of future generations. Thus, the interest in safeguarding the economic–financial context and public debt sustainability consists in the interests of future generations. Hence, these interests too are inevitably and significantly affected by the financial choices and measures adopted by the public administration.<sup>68</sup>

65 Chapter IV, Section 2.2.

66 This can also be defined as "institutional capacity building", the public administration's power to perform in a more effective and efficient way.

67 G. Contaldi, *Politica economica e monetaria*, in *Enciclopedia del diritto*, "Annali" VII, Milan: Giuffrè, 2014, p. 811.

68 James M. Buchanan's well-known studies on public debt show that the primary burden of public debt is shifted to future generations (such generations being any set of individuals living in any time

These considerations highlight how the real balance between financial rules and constraints and the protection of rights lie in the administration's ability to manage and organize the system. It is therefore an organizational problem, in which bureaucratic discretion assumes highly technical features. This was seen in the previous section, which explores how bureaucratic discretion works in a peculiar way in the financial field, and how even the balancing of interests takes on novel forms, especially with regard to the principle of proportionality. As noted, in the financial field, bureaucratic discretion is peculiar because it combines a high level of technical complexity – treading a difficult line between convenience and proper action – and a significant level of relativity in evaluation.<sup>69</sup>

Generally, the balancing or weighting of interests is dichotomous: the public administration evaluates each case based on certain factors, to ascertain which one weighs more in the specific circumstances. Think of: the balancing between transparency and the protection of personal data; the construction of public infrastructure and the protection of landscape; environmental protection and the economic development of businesses; etc. In the financial field, financial interest cannot be effectively weighed, nor can it ever completely give way; it can, at most, be adapted (as emerges in the case law on “incompressible” rights). This exercise requires a high organizational capacity, which implies competence in financial management, in improving performance without wasting resources, and in achieving the protection of certain rights by adapting the needs of the administrative apparatus to those of civil society, and not the other way round.

In this sense, the relationship between financial interest and rights is especially a matter of organizational capacity, aimed at ensuring proper exercise of the administrative function (performance), protecting rights and at the same time managing public resources correctly.

### 3. Does public finance law affect the balance among public powers?

The second dimension considered in analyzing the shaping power concerns the relationship between public administration and other public powers. There are at least three main findings.

First, EU public finance rules have changed the structure and balance of relations among public powers, both at a supranational level and within Member States. The relationship between national public administrations and EU institutions has changed profoundly, considering not only the relationships between national governments and the Council but especially the relationship between national public administrations and the Commission. This radical change was brought about, first

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period following that in which the debt is created). Therefore, financial rules aimed at limiting and containing public debt meet the interests of future generations. J.M. Buchanan, *The collected works of James M. Buchanan, with a foreword by G. Brennan*, vol. 2: *Public principles of public debt. A defense and restatement*, Indianapolis: Liberty Fund, 1999, especially p. 27.

<sup>69</sup> On the relationship between discretion and public finance choices, D. Robbins, Administrative discretion: Its use in budgetary analysis, in *Public Administration Quarterly*, vol. 29, no. 2, 2005, p. 187.



and foremost, by the evolution of EU financial regulation and, by extension, of national public finance regulation.

Second, public financial rules have affected the weight of the administration in charge of the budget (the treasury). In various Member States, the budget administration already had a leading role compared to other public administrative bodies. However, the application of EU financial rules in recent decades has bolstered its role.

Finally, the application of financial rules has changed the relationship between Member States and economic power, meaning the panoply of economic operators, companies and private entities operating in markets. In general, EU financial rules have supported the development of Member States' economic policies in the pursuit of common objectives, in the primary interest of the Union. On this point, several scholars highlight, primarily, how EU public finance rules have also contributed to the development of neoliberal policies, buoyed especially by some Member States with stronger economies. Above all, those rules have contributed to modifying the relationship between the public and private sectors, and therefore between public administration and the market.

The following sections analyze each of these three points.

### ***3.1. How public financial rules affect the relationships between European Union institutions and Member States' public administrations***

EU public finance rules have decidedly affected the relationships between EU institutions and Member States, with particular regard to the relationship between the Commission's technical apparatus and national public administrations.

The impact can be reconstructed examining at least three steps. The first is the establishment of a new administrative function within the EU legal framework; the second step concerns the constraints arising from the exercise of this function for Member States; the last consists in the evolution of a new organizational relationship, an intersubjective relationship between national and European institutions in the implementation of the national RRP.

