Why the Italian President's Decision was Legitimate

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On 27.05.2018, Sergio Mattarella, the President of the Italian Republic, refused to appoint a government supported in Parliament by the Five Star Movement and the League, often described as the foremost populist parties now active in Italian politics.

The refusal was due to the parties' insistence on having prof. Paolo Savona as the Minister of Economy and Finance. Counter-proposals by the President of the Republic (such as the appointment to that Ministry of a senior MP of the same majority, or of the prospective Premier) were dismissed.

Prof. Savona is a well-respected economist, and also a former Minister of Industry in the Ciampi Government (1993-1994). He has been consistently skeptical on the financial and monetary constraints enshrined in EU law. In 2015, he held that Italy should have at hand a "plan B" – to be kept confidential as long as possible – for abandoning the Euro. He also went as far as to argue that the participation of Italy to the EU is a stretch of the relevant constitutional principles, particularly popular sovereignty, because political powers on economy and money have been forfeited. A presentation of these positions can be found here.

These positions were not explicitly endorsed by the two parties and their "contract for government" (a summary in English is available here). Nevertheless, the contract seemed to go in the direction of deficit spending: but finding credit where, and at what cost? Coaxing the ECB into unconditional OMTs, or debt cancellation (as in a first draft of the contract)? Switching back to a national currency? Prof. Savona's ideas somewhat matched with the blank spots. Moreover, the renowned economist apparently did not deny that he was ready to let the "spread" (yield spread between Italian and German bonds) soar high, to put pressure on EU institutions. Instead, he affirmed his commitment to a different, stronger and more equitable Europe (see here and here).

The President of the Republic immediately disclosed the reasons for his refusal (see here), stressing that this was the only controversial appointment in an otherwise cooperative effort to form a new government.

The reasons may be summarized as follows:

1. Article 92 of the Italian Constitution vests in the President of the Republic the power to appoint Ministers, and this power has never tolerated, and may not tolerate, impositions;
2. the spread is already increasing, together with investors' concerns on the future of Italy, threatening financial stability;
3. participation in the Euro and the EU are fundamental choices and they must be given open and serious consideration, whereas they have not been at the forefront of the Italian political elections of March 2018.

Immediately after the refusal, the President of the Republic summoned another renowned economist (Carlo Cottarelli) to try and form a government. Some MPs, including the leader of the Five Star Movement, called for President Mattarella to be impeached under Article 90 of the Italian Constitution, for «high treason or violation of the Constitution».

Here the focus will be on the reasons underlying the President's decision, particularly no. 1 and 3. Concerning no. 2, a broader point must be kept in mind: Italian public debt is beyond 130% GDP; interests on this staggering amount are the main factor preventing a budget surplus. Therefore, the "spread" is relevant not in itself, but as a reminder and symptom of a chronic weakness in the national economy.

The exact nature of the Presidential office and powers is a classical conundrum in Italian constitu-

tional law. A traditional view is that the President of the Republic enjoys a broad array of discretionary powers, both formal and informal, which he must exercise to guarantee the Constitution and a well-functioning institutional system (see also ECLI:IT:COST:2013:1, particularly §§ 8.2-3). When political bodies act in a coherent and orderly fashion, the President tends to shift towards the background, and vice versa. In a sense, this reflects the flexible nature of the parliamentary form of government: e.g., when the Government and the parliamentary majority are strong, the President mostly recedes to control and containment of single highly controversial decisions; but in 2013, when the Italian Parliament seemed paralyzed, it fell on Giorgio Napolitano (re-elected to the office for the first time in Italian history) to find a way out of the gridlock.

The President's acts may still be questioned in a conflict of powers (Article 134 of the Italian Constitution), if they unduly infringe on other organs' constitutional functions. But the procedure for high treason and violation of the Constitution has never been enacted: it has been occasionally discussed; it was started in 1991 and (by the Five Star Movement) in 2014, with all the accusations later archived. It has always been considered a merely theoretical option.

All the President's acts (with very few exceptions) must be signed by a Minister or the President of the Council of Ministers (Article 89 of the Italian Constitution). This, depending on the type of act and function, may entail either a formal and supervisory role by the President, or a substantive one. The appointment of the Government is a complex act: it should be the confluence of the substantive will of both the President of the Republic, and the relevant political bodies (the parliamentary majority and the prospective President of the Council). No choice can be forced unto the President of the Republic: rightfully did President Mattarella resist encroachments on this.

Indeed, Presidents often refused to appoint certain individuals to certain Ministries, mostly due to personal conditions of those individuals: e.g. President Scalfaro did not appoint Mr. Berlusconi's own lawyer as Minister of Justice; President Napolitano refused to appoint an acting magistrate to the same office.

The difference, today, is that Mattarella's opposition finds its grounds not in personal conditions, but in the political opinions of the (refused) appointee and in a certain ambiguity on them by the parliamentary majority (see above).

The decision is open to debate, as it is only natural with discretionary powers. The question, whether the appointment of Prof. Savona really made such a difference, is legitimate. But also the answer, which Sergio Mattarella gave "not with a light heart" (as he acknowledged in his statement), is legitimate: it did not overstep the President's mark and cannot be considered in any way a violation of the Constitution. Article 1 of the Constitution stipulates that "Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution". Article 92 is one of such "forms". President Mattarella enacted it bearing in mind that the Italian Constitution accepts "the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations" (Article 11), as well as "the constraints deriving from EU legislation" (Article 117), notwithstanding the balanced budget principle (Article 81).

This does not mean that European obligations are beyond debate, criticism – also fierce – and reform. The balanced budget principle itself could be struck out of the Constitution, in the same way it was introduced in 2012 (constitutional law no. 1 of 2012), in the wake of the Fiscal Compact. But these fundamental issues should be framed in the open, before Italian citizens and the European partners, explaining how the status quo should change, and what to do in the meantime; not advanced surreptitiously, through the appointment of a Minister who declared himself ready to directly challenge, and possibly breach, basic European obligations. The theory of games (which Prof. Savona invoked in a recent statement) is all very well; but, in this case, its compatibility with the principle of sincere cooperation and the logic of a full-fledged democratic deliberation is questionable. The sudden firmness of the Five Star Movement and of the League

on the name of Prof. Savona – after much elasticity on other appointments, including to the premiership – was unsettling. Appreciating the risks implicit in such a move was a delicate task, but still within the President's powers.

What now? The new government is unlikely to find a majority in Parliament; it will probably be a short-term, neutral caretaker, until the new elections, which may take place as soon as next autumn. The impeachment procedure – should it start at all – will end in nothing, although it might stir the electoral propaganda. Indeed, the entrenchment on Prof. Savona and the (euphemistically) far-fetched impeachment proposals signal a sharp increase of the sovereigntist and populist rhetoric. Some speculate that the crisis has been purposefully sought by politicians to increase their own approval ratings in the incoming elections. Undoubtedly, now European issues are bound to come into an open, maybe incensed debate.

The next turning point will be the European Council of June 2018. The intertwining trends of European and Italian politics have been such, that now Italy will hardly be in the position to participate in a strong and decisive fashion. Nonetheless, if the debate has no serious, constructive and – if need be – original outcome, on issues such as "migration" or "jobs, growth and competitiveness" in the Eurozone, the situation will not become easier.

Through a difficult decision of its President, the Italian Republic has renewed its commitment to pluralist constitutional democracy and European political integration. It is now for the EU do to the same.

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