As regards the first step, previous chapters have shown that the latest EU regulatory framework has granted the Commission a new financial role, linked to the implementation of recovery and support programmes for Member States affected by the COVID-19 pandemic. This role entails collecting resources directly on financial markets, by issuing specific instruments and acting as a financial intermediary in relations with Member States. Moreover, some organizational innovations have been implemented within the Commission, in order to ensure the full exercise of its debt management capacities.<sup>70</sup> This development has produced significant

<sup>70</sup> The Commission has been entrusted with the typical tasks of a debt management office. In this sense, the configuration of an almost "European Union Treasury" has been recognized: F. Spielberger, D. Hodson, D. Howarth and I. Mugnai, Building a European Union 'treasury': Explaining the European Commission's new approach to debt issuance and management, in *Journal of Common Market Studies*, November 2024, pp. 11–13.

changes not only in the exercise of the power of the purse at various levels of government, but especially in the relationship among parliaments, governments and administrations at both European and national levels. As noted in earlier sections, the Commission's new role affirms and implements the "development of a European macroeconomic policy".<sup>71</sup>

The second step entails the distribution of resources by the Commission to the Member States according to a performance-based system, linked to their achievement of objectives set in national plans. This is a direct consequence of the Commission's new role, at the basis of the RRF mechanism, which was analyzed in Chapters II and III.<sup>72</sup>

The third step, which is pivotal to this analysis, concerns the technical bodies in Brussels. These are called upon both to approve the contents of national programming, and especially to verify that the objectives enshrined therein have been properly implemented at the national level. Verification is done in close and direct contact with the relevant national public administrations, which are mainly central-state bodies. This remains the case even though implementation is often entrusted to territorial administrations in many Member States.<sup>73</sup>

What is innovative about this type of "interaction", resulting from the evolution of the EU financial regulatory framework?

This interaction involves a multilevel and intersubjective relationship between the EU's technical apparatus and national public administrations, which takes on the new form of a "hetero-directed co-administration". It does not fall within existing conceptual categories for composite administrative procedures or other types of euro-national procedures (or methods), nor under the organizational category of networks or integrated administrations.<sup>74</sup> There are subtle differences, which call for a more detailed analysis.

71 L. Lionello, Next generation EU: Has the Hamiltonian moment come for Europe? in *Eurojus*, vol. 4, 2020, pp. 22–42.

72 Through the operational agreements (concluded on the basis of Article 20, Regulation EU 2021/241) between the Commission and Member States, national RRFs defined national objectives and commitments "as in a private law contract". The plans meticulously list the respective commitments in a context different from the traditional one of partnership agreements for the European Structural and Investment Funds (ESIF): F. Corti and J.N. Ferrer, Steering and monitoring the recovery and resilience plans: Reading between the lines, in *Recovery and Resilience. Reflection Papers*, no. 2, Brussels: Centre for European Policy Studies, April 2021, especially p. 6. The operational agreements defined the monitoring and implementation calendar, the indicators for the achievement of goals and objectives, the methods of access by the Commission to the data and, where applicable, additional goals and objectives connected to loan disbursement.

73 J. Zeitlin, D. Bokhorst and E. Eihmanis, National recovery and resilience plans, in F. Fabbrini and C.A. Petit (eds), *Research handbook on post-pandemic EU economic governance and NGEU law*, Cheltenham and Northampton: Edward Elgar Publishing, 2024, p. 145.

74 About these categories of organization, E. Schmidt-Aßmann, Introduction: European composite administration and the role of European administrative law, in O. Jansen and B. Schöndorf-Haubold (eds), *The European composite administration*, Morselt: Intersentia, 2011, p. 2.

As a first point, the Commission carries out a thorough control over the execution of the objectives established in national RRFs within the NextGeneration EU framework. This technical activity: (i) takes place systematically throughout the year according to a general schedule; (ii) regards not only the fulfillment of targets and milestones but, especially, the upstream definition of specific measures to implement the objectives; (iii) occurs both through systematic and online – formal and informal – meetings between the Commission offices and the relevant national administrations, and through on-site inspections; (iv) employs various tools to involve national administrations, such as fiche comments and requests for clarification requiring responses by administrations; and (v) can be ongoing and can lead to additional examinations or “pending issues”.

The second point to note is that the aforementioned practice is not a formal administrative procedure. Composite administrative procedures consist of phases taking place at both the European and national level and aim to adopt a single administrative act.<sup>75</sup> In the practice being discussed, the procedure may provide for various phases, but is not intended to result in adoption of an administrative provision. Rather, its purpose is to advance and support the national implementation of the national programme.

Under the RRF, the Commission disburses financing instalments to Member States upon their submission of a payment request, based on achieving the established milestones and targets and corroborated with detailed and comprehensive evidence. The Commission thoroughly examines this information before it can make a positive preliminary assessment of the payment request.<sup>76</sup> Then, the Commission refers the preliminary assessment to the Economic and Financial Committee (EFC) for its opinion, which the Commission is obliged to consider. Next, the Commission can adopt the final disbursement decision, through a comitology committee.

Consequently, there is no link between the preliminary technical activities carried out by the EU apparatus in synergy with national public administrations, and the adoption of the Commission’s assessments, although such assessments can take into account any information that may have emerged in technical meetings.

Hence, the practice in question can be considered neither an administrative procedure aimed at verifying the prerequisites for disbursement of financing tranches, as procedures for the other European funds (cohesion funds, etc.) might be.<sup>77</sup> Rather, it has become much more complex. The Commission does not simply check the achievement of the milestones and targets *ex post*. On the contrary, it collaborates with national public administration at a preliminary stage to define the best and most suitable measures to achieve the objectives.

75 On the composite administrative procedures, S. Cassese, *European administrative proceedings*, in *Law and Contemporary Problems*, vol. 68, 2004, p. 21.

76 Payments under the RRF are performance-based and contingent on Member States implementing the investments and reforms outlined in their respective RRFs.

77 For a detailed description of procedures for the use of other European funds, V. Margaras and B. Széchy, *Guide to EU funding 2023 edition*, Brussels: Research Service of the European Parliamentary Research Service (EPRS), 2023.

As for the third point, the category of euro-national institutional procedures does not seem appropriate either.<sup>78</sup> This category comprises the mixed-nature procedures associated with, for example, the functioning of the European Semester. The European Semester endows EU institutions with a supervisory activity, envisaging document exchange between the European and national levels in order to define national budget planning. Within NextGeneration EU, instead, the interaction between the European and national levels no longer concerns only decision-making and the planning phase but, above all, the administrative and executive phases.

The fourth point is that the interaction between the Commission and national public administrations cannot be traced back to the organizational figures that have traditionally characterized the relationships between the European and national level. It is not a network, such as those supervising antitrust matters, which entail the participation of the Commission and in which the independent national authorities participate. Nor is it a form of integration, such as the process in the banking sector. Nor, again, do there seem to be shared functions, such as those underlying common administrative systems or other forms of coordination or cooperation.<sup>79</sup>

The co-administration model, often used to describe the functioning of European structural funds, is probably the most similar one to the interaction between the European and national levels in the NextGeneration EU context. Co-administration consists in “close consultation between the Commission and the Member States, at various levels, in the management of the funded interventions and, in particular, in the preparation, financing, monitoring and evaluation phases”.<sup>80</sup>

Nevertheless, some peculiarities must be considered. The interaction between the Commission and public administrations in the Member States entails: the definition of common general objectives linked to common EU interests (digital transition, environmental protection, energy independence, military defense, etc.); the step-by-step support in the implementation of measures linked to the targets and milestones; meticulous oversight, including in the field; introduction of a reversal ban, so that established measures cannot be modified without the EU’s approval (following a complex process) and there is no scope for self-regulation.<sup>81</sup> Moreover,

78 C. Fasone and N. Lupo, Learning from the euro crisis: A new method of government for the European Union’s economic policy coordination after the pandemic, in *International Journal of Constitutional Law*, vol. 22, no. 3, July 2024, p. 882.

79 For a general analysis of the different organizational figures in the EU, D. Hodson, U. Puetter, S. Saurugger and J. Peterson (eds), *The institutions of the European Union*, 5th edition, Oxford: Oxford University Press, 2025, who classified them according to their tasks (providing direction, managing the Union, governing the EU policies and managing interests).

80 E. Chiti and C. Franchini, *L’integrazione amministrativa europea*, Bologna: Il Mulino, 2003, p. 63, who added that “[t]he procedure for implementing the interventions is rather complex because it develops on different levels, and is also divided into sub-procedures. First of all, there is a programming phase; this is followed by the investigation phase, the decision-making phase and the implementation phase; finally, there is the control phase. The Commission and the national administrations participate in all of these stages, albeit with different tasks and responsibilities” (author’s own translation).

81 Some aspects are described by the ECA, special report no. 7 of 2023 (*Design of the Commission’s control system for the RRF. Assurance and accountability gap remains at EU level in the*

European regulations do not provide for the establishment of fully independent management authorities at the national level, unlike the case with EU structural funds. National public administrations engage in such management directly. In this connection, the financial/budget administration and the Commission enjoy a significant role. As the RRF follows a performance-based mechanism, the Commission carries out direct control and evaluation, albeit on the basis of national reporting.

Therefore, this is a particularly intensive form of co-administration. One key aspect is worth exploring in detail. Co-administration generally presupposes joint ownership of functions and a unitary purpose, in the mutual interests of the EU and each Member State. The context of structural funds is however characterized by sectoral interests, and concern specific actions and interventions within States. The NextGeneration EU framework introduced cross-cutting and wide-ranging interventions, in light of specific predefined missions. In this framework, the EU has defined a hierarchy of prevailing public interests, regardless of States' specific needs.

These characteristics indicate that a “hetero-directed co-administration” model exists, whereby the EU level directs and co-manages, and the national level co-manages and interacts with the implementing bodies. Therefore, the European level does not only direct; it also engages in management, examining the details of the measures implemented to meet the targets and milestones set in national plans (and the content of national rules). This is a modern version of the indirect rule model, which is most strikingly manifested in the field of public finance.<sup>82</sup>

### **3.2. How public financial rules boost the role of budget administration in relation to other powers**

Historically, public finance first determined the development and strengthening of public administration in Europe, and financial administration especially, during the gradual transition from medieval empires and regimes to national States. In this period, it became increasingly necessary to establish a stable administrative body that not only collected revenue from taxes and tributes across the national territory, as already occurred in the past, but above all maintained state accounts (originally in the monarch's primary interest) and ensuring their order (accounting function).<sup>83</sup> This administrative apparatus was vast and complex, as demonstrated

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*new delivery model, despite extensive work being planned*). Moreover, Commission, *Report on the implementation of the recovery and resilience facility: Moving forward*, Luxembourg: Publications Office of the European Union, 19 September 2023 COM(2023) 545 final.

82 On the relationship between the EU and Member States, some scholars noted the emergence of a (new) indirect model to elevate and protect supranational interests. If indirect administration initially served the inviolability of national administrative rights, today, influenced by the “European constraint”, it is a powerful driver of convergence between state systems (G. Vesperini, *Il vincolo europeo sui diritti amministrativi nazionali*, Milan: Giuffrè, 2011, p. 146).

83 From this perspective and for a comparison with the US experience, see the well-known book written by E.J. Ferguson, *The power of the purse. A history of American public finance 1776–1790*, Durham: University of North Carolina Press, 1961.

by the French experience of administrative centralization, with the institution of the budget administration and the inspectorate body (intendants). This model was later transposed to other legal systems, such as the Italian one.<sup>84</sup>

Today, the budget administration in France has received further powers by Article 47(3) of the French Constitution, which establishes that “should Parliament fail to reach a decision within seventy days, the provisions of the [Finance] Bill may be brought into force by Ordinance” adopted by the government (author’s own translation). This procedure is similar to that applied, for example, to the adoption of laws financing social security, in which the role of French Parliament is greatly reduced in favour of the executive power.<sup>85</sup> In this context, the *Direction du Budget* has always played a central role, as all public policies rely on its financial intervention. Over time, the *Direction du Budget* retained not only this role but also became the main driving force behind the entire reform of the French Organic Law on Budget Acts (LOLF).<sup>86</sup>

Another significant example is the role of the Treasury in the history of the United Kingdom, as illustrated especially by John Maynard Keynes.<sup>87</sup> Today, HM Treasury

is perhaps the most powerful department in Whitehall. Its ownership of public spending means it has direct control over the money available to the rest of government, while the Treasury’s responsibility for tax policy gives it enormous influence over the finances of households and businesses.<sup>88</sup>

Echoing this finding, the weekly publication *The Economist* published an article titled *Reducing the power of the Treasury is a good idea. Don’t break it up. But do give departments more freedom*, highlighting the budget administration’s growing strength at the expense of other public powers.<sup>89</sup>

84 E. D’Alterio, *I controlli sull’uso delle risorse pubbliche*, Milan: Giuffrè, 2015, p. 1.

85 Article 47–1 of the 1958 French Constitution provides a special procedure for bills financing social security, which is largely analogous to that established in Article 47 for bills of finance. See also Article 49(3): “The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance Bill or Social Security Financing Bill an issue of a vote of confidence before the National Assembly. In that event, the Bill shall be considered passed unless a resolution of no-confidence, tabled within the subsequent twenty-four hours, is carried as provided for in the foregoing paragraph. In addition, the Prime Minister may use the said procedure for one other Government or Private Members’ Bill per session” (<https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958>). The French Conseil Constitutionnel has ruled on the pensions law in response to complaints about the abuse of the special procedure provided for by Article 47–1 of the Constitution, based on the constitutional principle of clarity and sincerity of parliamentary debate (Conseil Constitutionnel, Décision no. 2023–5 RIP, 3 May 2023).

86 Again in 2024, the bill on financing social security was adopted based on Article 49(3) of the Constitution (see: French PM forces social security budget bill through, exposing his government to a no-confidence vote, in *Le Monde*, December 2, 2024).

87 See Chapter I, Section 3.3.

88 As reported by the English Institute for Government, 20 March 2024, <https://www.instituteforgovernment.org.uk/event/treasury-power-government>, which studied the significant role of the Treasury in the English administrative system.

89 The article was published on 25 August 2022.

Therefore, public finance rules have affected not only the development of public administration but have also acted to strengthen budget administration within Member States, including by influencing the balance of public powers within States themselves.<sup>90</sup>

This strengthening occurred mainly in two ways.

As for the first way, as studied extensively in sociology, complexity – especially in the finance field – tends to keep the inexperienced away and enhances the role of experts and the professional bureaucracy.<sup>91</sup> The more numerous the constraints and complexities, as in EU financial regulation, the more knowledge and expertise are needed, generally located in technical-administrative bodies.

Returning to the example of French budget administration, two major challenges induced by EU financial regulation have recently led to significant changes. One is the elaboration of a “budgetary constitution”, that is, the LOLF, and the need to “cure” public finances. Since January 2006, the French budget administration has led to the implementation of the LOLF, under pressure from EU financial rules and acts.<sup>92</sup> This responsibility prompted the budget administration to redefine its position towards other ministries, to adapt its tools in the light of the innovations brought about under the financial constitution and to accept new functions, such as the negotiation of objectives and the monitoring of performance indicators in collaboration with other ministries.

The second way derives from the specific functioning of the EU rules. From this perspective, there are various aspects to take into consideration.

First, the balanced budget rule is decisive in economic-financial planning, relying on specific estimates. These estimates, which form the basis for negotiating the objectives with the EU institutions by the Prime Minister and the Minister of Economy and Finance, are made by the national budget administration. Although the EU rules apply criteria for greater “independence”, this crucial activity remains almost completely the prerogative of the State’s budget administration. According to the Two Pack, Member States must, in their programming documents, indicate whether the macroeconomic forecasts were drawn up by an independent institution, or by the government and then validated by an independent institution.<sup>93</sup>

Second, the balanced budget rule requires Member States to carefully assess the financial effects of expenditure forecasts on financial balances. This applies not

90 On the expanding role of the Italian budget administration, E. D’Alterio, *Dietro le quinte di un potere. Pubblica amministrazione e governo dei mezzi finanziari*, Bologna: Il Mulino, 2021, especially p. 27.

91 On the power of bureaucracy, Max Weber’s theses are very well known: especially M. Weber, *Economy and society*, vol. 2, English edition by G. Roth and C. Wittich, Berkeley and Los Angeles: University of California Press, 1978, p. 956.

92 See, for instance, Council opinion of 27 February 2007 on the updated stability programme of France, 2006–2010, in which the Council invited France to “strengthen the monitoring and enforcement of expenditure rules for all sub-sectors of the general government so as to ensure the respect of the ambitious multi-annual expenditure ceilings”, p. 3.

93 This is the solution adopted in Italy, where the task falls to the Parliamentary Budget Office: see Article 18(1) of Law No. 243/2012 and Article 10-ter of Law No. 196/2009.



only to the State budget law, but also to legislative acts adopted during the year and involving new or greater burdens than those foreseen in the budget. Identifying these effects, especially on net borrowing, is crucial to ensure compliance with EU parameters. For budget forecasts, this calculation is entrusted to the Member States' national budget administrations. For additional legislative forecasts involving new or greater burdens, the task would fall to the ministries competent for the subject matter of the expenditure forecast. In both cases, the budget administration plays an essential coordinating role.

Third, EU rules provide that Member States can temporarily depart from the programmatic objectives or the adjustment path, in exceptional circumstances. This was the case, for example, with the COVID-19 health emergency. Here too, the budget administration played an essential role, preparing the reports supporting requests for authorizations for such departures. On this point, it has been noted that in EU Member States, the State has been "reduced to government and administration", in the face of semi-paralyzed parliaments.<sup>94</sup>

Under the RRF, within NextGeneration EU, this has become even more accentuated. The RRF led to a key role for the public administration: implementing targets and milestones defined in the national recovery plans, while at the same time receiving interventions. These rules expanded the public administration's role in several fields (public recruitment, technical assistance, databases, reforms, etc.). In turn, national public administration, and especially the budget administration, used circulars, guidelines, technical instructions and more to impose common rules and practices on other institutions, such as local authorities, in order to correctly apply national resilience plans, and to promptly comply with RRF obligations. These measures established operational specifications, in particular with respect to drafting, selection and control activities. They mostly regulated or detailed the EU acts, with the result of compressing decision-making spaces, limiting choices, directing activities and setting up procedural initiatives.

This significant strengthening of budget administration in (especially some) Member States occurred mainly at the expense of the role of national parliaments.<sup>95</sup> More generally, EU integration and the development of EU powers have led to a gradual compression of the role of national parliaments. This phenomenon, usually described as due to top-down pressure, is also caused by bottom-up dynamics, precisely because national executives and national budget administrations have strengthened within Member States, because of the EU financial rules seen in previous chapters.<sup>96</sup>

The long-standing debate on parliaments' inability to control public administration persists. Historically, this inability has been associated with the difficulty for

94 From a general perspective, M. Tushnet (ed), *The administrative state in the twenty-first century: deconstruction and/or reconstruction*, special issue of *Daedalus*, in *Journal of the American Academy of Arts & Sciences*, vol. 150, no. 3, 2021, pp. 5 ff.

95 W. Bateman, *Public finance and parliamentary constitutionalism*, Cambridge: Cambridge University Press, 2022, p. 199.

96 P. Krause, *Executive politics and the governance of public finance*, in M. Lodge and K. Wegrich (eds), *Executive politics in times of crisis*, London: Palgrave Macmillan, 2012, p. 136.

national parliaments to be effectively aware of the state of public resources and to fully exercise its power of the purse.<sup>97</sup> The phenomenon has several causes, including: the complexity of financial mechanisms, the reduced weight of parliament even in the production of spending legislation and the significant information asymmetry between government and parliament.

Another cause is the different powers that parliament and government can exercise over the budget. In the United Kingdom, Parliament can only approve or reject the budget as a whole, without being able to modify its provisions except for expressing a vote of no confidence in the Government. In France, when approving the draft budget, members of Parliament can propose to increase specific appropriations, provided that they also suggest cutting other expenditures, in the same amount. In Italy, Parliament can modify, approve or reject the budget, but the limited time available and other conditions significantly reduce the scope for parliamentary initiative. Indeed, most of the amendments to the budget are proposed by the Government itself, and not by members of Parliament. In Germany, the Minister of Finance can veto individual spending proposals if he considers that they do not meet the requirements of necessity and economic viability.<sup>98</sup>

In this framework, EU financial rules, such as those of the European Semester, hinder the interaction between parliaments and executive powers at the national level. This operates especially to the detriment of parliaments, given that Council and Commission indications and recommendations are evaluated by government, which then proceeds to implementation. The European indications have precedence and prevail over those of national parliaments.

In conclusion, this trend should not be interpreted as a limitation for national democratic institutions or as a source of democratic deficit, a concern often noted in scholarship with regard to the development of EU powers. On the contrary, EU financial rules do not threaten the democratic systems of the Member States; with the appropriate adjustments, they can strengthen democracy, as seen in previous sections.

### ***3.3. How public financial rules reshape the relationship between the public administration and the private sector***

EU public finance rules have influenced the relationship between the public and private sectors, more specifically between the public administration and the market. The term “private sector” or “market” refers to the economic power exercised

97 P.E. Coleman described this well in relation to the early Australian legal system, noting a peculiar paradox: “it is paradoxical that, whilst no adequate constitutional, statutory or Parliamentary control is exercisable over a Government or a Treasurer who conceals the true financial position, yet Parliament insists on exercising more or less stringent control over the financial administration of companies, local governing bodies, friendly societies, etc., and both civil and criminal law may be invoked where statutory provisions are infringed”: P.E. Coleman, *Public finance and parliamentary methods*, in *The Australian Quarterly*, vol. 4, no. 15, September 1932, p. 31.

98 This comparative analysis is taken from A. Monorchio and L. Mottura, *Compendio di contabilità di Stato*, 4th edition, Bari: Cacucci, 2018, pp. 169–170.

by enterprises, multinational corporations, economic operators, trading agents, etc., distinct from civil society, discussed in Section 2 previously.

In this connection, at least five key points are especially pertinent.

The first point concerns how EU public finance rules have, over time, stimulated outsourcing in the provision of public services. This phenomenon was analyzed both in the case studies of Chapter IV and in Section 1.4. on how EU financial rules have influenced national administrative reforms.

However, a core of activities and services in which the public sector “prevails” over the private sector persists. This occurs when public management turns out to be more advantageous than outsourcing, either because private management showed flaws or because stronger public control is appropriate for certain strategic functions. This might contrast the ample scholarship that highlights the increasingly drastic curtailment of the public sphere in Member States, in favour of the private management of public services.<sup>99</sup>

However, the issue must focus on the financial perspective. Although EU rules have often encouraged a greater involvement of the private sector, especially to contain public spending, public management has proven to be solid in various cases, counter to some common assumptions. For example, privatization does not always produce greater savings than public management (Portugal);<sup>100</sup> it is uncertain whether private management ensures a higher quality of services for the same level of public spending (United Kingdom);<sup>101</sup> full accessibility of a service is not always easier to achieve financially through outsourcing (Irish healthcare system).<sup>102</sup>

Thus, occasionally, the public sector remains strong in the provision of services, based on financial reasons. This produces a paradox: EU financial rules encourage States to resort to private provision of public services (outsourcing or privatization), yet due to financial reasons, in Member States it may be preferable to retain public management. Why does this happen?

There are several factors, including primarily the public administration’s organizational and managerial efficiency. In countries where the public administration is relatively efficient (such as the United Kingdom), outsourcing or privatization has revealed dysfunctions that could be better managed through public administration. Instead, where efficiency is low, outsourcing or, especially, privatization has produced greater benefits, because it compensated for the inefficiency and shortcomings of public administration. In other words, private management is not always preferable for financial reasons; rather, the level of organizational efficiency in the public administration can be decisive.

99 There is a rich literature on the phenomenon of the “hollow state”, which is “a metaphor for the increasing use for third parties, often nonprofits, to deliver social services and generally act in the name of the state”, H. Brinton Milward and K.G. Provan, *Governing the hollow state*, in *Journal of Public Administration Research and Theory*, vol. 10, no. 2, Tenth Anniversary Issue, April 2000, p. 359.

100 Chapter IV, Section 2.1.

101 Chapter IV, Section 2.2.

102 Chapter IV, Section 2.4.

For this reason, EU financial rules and acts – especially those adopted within the European Semester – should assess individual Member States’ situations in detail. Outsourcing and privatization do not necessarily always lead to better management of public resources. The ability of outsourcing and privatization to better manage public resources and contain public expenditure depends mainly on the level of efficiency of the national public administration in question. However, such an assessment does not emerge clearly in the European Semester measures, which focus on other factors.

The second point regards the main effect of outsourcing: a considerable increase in public procurement. This clearly reflects a chain reaction.

The public procurement sector has become increasingly significant in Member States, a trend bolstered by EU regulation. According to the ECA, “around €2 trillion, or 14 % of the EU’s gross domestic product, is spent each year on public procurement”.<sup>103</sup> Under EU law, public procurement is a key element of the single market, helping public authorities obtain the best value for money when purchasing works, goods and services. A successful model in several Member States is that of public–private partnerships.<sup>104</sup>

Nevertheless, the ECA concluded that

the level of competition for public contracts to deliver works, goods and services, decreased over the past 10 years in the EU single market. There is a lack of awareness for competition as prerequisite for value for money procurements. Commission and member states have not made systematic use of data available to identify the root causes of limited competition, they took only scattered actions to reduce obstacles to competition in public procurement.<sup>105</sup>

Moreover, the EU rules contributed to new administrative burdens, poor transparency and scarce development of competition (“some of the objectives of the 2014 reform may at times go against the overarching objective of ensuring competition in public procurement”).<sup>106</sup>

Thus, EU legislation has promoted increasing recourse to outsourcing, which in turn results in the expansion of public procurement. Conversely, there is no corresponding increase in the level of competition (the ECA certified a high number of direct contract awards in most Member States, and a limited level of direct cross-border procurement).

103 ECA, *Public procurement in the EU. Less competition for contracts awarded for works, goods and services in the 10 years up to 2021*, no. 28, Luxembourg: Publications Office of the European Union, 2023, p. 4.

104 From a comparative perspective, G.A. Hodge, C. Greve and A.E. Boardman, *International handbook on public–private partnerships*, Cheltenham and Northampton: Edward Elgar Publishing, 2010, p. 3.

105 ECA, *Public procurement in the EU* . . . , p. 4.

106 ECA, *Public procurement in the EU* . . . , p. 5.

These data prove not so much a failure of EU legislation as, more specifically, the difficulty to pursue a common European objective by applying equal standards and rules for all. This “one-size-fits-all” approach fails to adequately consider the specific context: the reality of public administration within each Member State. On one hand – as seen in Section 1.1. – EU institutions, and especially the Commission, take into account Member States’ specificities when evaluating and supervising them within the European Semester. However, they do not do so when formulating the rules to be applied at the national level, because they rely excessively on the States’ ability to make the necessary adjustments during transposition. This tendency has arisen several times in EU legislation, both in public finance matters and in the field of public procurement, bodies of law that are moreover closely interlinked.

The third point deals with another chain reaction effect: the growing and ever-deepening interaction between public administration and the market. This has forced the former to develop significant predictive capabilities that it lacked before and that it is still struggling to develop.

Consider, for example, the “do no significant harm” (DNSH) principle, required for all public contracts relating to the use of RRF resources. As provided for by EU public finance rules, in public procurement the DNSH principle applies in the execution of multiple public investments financed by the RRF.<sup>107</sup> In this context, the definition of “EU sustainable finance regulations” was used.<sup>108</sup> Public administrations must ensure compliance with the DNSH principle, even if the public work is entrusted to private entities. In particular, the public administration must adopt “DNSH assessments” for each project financed by the RRF. The public administration must provide hard proof for the DNSH assessment, from start to finish of the outsourced intervention. Proof must also be provided for monitoring and reporting activities, when controlling expenditure. All these requirements result in a considerable administrative burden; in addition, a lack of homogeneity in the application of the principle must be noted.

The DNSH principle has produced the positive effect of obliging public administration to develop specific evaluation skills, in terms of environmental impact of projects. On the other hand, however, the principle has revealed some problems in application, especially in countries that are less advanced in conducting impact assessments.

Accordingly, in some Member States, the public administration suffers from a structural operational deficit in the field of impact assessments. An example is Italy. Other Member States, however, have more experience in this field, such as

107 The obligation to comply with the “horizontal principle” of “not causing significant damage to the environment” (or DNSH) is strictly connected with the European mission of the “just transition” towards a sustainable future. The hypotheses of “significant harm to the environment” are detailed in the Article 17 of the “Taxonomy Regulation” (Regulation EU 2020/852), by considering the six environmental objectives set out in the Article 9 of the same Regulation.

108 N. Pfaff and O. Altun, *Ensuring the usability of EU taxonomy*, Zurich: International Capital Market Association (ICMA), February 2022, p. 18.

France.<sup>109</sup> This difference significantly affects the proper implementation of the DNSH rule, to the point that in some States such assessments are reduced to mere “exercises in style”. Here, too, it is clear that EU financial rules, including the DNSH principle (which operates more as a conditionality rule for disbursing RRF and other EU funds), should be better tailored to the characteristics and level of experience of public administrations in each Member State.

The fourth point concerns a cultural aspect. EU public finance rules, especially those adopted under NextGeneration EU, have pushed public administrations in Member States towards emerging market sectors.

An example is the digital sector. NextGeneration EU includes digital transition among its main objectives. The programme thus required Member States to include several targets and milestones linked to the digital sector in their RRP. In Member States where digitalization in the public sector was already advanced, such as Denmark, these European rules did not entail major changes. However, in Member States where digital evolution was still in its infancy, the EU rules did have enormous impact.

Public administrations in countries such as Greece, Italy, Portugal and Ireland had to undertake a substantial cultural and organizational shift, often while facing challenges such as a high average age within the public administration, or the poor development of technologies in administrative processes.

From this perspective, EU public finance legislation has succeeded in encouraging Member States to develop digitalization in the public sector, with important benefits both within and beyond the public administration. This has been associated with growing attention, also on the part of scholarship, to the use of more advanced technologies, such as artificial intelligence, in the performance of public functions. Public finance law has been used as a tool to innovate and modernize public administration, promoting a cultural revolution over its traditional reliance on paper.<sup>110</sup>

The last point concerns the increasing information asymmetry between public administration and the market. In several Member States, public administrations have retained an old, if not obsolete, organizational structure. Conversely, economic power evolves much more rapidly, driven by major global powers such as the United States of America or China, the economic influence of which exceeds that of the EU.

This asymmetry is clear in certain Member States, leading to the EU’s repeated invitations, contained in CSRs, to innovate the public administration.<sup>111</sup> The trend thus triggered a race for the public administration to catch up with the market, and, more generally, economic power.

109 An interesting analysis was carried out by T. Perroud and S. Rose-Ackerman, Impact assessment in France: U.S. models and French legal traditions, in *European Public Law*, vol. 20, no. 4, 2014, p. 649.

110 C.M. Proftoroiu, C.I. Negoit  and A.V. Costea, Digitalization of public administration in EU member states in times of crisis: The contributions of the national recovery and resilience plans, in *International Review of Administrative Sciences*, vol. 90, no. 2, 2024, p. 336.

111 R. Pe a-Casas, S. Sabato, V. Lisi and C. Agostini, *The European Semester and modernisation of public administration. Final report*, European Social Observatory (OSE)-European Public Service Union, November 2015, especially p. 20.

This phenomenon has yielded several interesting consequences. For example, EU financial regulations push public administrations to align not only with the market, but also with the trends and needs characterizing certain economic sectors, such as energy. Implementation of the REPowerEU regulation, linked to the RRF, required national public administrations to reformulate various milestones and objectives, despite sometimes lacking adequate knowledge of the complex and continuously evolving energy sector.<sup>112</sup>

Moreover, the concrete application of the REPowerEU rules highlighted how, in some cases, public administrations lacked the knowledge required to effectively manage energy transition processes and related financial resources, thus obliging them to rely entirely on corporate giants in the sector, including when programming objectives.<sup>113</sup>

In conclusion, at least three general findings can be mentioned. First, EU public finance rules have led not only to greater resort to the private sector, but also to greater blending between public and private. Under public finance law, the type or nature (core or noncore) of the function and service considered is irrelevant. If private management is financially more sustainable and preferable, it should be adopted. However, this approach has clashed with the public sector's greater suitability, in some cases, with respect to the management of certain services and functions. This trend emerged where the public administration is relatively efficient, and private management is not particularly more suitable.

Second, this combination between the public and private sector stimulated by EU public finance rules has often failed to achieve the results desired, such as fostering competition or environmental protection. This reveals a significant aspect: the financial nature of the rules tends to “interfere” with the theoretical and main aim of the rule itself. A similar situation occurred in the application of the rules on financial conditionality (Regulation EU 2020/2092) in Hungary and Poland, where the financial scope of these rules interfered somewhat with the pursuit of the rule of law principles.<sup>114</sup>

Finally, the Commission generally carries out in-depth impact assessments of EU rules in Commission staff working document impact assessments.<sup>115</sup> Assessments can be preliminary (ex ante), ongoing and ex post. However, these activities do not regard all EU public finance rules and, especially, their impact on the

112 A. Widuto, *Energy transition in the EU*, Brussels: Research Service of the European Parliamentary Research Service (EPRS), November 2023, p. 2.

113 The implementation of certain national RRFs required the support of some big companies, especially in the energy sector, in order to identify, programme and carry out works and build infrastructures.

114 We recall that there was a strong resistance by these countries to respect the conditionality mechanism, by pressing the need to separate the provision of funding from the implementation of the rule of law and, therefore, the financial dimension from the protection of fundamental rights. See Chapter II, Section 1.2.1. for the details of the cases.

115 A description of the activity is available at [https://home-affairs.ec.europa.eu/whats-new/evaluations-and-impact-assessments\\_en](https://home-affairs.ec.europa.eu/whats-new/evaluations-and-impact-assessments_en).



functioning of public administration and on the private sector within each Member State.<sup>116</sup>

This book has shown how financial rules can produce remarkably different consequences depending on the national reality considered. For example, the EU financial rules that induced and promoted the digital transition have had very different consequences in individual Member States, depending on the level of efficiency and innovation of the public administration and on the development of the digital market in each national context (compare the case of Denmark to that of Greece or Italy).

It would not be far-fetched to think of an *ex ante* and, especially, *ex post* impact assessment of EU financial rules that is calibrated to the characteristics and specificities of public administrations in Member States and, above all, to the level of “maturity” and the characteristics of the relationship between the public and private sectors within each national context.

This is not easy to implement, given that the Commission generally finds it difficult to obtain information from states on the application of public policies. Indeed, Member States are jealous of the information on their respective administrative apparatuses, as well as on the national application of public policies. This gives rise to a short circuit in the EU financial regulatory framework. How can one imagine a common, useful and effective financial policy and regulatory framework, if the EU is not aware of the impact that these rules have on the public and private sectors within its Member States?

Against such a backdrop, there may be a risk of insisting on inappropriate tools or pursuing unrealistic aims, as seen in the case of certain public procurement rules that were intended to foster competition but failed to do so.

These issues highlight a series of weak links in the complex structure of the EU public finance system, especially from the perspective of national public administrations.

116 The Commission staff working documents on the evaluation of the RRF, for example, are assessments of the RRF implementation, but not specific and effective analyses of the impacts on the public administrations in the Member States.